

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

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Machine Guns, Destructive Devices and Certain Other Firearms;	)	
Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity With Respect to Making or Transferring a Firearm	)	Docket No. ATF 41P
	)	RIN 1140-AA43

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**Firearms Industry Consulting Group's  
Comments in Opposition to Proposed Rule ATF 41P**

Joshua G. Prince,  
*General Counsel*  
Thomas H. Odom  
Firearms Industry Consulting Group,  
a Division of Prince Law Offices, P.C.  
646 Lenape Road  
Bechtelsville, PA 19505  
888-313-0416

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**Firearms Industry Consulting Group's  
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On September 9, 2013, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or the "Agency") published a Notice of Proposed Rulemaking ("NPR") in the Federal Register at Volume 78, pages 55014 through 55029, to institute this rulemaking proceeding with respect to firearms regulated under the National Firearms Act ("NFA"), 26 U.S.C. §§ 5801-5872. ATF's current regulations under the NFA are codified at 27 C.F.R. Part 479.

The Firearms Industry Consulting Group ("FICG"), a division of Prince Law Offices, P.C., represents numerous individuals, gun clubs, and Federal Firearms Licensees ("FFLs") in Pennsylvania with regard to State law issues. Furthermore, in relation to federal issues, FICG represents numerous FFLs across the United States in all matters relating to firearms. FICG actively works to defend, preserve, and protect constitutional and statutory rights of firearms owners, including through Article I, Section 21 of the Pennsylvania Constitution and the Second Amendment to the United States Constitution. In this comment, FICG represents the interests of its respective clients.

FICG's purpose is:

To provide legal representation in the protection and defense of the Constitutions of Pennsylvania and the United States, especially with reference to the inalienable right of the individual

citizen guaranteed by such Constitutions to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

FICG's interest in this matter stems from its representation of numerous Pennsylvania citizens and FFLs nationwide who seek to make or acquire NFA firearms. In response to the NPR, FICG offers this public comment for consideration with respect to the proposed rule.

With the exception of ATF's proposal to add new section 479.90 with respect to decedents' estates, FICG opposes the remainder of the proposed rulemaking for the reasons set forth below and in the Exhibits to this Comment incorporated herein by reference.

**I. PROCEDURAL IRREGULARITIES HAVE DENIED INTERESTED PERSONS A MEANINGFUL OPPORTUNITY TO COMMENT ON THE PROPOSED RULEMAKING**

ATF has repeatedly violated the basic obligations designed to permit meaningful public participation in this rulemaking proceeding. Despite efforts by FICG and other interested persons to encourage compliance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501-559, other statutory provisions governing rulemaking, and fundamental due process, ATF has persisted on a course that ensures a waste of time and resources by all involved. It should be clear that ATF cannot proceed to promulgate a final rule without publishing a proper NPR and providing the necessary opportunity for *meaningful* public comment.

*A. ATF Failed to Make Available the Underlying Studies and Other Information Upon Which It Purportedly Relied in Formulating its Proposed Rule*

On August 29, 2013, a draft of the NPR signed by the Attorney General was posted on the Website of the Department of Justice shortly after it was announced that a draft had been

submitted for review by the Office of Information and Regulatory Affairs ("OIRA"). The NPR published on September 9, 2013, was identical to the August 29 draft with respect to expressly indicating that the proposal rested on certain studies and other underlying information. Once the August 29 draft was published, FICG advised ATF that none of the referenced materials had yet been placed in the rulemaking docket and requested that "[i]n order to ensure an adequate opportunity to comment on the ATF proposal, [we] respectfully request that you immediately make available the following documents together with any others upon which ATF relied in preparing the proposal." *See* Exhibit 1.

Specifically, FICG requested seven categories of information referenced in the NPR:

1. The National Firearms Act Trade and Collectors Association ("NFATCA") petition for rulemaking dated December 3, 2009, together with other documents exchanged with NFATCA or disclosing consultations with NFATCA on the subjects on the petition.
2. The "numerous statements" that ATF has received from Chief Law Enforcement Officers ("CLEOs") regarding purported reasons CLEOs decline to sign applications.
3. Documents regarding the denial of an unidentified person's application for transfer of a silencer and that individual's subsequent effort to procure transfer of the same silencer to a trust as to which the individual was the settlor.
4. Documents regarding the situation in Texas in which ATF became aware that "a member of a LLC was an illegal alien, living in the United States under an assumed name, and had a felony warrant outstanding" at the time "the LLC had 19 firearms registered to it".
5. Documents regarding the situation in Tennessee in which "ATF became aware of applications submitted to transfer two NFA firearms to a trust in which one of the trustees was a convicted felon."
6. Documents demonstrating the basis for ATF's "estimate" that, on average, legal entities have only two responsible persons, including the methodology for the survey of thirty-nine applications.

7. Documents reflecting the methodology for the selection of the sample upon which ATF based the estimate of an average of only 15 pages per submission for the proof of the existence and validity of a legal entity (*e.g.*, partnership agreements, articles of incorporation and corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures).

By e-mail dated September 4, 2013, Brenda R. Friend, the ATF contact person identified in the NPR, declined to make public any of the requested information. *See* Exhibit 2. Out of an abundance of caution, once the NPR was published, on September 9, 2013, FICG renewed its request in the event the previous denial had been premised on the request being premature. *See* Exhibit 3.

Despite these requests, ATF still declined to make public any of the requested information.<sup>1</sup> ATF did not merely fail to post materials to the eRulemaking site, none of the information was available in ATF's reading room as well. *See* Exhibit 4. Although ATF's Ms. Friend indicated this request would be referred for processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and FICG requested expedited processing, *see* Exhibit 5, the statutory time period expired with no response from ATF and FICG faxed its administrative appeal of the constructive denial to the Department of Justice ("DOJ"). *See* Exhibit 6. FICG submitted the comment it drafted on behalf of David M. Goldman (1899) previewing several of the arguments premised on ATF's failure to provide the information necessary to permit meaningful comment on the proposed rule. Only the following week did ATF respond, stating: "Your request is granted." Exhibit 7. But not a single responsive document was provided, only the NPR itself. *Id.* And despite notifying DOJ of that fact and that, consequently, the

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<sup>1</sup> ATF also failed to include either of FICG's requests or Ms. Friend's reply in the rulemaking docket. In so doing, ATF concealed from interested members of the public the fact that underlying documents had been requested and that ATF declined to make them available. Omitting these items that clearly were identified as relating to this proceeding also raises the question of what other pertinent materials may have been excluded. *See infra* Part I(F)(1).



administrative appeal had not been mooted, *see* Exhibit 8, after DOJ's receipt of that notice, it inexplicably asserted: "Because ATF responded to your request, your appeal from ATF's failure to respond to your request is moot." Exhibit 9.<sup>2</sup> After counsel invested significant time preparing a complaint seeking judicial review of the matter, DOJ then notified FICG in a letter dated November 13 that it, *sua sponte*, had docketed a *new* administrative appeal as of November 5, *see* Exhibit 10, conveniently delaying the time for filing of a court action until just days before the comment period will expire. On December 5, the new appeal period expired without any further communication from DOJ. As a result ATF still has provided none of the documents underlying the NPR either in the docket or in response to the FOIA request.

It has long been understood that "[t]he process of notice and comment rule-making is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982). "If the [NPR] fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Id.* at 530. Providing access to materials like FICG requested has long been recognized as essential to a meaningful opportunity to participate in the rulemaking process. Where, as here, ATF acknowledges in the NPR that "this rulemaking *is in response* to a petition for rulemaking," 78

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<sup>2</sup> Even counting from Ms. Friend's September 4 e-mail acknowledgment, the 20-day period for responding to a FOIA request had expired in ample time for the administrative appeal received by DOJ on October 22 to have been ripe. Mr. Goldman's comment was received by ATF on October 21. It was not until a week later when, by letter dated October 28, ATF purported to grant the request. ATF sent its response by regular mail that was received by FICG on October 30. That same day, FICG notified DOJ by e-mail and letter that ATF's purported grant of the FOIA request provided *none* of the requested documents and did *not* moot the *already-pending* appeal. The following day, without explanation, DOJ simply stated that the appeal was moot.

Fed. Reg. at 55,020 (emphasis added), and devotes six columns of discussion to the petition for rulemaking, 78 Fed. Reg. at 55,016 to 55,017, it is difficult to comprehend how ATF can refuse to make that petition available to persons interested in commenting on the proposed rule.<sup>3</sup>

The APA "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule." *American Medical Ass'n, v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)). In order to ensure that rules are not promulgated on the basis of data that to a "critical degree, is known only to the agency," the agency must make available the "methodology" of tests and surveys relied upon in the NPR. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.3d 375, 392-93 (D.C. Cir. 1973).

An agency commits serious procedural error when it fails to reveal the basis for a proposed rule in time to allow for meaningful commentary. *Connecticut Power & Light*, 673 F.2d at 530-31. The notice and comment requirements

are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

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<sup>3</sup> More than a month after FICG requested a copy of the NFATCA petition from ATF, NFATCA purported to post the petition on its Website. There are reasons to question the authenticity of the posted document that can be addressed only by ATF's production of the petition it received for purposes of comparison. If, indeed, the posted document is authentic, it is difficult to conceive why ATF resists releasing the original petition. On the other hand, the document posted by NFATCA is unsigned, undated, contains formatting and grammatical errors, misstatements of substantive law, and is so cursory as to raise questions about ATF's characterization of it in the NPR. And, despite ATF's statement that the petition was received on December 3, 2009, 78 Fed. Reg. at 55016, the document posted by NFATCA appears to have been drafted *prior to* the April 2009 edition of the *National Firearms Act Handbook*, see *infra* note 7 and accompanying text, suggesting it may be an outline or early draft of the final petition.

*International Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

In this rulemaking proceeding, ATF not only refused to make available the requested rulemaking petition, ATF refused to provide access to the documents that underlie all the key assumptions referenced in the NPR, from the details regarding the few instances that purportedly prompted the decision that more regulation was needed, to an explanation as to how criminalizing already criminal activity serves any purpose, to the reason that CLEOs refuse to sign Forms 1 and 4 as currently worded, to the methodology employed in supposedly "random" samples. The lack of access to those materials has seriously hindered the ability of interested persons to address anything that underlies the numerous apparent unsupported assertions in the NPR. Bringing forth any such material in support of a final rule will do nothing to remedy the fact that those materials were not available to inform the interested persons preparing public comments. If ATF intends to revise Part 479 in the manner proposed, ATF needs first to lay the foundation for a proposal and then expose that foundation to meaningful critique.<sup>4</sup>

*B. ATF Failed to Describe a Single Situation Illustrating the Problem it Purports to Address; The Entire Rulemaking Seems to Rest on a False Premise*

In the NPR, ATF did not identify a single instance where a *registered* NFA firearm was used in the commission of a crime.<sup>5</sup> Indeed, such incidents are sufficiently rare that -- short of an outright ban -- proponents of gun control measures point to the NFA registration process as the

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<sup>4</sup> As noted above, ATF also has failed to produce any of these documents in response to FOIA requests filed by FICG and other interested persons. At least one FOIA request for the NFATCA petition and related documents has been awaiting an initial determination since January 2013.

<sup>5</sup> ATF failed to produce documents regarding any such instances in response to yet additional FOIA requests. *E.g.*, FOIA Request of Thomas H. Odom, Aug. 27, Sept. 30, Nov 4, 2013.

goal to which they aspire.<sup>6</sup> The current ATF proposal addresses a subset of the NFA universe: NFA firearms owned by a legal entity (*e.g.*, corporation, LLC, or trust). And again, ATF failed to identify a single example where a prohibited person gained actual possession of a NFA firearm by virtue of his relationship to a legal entity, let alone where a person gained possession of a NFA firearm due to his relationship to a legal entity and then used that firearm in the commission of any crime. Instead, ATF described three situations, none of which on their face illustrate the problem that ATF speculates may exist. In fact, those examples may serve to illustrate that there are even more safeguards under current law than ATF considered. Without access to the details of the three situations, however, one can only raise questions about the carefully-phrased descriptions and the questions they leave unanswered.

It is entirely likely that existing prohibitions and safeguards applied (or would have applied) in each of the three situations but the ability to demonstrate such a fact is frustrated by ATF's refusal to permit its characterizations to be subject to meaningful public scrutiny

1. *The Silencer Transaction*

ATF described a situation in which a prohibited person sought to acquire a silencer from a FFL but had his application denied (presumably by ATF) "because the transferee was determined to be prohibited from possessing a NFA firearm." 78 Fed. Reg. at 55016. ATF did not explain the basis of the prohibition or whether that basis was grounded in fact. ATF did not explain whether it investigated potential violations of the laws prohibiting false statements and referred the matter for prosecution.

According to ATF's account, the same FFL "subsequently applied to transfer the same silencer to a trust whose name contained the same last name as the prior transferee" and upon

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<sup>6</sup> See [http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File\\_id=10993387-5d4d-4680-a872-ac8ca4359119](http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=10993387-5d4d-4680-a872-ac8ca4359119) (visited Oct. 6, 2013) (attached as Exhibit 11).

review of the trust document ATF "found that the prohibited person was a settlor of the trust and, thus, would have access to the firearm." *Id.* ATF denied the transfer so the prohibited person, in fact, did not obtain access to the suppressor. *Id.* But ATF omitted facts critical to examining the situation.

How much time had transpired between the two visits to the FFL? Did the same individual approach the FFL each time? If a different individual approached the FFL the second time, did the FFL recognize the name on the trust was that of the prohibited person? Did the FFL recognize a potential "straw purchase" and notify ATF? If the FFL played a role in alerting law enforcement, rather than demonstrate a flaw in the existing regulations, this example may show yet another safeguard: watchful FFLs.

ATF did not even address whether the settlor of the trust could have succeeded in obtaining the suppressor without going through additional checks. At least since the publication of the April 2009 edition of ATF's *National Firearms Act Handbook*, ATF has advised that despite its prior approval on a Form 4, an individual taking physical possession of a NFA firearm from a FFL on behalf of a legal entity must complete a Form 4473 and undergo a background check through the National Instant Check System ("NICS") at that time.

Subsequent to the approval of an application requesting to transfer an NFA firearm to, or on behalf of, a partnership, company, association, trust, estate, or corporation, the authorized person picking up the firearm on behalf of, a partnership, company, association, trust, estate, or corporation from the FFL *must* complete the Form 4473 with his/her personal information and *undergo a NICS check*.

ATF, *National Firearms Act Handbook* § 9.12.1 (Apr. 2009) (emphasis added).<sup>7</sup> As the public

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<sup>7</sup> This instruction would seem to be in tension with 27 C.F.R. § 478.102(d)(2), which does not require NICS checks where "[t]he firearm is subject to the provisions of the National Firearms Act and has been approved for transfer under 27 CFR part 479." To the extent, however, that the  
(footnote continued)

comments make clear, FFLs take seriously this instruction. *E.g.*, Comments 0120, 0207, 0551, 0909, 1002.<sup>8</sup> And many individuals taking physical possession of NFA firearms on behalf of legal entities report going through NICS checks. *See, e.g.*, Comments 0117, 0135, 0145, 0181, 0188, 0226, 0260, 0486, 0577, 0731, 0744, 0775, 0911, 0914. Moreover, some States require, as a matter of State law, that a background check be completed before physical transfer of a firearm. *See, e.g.*, Comments 0197, 0260. Because ATF failed to even disclose the jurisdiction in which this event supposedly took place, it impossible to evaluate whether such a law may have been applicable. Yet, if either of those obstacles would have precluded the settlor from taking physical possession of the suppressor, rather than demonstrate a flaw in the existing regulations, this example shows yet more safeguards: State laws regulating the sale and transfer of firearms as well as vigilant FFLs.

In addition, it does not follow that even a prohibited person who could not possess a NFA firearm could not serve as the settlor of a trust that could own a NFA firearm, as ATF's description of the situation seems to assume. Even a prohibited person can establish a trust as settlor thereby retaining his *ownership* interest in property while surrendering his right to the *possessory* interest to a trustee. *See United States v. Zaleski*, 686 F.3d 90 (1<sup>st</sup> Cir. 2012); *United States v. Miller*, 588 F.3d 418 (7<sup>th</sup> Cir.2009); *Cooper v. City of Greenwood*, 904 F.2d 302 (5<sup>th</sup> Cir. 1990). It is not at all uncommon for trustees to hold assets that a beneficiary has no current

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(footnote continued)

Handbook directive applies only to legal entities while the regulation applies to individuals, there is an added safeguard with respect to legal entities that is not present for individuals acquiring NFA firearms.

<sup>8</sup> ATF assigned a unique identification number (distinct from the "tracking number") that begins with the prefix ATF-2013-0001- to each comment posted to the electronic docket. For ease of reference, throughout these comments other matters filed as public comments will be cited by the four digits that follow that prefix.

legal ability to possess.<sup>9</sup> In other regulatory contexts, the restrictions of such trusts have been accepted for decades as a means for a person prohibited from possessing property without advance regulatory approval to nonetheless maintain an ownership interest in the property. *E.g.*, *Water Transport Ass'n v. Interstate Commerce Comm'n*, 715 F.2d 581 (D.C. Cir. 1983) (citing *Illinois Cent. R.R. v. United States*, 263 F. Supp. 421, 424 (N.D. Ill.1966) (3-judge court), *aff'd mem.*, 385 U.S. 457 (1967)) (common carrier acquisition of interest in another common carrier pending regulatory approval).

## 2. *The Texas LLC Situation*

ATF described a situation involving "an illegal alien, living in the United States under an assumed name" who also "had a felony warrant outstanding." 78 Fed. Reg. at 55023. At first blush, it does not sound as if such an individual would have qualms about seeking a NFA firearm from a black market source if he wanted one, in which case ATF's proposed rule would accomplish nothing. But ATF's characterization may be misleading.

ATF asserted that the individual was a "member of an LLC" and that "the LLC had 19 firearms registered to it." *Id.* ATF's description raises more questions than it answers. To start with, ATF did not disclose how "ATF became aware" of the situation. Did another member of the LLC advise ATF? If so, once again, it would seem that responsible persons associated with legal entities served as an added safeguard. Were any of the "19 firearms" registered to the LLC subject to the NFA or is the entire example inapposite?

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<sup>9</sup> For example, if a minor were entitled to receive property under a deceased parent's Will, it is common that the Will would contain provisions for holding the property in trust for the benefit of the child until he attained age 18. Where the particular property is a firearm or other item subject to special regulations, it is even more common that the legal instrument will contain explicit provisions prohibiting distribution until the person is legally entitled to take possession. In the context of a decedent's estate, ATF's proposed rule seems to acknowledge such restrictions as completely adequate.

Was the prohibited person "living in the United States" even in Texas or had he fled to avoid the felony warrant and was 1,000 miles from any firearms held by the LLC so that any access was entirely hypothetical? Had the prohibited person been deported the day after he joined the LLC? Did the LLC have procedures in place to ensure that anyone taking physical possession of any of its firearms had to undergo further screening so that the example illustrates yet another safeguard under current law? Did the prohibited person even know the LLC had firearms? Were they all kept secure in a safe that only a different member of the LLC could access?

The answers to these questions are crucial as ATF did not represent that the prohibited person ever had *actual* possession of any of the firearms.<sup>10</sup> At most ATF suggested some form of *constructive* possession. "[C]onstructive possession is necessarily a fact-specific inquiry. *United States v. Fambro*, 526 F.3d 836, 839 (5th Cir.2008); see *United States v. Booker*, 436 F.3d 238, 242 (D.C. Cir. 2006). Factors that aid that inquiry include: the defendant's knowledge and access to the firearms; his proximity to the firearms; his occupancy or presence, exclusive or joint, at the place where firearms were found; the nexus between the defendant and the firearms; and his association with and exercise of control over the person in actual possession of the firearms. *United States v. Jones*, 484 F.3d 783, 788 n.11 (5th Cir.2007); *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir.1993); *United States v. Morris*, 576 F.3d 661, 666 (7<sup>th</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 1313 (2010). Even when an individual is in close proximity to a firearm -- which ATF did not even suggest was the case here -- that fact alone is insufficient to establish constructive possession. "[M]ere proximity to a gun is insufficient to establish constructive possession, evidence of some other factor -- including connection with a gun, proof

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<sup>10</sup> "Actual possession" means that "the defendant knowingly has direct physical control over a thing at a given time." *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir.1998).



of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise -- coupled with proximity may suffice." *Booker*, 436 F.3d at 242 (quoting *United States v. Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003)). Where a firearm is located someplace where the prohibited person is not the sole occupant (as would seem very likely to be the case with respect to properties of the LLC), courts impose a higher standard for finding constructive possession, requiring evidence the prohibited person had knowledge of the firearm and access to it. *See United States v. Meza*, 701 F.3d 411, 419 (5<sup>th</sup> Cir. 2013). ATF provided no information that suggests the prohibited person ever even established *constructive* possession.

ATF was also silent whether the felony warrant resulted in a conviction or if it even came to trial. Or, whether it involved a crime of violence or involved a technical violation of an obscure environmental regulation. Regardless of any involvement in the felony, however, the individual would still have been a prohibited person by virtue of his status as an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A). While ATF did not disclose how long the individual may have been illegally in the United States, it may be that the example better illustrates the Administration's limited enforcement of immigration laws rather than anything about the access to NFA firearms.

### 3. *The Tennessee Trust Transaction*

ATF asserted that two applications were submitted to transfer NFA firearms to a trust in which one of the trustees was a convicted felon. 78 Fed. Reg. at 55023. The most ATF said about the potential harm presented by this situation was: "ATF would not have known of the need to conduct any background checks for the trust members to determine if they were prohibited persons." *Id.* On its face, the NPR does not even make out a case that if the "convicted felon" had applied in his own name as an individual that a transfer would have been

improper. Not all convicted felons are prohibited from owning NFA firearms. Congress excluded convictions relating to antitrust, unfair trade practices, restraints of trade, and similar matters. *See* 18 U.S.C. § 921(a)(20), (g)(1). ATF did not represent that upon conducting its investigation it determined that the individual was prohibited from owning a firearm.

ATF acknowledged, moreover, that it was the FFL that provided the information prompting it to investigate this matter. Here is positive confirmation that rather than display the need for yet additional regulations, there are safeguards already in place in addition to the criminal prohibitions and other measures discussed below. *See infra* Part III(A).

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If these three examples are the best ATF has to offer out of the entire period since 1934, when Congress authorized ownership of NFA firearms by "a partnership, company, association, or corporation, as well as a natural person" in the original NFA itself, *see* NFA § 1(c), 48 Stat. at 1236, there is simply *no evidence any problem* that existing law does not address. Despite identifying these shortcomings in the comment FICG filed on behalf of David M. Goldman [1899], ATF still refused to provide information that would permit an investigation into any of the instances. Closely related to ATF's failure to make available for public consideration any of the material underlying its proposal is ATF's conflicting statements regarding its proposal that can only serve to confuse and mislead interested persons.

C. *ATF Failed to Provide Any Explanation for Selecting its Proposal Over Alternative Measures ATF Had Under Consideration*

Part of the reasoned decision-making process the APA demands is that an agency evaluate not only its proposed solution but also significant alternatives. Where, as here, ATF had purportedly invested substantial time considering an alternative measure only to abandon it on the eve of publishing the NPR, it was appropriate for ATF to address the differences in costs and

benefits between the two alternatives. So as to permit informed public comment, ATF should have disclosed in its NPR that it had considered alternatives and expressly address its reasons for proposing one alternative over others, including a discussion of relative costs and benefits.

ATF repeatedly published an abstract in the Unified Regulatory Agenda stating:

The proposed regulations would (1) add a definition for the term "responsible person"; (2) require each responsible person of a corporation, trust or legal entity to complete a specified form, and to submit photographs and fingerprints; (3) require that a copy of all applications to make or transfer a firearm be forwarded to the chief law enforcement officer (CLEO) of the locality in which the maker or transferee is located; and (4) eliminate the requirement for a certification signed by the CLEO.

In October 2012, ATF published that description and indicated that it contemplated publishing a NPR in July 2013. In October 2011, ATF indicated the NPR was scheduled for May 2012.

As that abstract indicates, consistent with the NFATCA petition for rulemaking dated December 3, 2009, ATF contemplated that its proposed rule would "eliminate the requirement for a certification signed by the CLEO." While ATF is permitted to change course before publishing a proposed rule, certainly where ATF considered an alternative, internally and in discussions with NFATCA, over a period of years, that alternative warrants consideration and ATF must provide some reasoned explanation for the change in course. Relying on nothing more than a "conclusory statement would violate principles of reasoned decisionmaking." *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985); *see also Pearson v. Shalala*, 164 F.3d 650, 659 (D.C. Cir. 1999).

ATF did not explain how the alternative of eliminating the requirement for CLEO signature compared to its favored approach in terms of benefits to be obtained or costs to be imposed. Obviously there are differences in benefits and costs among the alternatives of (a) imposing new obligations on responsible persons associated with legal entities while *eliminating*

the CLEO signature requirement for individuals, the only applicants subject to that requirement, (b) imposing new obligations on responsible persons associated with legal entities while *retaining* the CLEO signature requirement for individuals, (c) imposing new obligations on responsible persons associated with legal entities while *changing* the description of the matters certified by the CLEO signature requirement for individuals, (d) imposing new obligations on responsible persons associated with legal entities while *retaining* the CLEO signature requirement for individuals and *expanding*, for the first time, the CLEO signature requirement to applicants using a legal entity, and (e) imposing new obligations on responsible persons associated with legal entities while *changing* the description of the matters certified by the CLEO signature requirement for individuals, and *expanding*, for the first time, the CLEO signature requirement to applicants using a legal entity. Yet, nowhere in the NPR did ATF undertake to compare the benefits and costs of these five different alternatives.

As noted above, *see* Part I(A), ATF declined to provide any information regarding specific statements from CLEOs regarding the reasons they did not sign forms or whether the rephrased certification would prompt any different response. ATF did not undertake to perform any sort of survey of CLEOs to ascertain the facts before selecting a new proposed course of action. The record contains many examples of situations where CLEOs refused to sign forms on bases contrary to ATF's unsupported assumption. *E.g.*, Comments 0002, 0009, 0020, 0040, 0042, 0048, 0052, 0061, 0064, 0065, 0074, 0075, 0083, 0085, 0086, 0087, 0104, 0111, 0115, 0122, 0123, 0125, 0127, 0132, 0137, 0138, 0156, 0157, 0162, 0165, 0171, 0992, 0993, 0994, 1002, 1076, 1269, 1899 pp. 33-38 & Exhibits. 2-4, 6. Moreover, ATF did not identify a single example of a situation since the development of the National Instant Check System ("NICS") where an individual applicant passed the NICS check only to be properly flagged as a prohibited

person by a CLEO. With no such examples, ATF carries a heavy burden to explain why its proposed rule is a superior alternative to the approach it studied and identified in the Semi-Annual Agenda, let alone additional variations.

ATF failed to provide information regarding the *marginal* benefits to be obtained by its favored approach over any of the alternatives. ATF failed to provide information regarding the *marginal* costs imposed by its favored approach over any of the alternatives. Substantive issues regarding the flaws in ATF's cost/benefit analysis are addressed below but it must be noted at the outset that ATF utterly failed to provide the information needed to permit meaningful public comment on its proposed rule. The NPR omitted entirely this important discussion and ATF compounded the error by refusing to make available any of the documents underlying the putative cost/benefit analysis.

D. *ATF Provided Conflicting Information Regarding Implementation of Any New Rule, Potentially Providing False Reassurance to Persons Interested in Filing Comments*

The summary of the proposed rule in the pre-publication drafts provided, in pertinent part: “The proposed changes include ... photographs and fingerprints, as well as law enforcement certificate, *when the legal entity files an application* to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm,” 78 Fed. Reg. at 55014 (emphasis added). That statement suggests any new rule would not apply to existing entities with respect to previously approved authority to make or receive specific NFA firearms. The text of the actual proposed rule in the drafts, however, was less than clear.

Attorney Robert K. Merting reported that on the afternoon of August 29, 2013, he spoke by telephone with Brenda Friend, the contact person at ATF designated in the draft NPR. *See* Exhibit 12. He reported: “Ms. Friend specifically confirmed that the rule would not be

retroactive and those transactions already approved will stand." Merting also reported that in that conversation ATF advised him that applications pending at the time of the promulgation of a new rule would be processed under the existing rule rather than the new rule. Merting stated: "The current regulations still stand, and if you have been waiting to purchase NFA firearms now is the time. *Past transfers should not be affected by this rule change and those with firearms owned by a trust will be grandfathered in.*" *Id.* (emphasis in original).

The information Merting reports that he received orally is consistent with prior indications from ATF. During the NSSF/FAIR's 12th Annual Import Export Conference in Washington, D.C. on August 6-7, 2013, an individual inquired if a new regulation was implemented, would the applications pending approval be "grandfathered" or would they be returned. The response from the ATF spokesperson was that any new regulation would only apply to applications submitted after the effective date of the regulation. Any contrary approach would be exacerbated by ATF's backlog and a current processing time in excess of six months.

FICG identified these prior statements and requested that ATF revise the draft before publication in the *Federal Register* so as to inform the general public as to how any new rule would be implemented, rather than to privately provide oral guidance to selected individuals. *See Exhibit 13.* ATF declined to make any such revision before publication. By e-mail dated September 4, 2013, ATF refused even to confirm in writing that any new regulation would not be applied to "responsible persons" already in place with respect to trusts and other legal entities previously established for firearms as to which ATF had previously approved a making or transfer application. *See Exhibit 2.*

Interested persons should not be lulled into the belief that proposed regulations would not apply to them only to be blindsided by a final rule to the contrary. Nor should interested persons

be required to devote limited time and resources to addressing matters not at issue as a distraction from other important matters raised by the proposed rulemaking. The question of how ATF would implement any new regulation was a subject of concern among some of the very first public comments submitted in this proceeding.<sup>11</sup>

When the Nuclear Regulatory Commission proposed to change regulations applicable to nuclear power plants and "the original notice of proposed rule-making contained no indication of whether plants would be required to alter approved features to comply with the new regulations," a serious question of compliance with the APA was raised when NRC's final rule would apply three of the new requirements to plants already operating "regardless of whether they had received staff approval" under the prior regulations. *Connecticut Light & Power Co.*, 673 F.2d at 530. The court upheld the rulemaking only because the final rule encompassed "flexibility" in the form of permitting licensees to apply for exemptions from the new rule, tolled the new rules pending final NRC action on requested exemptions, and ensured that judicial review would apply with respect to NRC action on exemption requests. *See id.* at 530, 537. Here, in light of ATF's public statements, it would be improper for any final rule to impose new requirements on legal entities or their responsible persons except with respect to any new application to make or transfer a NFA firearm first filed after the effective date of any new regulation.

Even if ATF does not promulgate a final rule that it will attempt to apply with respect to legal entities as to which transfers were previously approved, the problem remains that ATF has needlessly confused the public and skewed the priority of issues interested persons would choose to address in public comments. Congress established the *Federal Register* and enacted the APA

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<sup>11</sup> Comments expressing concern with the "grandfathering" or transition issues include 0093, 0255, 0473, 1076, 1270, 1936, and 3560.

to ensure *all* members of the interested public would have access to the same information regarding an agency's rules and a fair opportunity to be heard in the formulation of those rules.

E. *ATF May Have Confused Members of the Public by Posting Unrelated Material to the Docket, Including a Statement that the Comment Period was Closed*

With the publication of the NPR, the electronic portal at [www.regulations.gov](http://www.regulations.gov) was opened. The only item placed in the docket at the same time as the NPR was a final rule entitled *Importation of Defense Articles and Defense Services: U.S. Munitions Import List*, codified in 27 C.F.R. Part 447. As the NPR addresses 27 C.F.R. Part 449, it was not immediately apparent what relationship the final rule has to the newly-proposed rule. The NPR contains no reference either to Part 447 or the U.S. Munitions Import List.

On September 10, 2013, FICG brought this matter to the attention of ATF, requesting that "[i]f the final rule was added to this docket by mistake . . . that it be removed as it would seem very likely to confuse interested persons who care to comment on ATF 41P." *See* Exhibit 14. FICG further pointed out that due to the presence of the final rule the "Primary Documents" page for ATF 41P contains the text "Comment Period Closed" which could lead some interested persons to believe that it was too late to submit comments with respect to ATF 41P.

ATF removed the apparently extraneous matter from the docket but did nothing to correct any misimpression an unknown number of interested persons may have received that it was too late to file comments. In light of the fact that more than 100 comments were filed in the period when the confusing material was posted, there must have been relatively heavy traffic to the site.

Two weeks later, FICG discovered a page on ATF's Website entitled "ATF Submissions for Public Comments" that contained references to two matters, neither of which was 41P. That page may be found here: <http://www.atf.gov/content/contact-us/FOIA/ATF-submissions-public-comment>. Again, fearing that interested persons who navigated to ATF's Webpage may have



been misled or discouraged from filing public comments, FICG requested that ATF post a reference on the page to this rulemaking and a link to the electronic portal at [www.regulations.gov](http://www.regulations.gov). See Exhibit 15. ATF has not updated that page or otherwise responded to the request.

In *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995), the court held that the NPR was inadequate when it obscured an issue the agency addressed in its final rule. The same danger is presented here, not because notice is hidden in a footnote in the background section of the NPR but rather because of the inclusion of extraneous material and the presence of words easily misunderstood to suggest the time to submit comments has passed. Like ATF's conflicting signals regarding how any rule would be applied to previously approved applications or applications pending at the time of the effective date of any new rule, its apparent error would seem to have required publication of a clarification in the *Federal Register*. Seemingly content to treat the entire rulemaking process as a charade, however, ATF made no effort to correct any misperception while there was still an opportunity for interested persons to submit comments.

F. *ATF Did, in Fact, Fail to Accept or Post Comments*

1. *ATF Failed to Include Pertinent Submissions in the Docket*

FICG physically inspected the docket at ATF's reading room after having made prior arrangements to review everything that had been placed in the docket. Despite oral assurances that everything was present, it was apparent that nothing other than public comments were made available. Nothing generated by ATF was in the docket, not even the *Federal Register* notice that initiated this proceeding or the petition to initiate a rulemaking upon which ATF purported to rely. As detailed in an October 3, 2013, letter to ATF, making matters worse, ATF refused to

acknowledge in writing what they orally confirmed, that everything had been provided. *See* Exhibit 4.

The physical inspection of the docket also revealed that ATF had selectively excluded correspondence clearly related to the rulemaking proceeding. FICG identified six items dating back to September 1 that had not been entered into the docket. FICG requested that all pertinent material be placed in the docket. *See* Exhibit 4. On October 24, 2013, ATF finally posted one of the six referenced items -- FICG's September 11, 2013 letter regarding ATF's delays in posting comments to the docket. Comment 1252. None of the other five referenced items were added to the docket by ATF prior to FICG's second physical inspection of the docket on November 15, 2013,<sup>12</sup> and ATF failed to otherwise respond to FICG's October 3 letter. Moreover, the explicit request in the October 3 letter that it be placed in the docket so as to alert others of omitted items was also apparently ignored by ATF.

FICG contacted ATF's Disclosure Division repeatedly beginning on November 6 to arrange a November 12 return visit to the reading room so as to inspect additions to the docket. By e-mail dated November 8, ATF declared that the reading room was closed and would not be available until November 15. *See* Exhibit 16. ATF did not explain how closing the reading room when the agency was open consistent was with its duty under FOIA. Moreover, ATF mandated that counsel for FICG submit documentation regarding his race, ethnicity, employment history, and other matters before it would permit him access to its reading room. *Id.* ATF has a statutory duty to provide public access to members of the public and where, as here, access is

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<sup>12</sup> On the afternoon of November 14, ATF finally posted the comment FICG prepared on behalf of David M. Goldman [1899] that ATF had received on October 21. Exhibits to the Goldman comment included FICG's October 3 letter and the six missing items referenced therein. As of the morning of December 9, five of the six referenced items and the October 3 letter itself were in the docket only as a consequence of resubmitting them as exhibits to the Goldman comment.

denied during the very period when the public are supposed to be able to investigate matters as a basis for submitting comments on a proposed rule, ATF has denied a meaningful opportunity to participate in the notice and comment rulemaking process.

2. *ATF Failed to Permit a Ninety-Day Comment Period*

For weeks, ATF's reading room was closed to any inspection and no newly-received comments were posted for review on [www.regulations.gov](http://www.regulations.gov). Correspondence and telephone calls related to this proceeding went unanswered. While some furloughs due to the budget stalemate in Congress were inevitable, ATF determined which positions were "essential" for operations and apparently did not bother to retain anyone associated with this proceeding or the numerous pending requests for information. Weeks passed during which the public was denied access to material necessary to participate in the comment process in a meaningful manner.

In light of this disruption, on October 11, 2013, FICG requested that ATF extend the public comment period by one day for each day the public lacked access to the docket. *See* Exhibit 17 [1488]. No response has ever been received. In the meantime, other agencies acknowledged the need for such an enlargement of time. *E.g.*, Department of the Interior -- Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Extending the Public Comment Periods and Rescheduling Public Hearings Pertaining to the Gray Wolf (Canis lupus) and the Mexican Wolf (Canis lupus baileyi)*, 78 Fed. Reg. 64192 (Oct. 28, 2013); Environmental Protection Agency, *Extension of Review Periods Under the Toxic Substances Control Act; Certain Chemicals and Microorganisms; Premanufacture, Significant New Use, and Exemption Notices, Delay in Processing Due to Lack of Authorized Funding*, 78 Fed. Reg. 64210 (Oct. 28, 2013); Department of the Interior -- Fish & Wildlife Service, *New Deadlines for Public Comment on Draft Environmental Documents*, 78 Fed. Reg. 64970 (Oct. 30, 2013); Department

of Labor -- Occupational Safety and Health Administration, *Occupational Exposure to Crystalline Silica; Extension of Comment Period; Extension of Period to Submit Notices of Intention to Appear at Public Hearings; Scheduling of Public Hearings*, 78 Fed. Reg. 35242 (Oct. 31, 2013); Department of Agriculture -- Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations; Extension of Comment Period*, 78 Fed. Reg. 65515 (Nov. 1, 2013); Federal Communications Commission, *Revised Filing Deadlines Following Resumption of Normal Commission Operations*, 78 Fed. Reg. 65601 (Nov. 1, 2013); Federal Trade Commission, *Ganley Ford West, Inc.; Timonium Chrysler, Inc.; TRENDnet, Inc.; Pinnacle Entertainment, Inc.; Honeywell International, Inc.; Nielsen Holdings, Inc., et al.; Polypore International, Inc.; Mylan, Inc., et al.; Actavis, Inc., et al.; Agency Information Collection Activities (Consumer Product Warranty Rule, Regulation O, Affiliate Marketing Rule)*, 78 Fed. Reg. 65649 (Nov. 1, 2013); Federal Communications Commission, *Revised Filing Deadlines Following Resumption of Normal Commission Operations*, 78 Fed. Reg. 66002 (Nov. 4, 2013). As a result, ATF failed to mitigate the impact of its staffing decision upon the public interested in this proceeding.

From November 4 through November 6, the [www.regulations.gov](http://www.regulations.gov) site was malfunctioning so as to prohibit the submission of comments as well as the inspection of comments that had already been posted. On November 7, 2013, FICG again requested that ATF extend the comment period. *See* Exhibit 18 [2198]. No response has ever been received. From November 10 through November 12, the [www.regulations.gov](http://www.regulations.gov) site was again malfunctioning. On November 18, 2013, FICG again requested that ATF extend the comment period both due to lack of public access to the electronic docket and ATF's refusal to make available its reading room for physical inspection of the docket. Exhibit 19. As of that point all or a significant part

of twenty-two days of the comment period -- more than 20% of the total -- had been compromised by the lack of access to the docket. ATF determined that a ninety day period was appropriate for public participation in this proceeding. Nonetheless, it has inexplicably departed from that standard.<sup>13</sup>

### 3. *ATF Selectively Delayed Reviewing and Posting Comments Received*

Long after returning to normal staffing levels, days passed without the posting of any new comments despite the backlog of hundreds of comments received by ATF. At no time after October 16 did the number of comments posted on [www.regulations.gov](http://www.regulations.gov) approach the number of comments received.<sup>14</sup> Yet, on October 23, 28, 29, 30, 31, November 5, 6, 7, 8, and 13, inexplicably not one comment was posted to the docket, conveniently delaying the posting of the comment FICG prepared for David M. Goldman [1899] from ATF's receipt on the morning of October 21, 2013 until the afternoon of November 14, 2013. *See* Exhibit 20. Once Mr. Goldman's comment was posted, suddenly the mysterious cause for delays in posting comments was ameliorated and comments were posted on every weekday from November 14 up to the deadline of December 9, except for Thursday and Friday of Thanksgiving week.

Moreover, the delay in posting material to the docket was not uniform. Upon inspection of the physical docket on November 15, it became clear that the overwhelming majority of comments received on October 21 were posted on November 1 [1620-1670, 1690-1700] if not earlier. Meanwhile another submission received in hardcopy on November 4 [1895] was posted

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<sup>13</sup> FICG was not alone in requesting ATF extend the comment period in response to these problems. *See, e.g.*, Comments 1895, 1908. And FICG was not alone in raising concerns about ATF's delay in posting comments to the docket. *See, e.g.*, Comment 2435.

<sup>14</sup> On the evening of December 2 -- one week prior to the deadline for filing comments -- ATF had posted only 2876 of the 4106 comments received, leaving 30% concealed from public examination. On the evening of December 4, more than 35% of submissions were unavailable and on the morning of December 9, more than 46% of comments received had yet to be posted.

*before* the Goldman comment. An inquiry into the different treatment of these submissions failed to generate a meaningful response. *See* Exhibit 19(B). Only on the eve of a scheduled physical inspection of the docket during which FICG had made clear ATF was expected to produce a copy of Mr. Goldman's comment was it finally posted. *See* Exhibits 19(C) & 21.

After the second physical inspection of the docket revealed the extent to which ATF continued to exclude FICG submissions or delay posting them to the docket while processing correspondence and comments from other interested persons, FICG electronically submitted its November 18, 2013 letter via [www.regulations.gov](http://www.regulations.gov) simultaneously with delivery to ATF. Upon completion of uploading the letter, a green "success" legend appeared and [www.regulations.gov](http://www.regulations.gov) generated a "receipt" stating: "Your comment was submitted successfully!" *See* Exhibit 22. Nonetheless, on November 23, all that was posted was a blank template that contained neither the text submitted in the "comment" field nor the uploaded file. *Id.* A November 23 inquiry to the staff at [www.regulations.gov](http://www.regulations.gov) generated a reply indicating that any error was attributable to ATF which manages the docket and documents. *Id.* Just as with respect to posting of the Goldman comment, only after FICG asked why its submission was missing from the docket was the matter addressed, on November 25. This experience raises the question what other material submitted for the docket by other interested persons was not properly posted.

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Communications to ATF regarding the rulemaking simply disappeared into a void, occasionally receiving a reply but usually ignored, sometimes to be placed in the docket and at other times not, sometimes posted promptly and at other times withheld from public view for weeks. Despite inquiries, ATF has declined to provide any explanation for the seemingly arbitrary management of the docket. ATF delayed posting the Goldman comment and its broad

critique of the flaws in ATF's proposal, denying persons interested in filing comments of the information and arguments in that comment, while at the same time ATF apparently seeded the docket with submissions from proxies.

G. *ATF Has Distorted the Public Comment Process  
by Apparently Submitting Hearsay Information Via Proxies*

Compounding the problem of ATF refusing to make available any information with respect to any prior examples of a prohibited person misusing a legal entity to gain actual possession of a NFA firearm, *see* Part I(B), and selectively excluding material or delaying postings to the docket, *see* Part I(F), ATF has apparently turned to proxies to submit comments in its own rulemaking proceeding in an effort to bolster the suggestion of prior misuse of legal entities.

The most obvious example of this tactic appears to be the comment of ATF Special Agent Gregory Alvarez [0599]. Agent Alvarez alludes to existing regulations governing the transfer of NFA firearms to trusts and asserts: "I have personally seen this exclusion be taken advantage of. This person would have been found out long before acquiring multiple NFA weapons had he been required to submit fingerprints and photograph with his application." To the extent that anyone associated with ATF is putting on the record information known to ATF that ATF refuses to make available for investigation and rebuttal, it adds insult to injury to permit the matter to come into the record in that manner.

The second example is even more egregious as, on its face, it does not disclose the author's connection to ATF or reveal that the only information he is offering is what ATF leaked to him. Docket entry ATF-2013-0001-0437 is a public comment submitted by John Brown, apparently the very same John Brown who, as President of National Firearms Act Traders and Collectors Association ("NFATCA"), submitted the petition to initiate a rulemaking on which

ATF purports to base this proceeding.<sup>15</sup> Repeated efforts to ascertain from Mr. Brown the details of the incidents as to which he asserts he has knowledge met refusals as he disavowed direct, personal knowledge stating only that as a result of "working inside ATF for over ten years" he knew things he "should never know." *See* Exhibit 23. As with Agent Alvarez, it would thus appear that ATF is itself the source of this information. As with the carefully phrased statements in the NPR itself, such statements lack details that would permit anyone to verify the truth of the matter asserted, investigate the circumstances, and provide a meaningful comment on the substance of the underlying event (if, in fact, there is a valid underlying event and not just conveniently circulated rumors). The planting of comments that merely repeat to ATF the very information ATF purports to have but refused to submit to public critique exacerbates the problem of ATF's refusal to provide underlying information. *See* Parts I(A) & (B).

FICG also requested that NFATCA provide information regarding any instances of NFA misuse so as to permit investigation of the circumstances. *See* Exhibit 24. No reply has been forthcoming from that source either. As with ATF's statements in the NPR itself, Mr. Brown seemingly offers only vague allegations with no verifiable information.

Mr. Brown's connection to ATF extends beyond his acknowledgment that the information to which he alluded in his comment came from ATF itself. Indeed, as Richard Vasquez -- ATF's Chief of the Firearms Training Branch and previous Assistant and Acting Chief of the Firearms Technology Branch -- testified under oath only last year, Mr. Brown "interacted with ATF a lot," was a friend since at least 2006, had personally transferred two firearms to him, had transferred firearms to other ATF employees, visited ATF "to meet and

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<sup>15</sup> Physical inspection of the entry in the docket demonstrates that the comment was authored by John Brown of Chantilly, Virginia, and associated with an e-mail address from which "John Battlefield Brown" corresponded directly with FICG. *See* Exhibit 23.



become personal with a lot of the offices" over a period of years, and provided him with information to pass along to ATF for ATF's use in a forfeiture proceeding. *See* Exhibit 25(A), pp. 202, 208-09, 226-32, 251, 255-56. Mr. Brown apparently went so far as to forward e-mails he had received from a FFL involved in litigation with ATF to ATF for ATF's use in the litigation against the FFL. *Id.*, pp. 232, 270. Indeed, Mr. Brown was not surprised to be characterized as a "confidential source" for Acting Chief Vasquez and ATF. Exhibit 25(E), pp. 611-12. Despite having acquired three machineguns illegally manufactured by George D. Clark, Mr. Brown seems to be the only FFL in that situation that ATF never referred for prosecution. Exhibits 25(A), pp. 255-56, 278; 25(C), pp. 396-97. In fact, ATF knowingly left Mr. Brown in possession of that contraband for six weeks and then promptly destroyed that evidence before the completion of prosecutions of other individuals in possession of Mr. Clark's machineguns. Exhibit 25(A), pp. 215-26, 278. In addition, during this same time period Mr. Brown, together with the attorney he reportedly hired to prepare the NFATCA petition upon which ATF now relies, hired two thirty-year veterans of ATF who simultaneously worked together with ATF to draft the *National Firearms Act Handbook*.<sup>16</sup> *See id.*, pp. 227-30 Ernie Lintner -- a specialist in ATF's NFA Branch and one-time Acting Chief of that Branch-- testified that he and other ATF employees met Mr. Brown at his place of business to discuss those revisions. *See* Exhibit 25(B), pp. 282, 332-34. And another NFA Branch employee, Daniel Pickney, testified to additional meetings held at ATF's Martinsburg, West Virginia, facility. *See* Exhibit 25(D), pp. 444-45, 459.

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<sup>16</sup> The most benign characterization of the relationship between ATF and Mr. Brown (if not his other associates and NFATCA more broadly) would seem to be that ATF established an unauthorized "advisory committee" in violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. FACA requires public notice of the meetings of such groups, that meetings are open to the public, and that minutes are maintained of such meetings. With respect to discussions relating to the proposal at issue here, either ATF is withholding records of consultations with Mr. Brown and NFATCA in violation of FOIA or ATF failed to create such records in violation of FACA.

As particularly pertinent to this proceeding, Mr. Lintner testified that he and Gary Schaible -- another former Acting Chief of the NFA Branch -- met with Mr. Brown "about some suggested regulatory changes that we wanted to try and make." *See* Exhibit 25(B), pp. 333-34. That is, ATF employees testified under oath that regulatory changes that *ATF* wanted to advance -- quite likely the subject of this proceeding -- were the subject of a meeting with Mr. Brown, confirming his statement about working "inside ATF". Indeed, Mr. Brown testified that NFATCA "deals with ATF on a weekly basis" setting up "meetings with very high-level agenda." *See* Exhibit 25(E), p. 650. As noted above, multiple FOIA requests have sought documents from such meetings, at least one dating back to January 2013. *See supra* note 4.

ATF seeks to simultaneously prevent any investigation into the incidents to which it makes vague reference in the NPR while "planting" comments in its own docket to give further credence to the incidents.<sup>17</sup> This tactic denies a meaningful opportunity to comment on the proposal.

H. *ATF's Prior Lack of Candor Demonstrates a Heightened Need for Procedural Regularity*

The litany of procedural irregularities in this proceeding would undermine the efforts of an agency with a sterling reputation for fairness and candor. ATF has a well-documented record of "spinning" facts and engaging in outright deception of the courts, Congress, and the public. Many of the examples of such conduct arise precisely in the area of regulation of NFA firearms as detailed in the Motion in Limine filed in *United States v. Friesen*, CR-08-041-L (W.D. Okla. Mar. 19, 2009). *See* Exhibit 27. In light of that record, there is an even greater need for ATF to

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<sup>17</sup> ATF also apparently gave special treatment to NFATCA submissions in this docket. A letter ATF received in hard copy on November 4 was posted on November 14. *See* Exhibit 26 (1895). The earliest any other material ATF received that same day was posted was November 19. *See* Comment 2136. Such prompt handling and posting to the docket contrasts sharply with ATF's treatment of FICG's submissions.

provide the underlying documents that would permit scrutiny of whether it has fairly characterized issues in the NPR, engaged in a fair consideration of alternatives it had under consideration, only inadvertently provided potentially misleading information about its proposed rule and its implementation, omitted pertinent submissions from the docket only through oversight, only accidentally failed to consider the request that after determining it appropriate to permit a 90-day comment period that it actually provide 90 days of access to its docket and 90 days of public access to its designated contact person, and that it had absolutely no knowledge that either its own Special Agent or a prior informant would act in an apparent effort to bolster ATF's unsupported assertions.

1. *ATF's "Institutional Perjury" Before the Courts*

ATF's NFA Branch Chief, Thomas Busey, advised ATF employees in the course of a training program that the National Firearms Registration and Transfer Record ("NFRTR") database had an error rate "between 49 and 50 percent" in 1994. Exhibit 27, p. 14. Yet, despite acknowledging such a high error rate, he observed that "when we testify in court, we testify that the database is 100 percent accurate. That's what we testify to, and we will always testify to that." *Id.* Judges have overturned their own imposition of criminal convictions upon learning of this information, *see, e.g., id.*, pp. 16-17, information that should have routinely been provided to defense counsel in advance of trial as *Brady* material.<sup>18</sup> *See also id.*, p. 6. It is difficult to imagine a more powerful admission that an agency had knowingly, repeatedly misled courts.

This blatant "institutional perjury" took place not only in the context of criminal prosecutions but also in support of numerous probable cause showings for search warrants.

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<sup>18</sup> In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court required that government investigators and prosecutors provide criminal defendants with potentially exculpatory information.

Indeed, NFA Branch Chief Busey expressly addressed that situation. Despite acknowledging an NFRTR error rate of 49 to 50 percent, he told his ATF audience "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4 waved in your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that happen." *Id.*, p. 15.

Using data obtained from ATF in response to FOIA requests, Eric M. Larson demonstrated that ATF apparently had added registrations to the NFRTR years after the fact, reflecting the correction of errors apparently never counted as errors. *Id.*, pp. 21-28. While reassuring courts as to the accuracy of the NFRTR, at the same time ATF seemed to be adding missing information to the database when confronted with approved forms that had not been recorded in the database. *Id.*, pp. 26-28. As a result of the questions raised by Mr. Larson, both ATF and the Treasury Department Inspector General conducted investigations. *Id.*, pp. 29-31.

In the course of the resulting investigations ATF's Gary Schaible recanted sworn testimony he had given years earlier in a criminal prosecution. *Id.*, pp. 30-33. The Inspector General's October 1998 report rejected Mr. Schaible's effort to explain away his prior sworn testimony, concluding: "National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed." *Id.*, pp. 32-33. It is difficult to understand how ATF could routinely provide Certificates of Nonexistence of a Record ("CNRs") to courts without disclosing that an unknown number of records were destroyed rather than processed for the NFRTR.<sup>19</sup>

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<sup>19</sup> In *Friesen* itself, the prosecution introduced duplicate ATF records of the approved transfer of a NFA firearm (bearing the identical serial number), but differing in the date of approval. Exhibit 27, pp. 48-49. ATF could not explain the situation. *Id.*, p. 49. Nor could ATF find the original documents underlying the computerized entries. *Id.*, p. 52.

## 2. *ATF's Deception in Congressional Oversight*

In response to a Congressional inquiry, a DOJ Inspector General advised that a request for documents that reflected errors in the NFRTR had been "fully processed" when, in fact, the documents had merely been sent to another component -- ATF itself -- so as to delay disclosure. *See Exhibit 27*, pp. 12-14. Moreover, ATF changed the meaning of terms like "significant" errors thereby frustrating any attempt to ascertain the true error rate. *See id.*, p. 19. So too, when a congressionally-mandated audit found a "critical error" rate in the NFRTR of 18.4%, the Treasury Department Inspector General seemingly manipulated audit procedures at the instigation of the NFA Branch so as to produce a more acceptable figure. *Id.*, pp. 35-39.

Congress remained sufficiently concerned about inaccuracies in the NFRTR to appropriate \$1 million (in Fiscal Years 2002 and 2003) for ATF to address remaining issues. *Id.*, p. 39. In 2007, however, Dr. Fritz Scheuren advised Congress that "serious material errors" continued to plague the NFRTR that ATF "has yet to acknowledge". *Id.*, p. 41.

As recently as June 2012, failure to answer questions about ATF's botched "Fast and Furious" gun-walking operation prompted the House of Representatives to find Attorney General Holder in both civil and criminal contempt. *See John Bresnahan & Seung Min Kim, "Attorney General Eric Holder Held in Contempt of Congress," Politico*, June 26, 2012 (Exhibit 28). Moreover, ATF apparently plans to publish a proposed rule this very month that flagrantly disregards limitations on its appropriations. In the latest Semi-Annual Regulatory Agenda, ATF projects a December 2013 publication of a proposed rule (RIN 1140-AA41) addressed to FFLs. A recent press report indicates that ATF has already submitted the draft to OIRA for review. *See Julian Hattem, "Feds Consider New Gun Regs," The Hill*, Nov. 20, 2013 (Exhibit 29). That report quotes the White House as saying the proposed regulations "would target cases where

guns go missing 'in transit.'" *Id.* Yet, it would seem that such a proposal flies in the face of a prohibition on spending any ATF appropriations "to promulgate or implement any rule requiring a physical inventory of any business licensed under section 923 of title 18, United States Code."<sup>20</sup>

### 3. *ATF's Misleading of the Public*

When, after a prolonged period of evasion, ATF finally produced a transcript of NFA Branch Chief Busey's remarks in the training session in response to FOIA requests, the transcript had been "corrected" by ATF's Gary Schaible to minimize damage to ATF. *See* Exhibit 27, p. 17. Among those corrections, Mr. Schaible asserted that he was unaware that any ATF employee had ever testified that the NFRTR was 100% accurate.

In order to frustrate public inquiries into the Waco Raid, ATF participated in a game of "shifting the paperwork and related responsibilities" among DOJ components and other law enforcement agencies. *Id.*, pp. 13-14.

Former Acting Chief of the NFA Branch, Mr. Schaible, testified that ATF repeatedly -- in 2000, 2001, 2002, 2003, 2005, 2008 -- approved NFA transfer forms without following procedures to update the information in the NFARTR. *See* Exhibit 25(C), pp. 398-414. The consequence of those failures was that members of the public received contraband machineguns

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<sup>20</sup> ATF appropriations are continued through January 15, 2014 by virtue of § 1101(a)(2) of the Continuing Appropriations Act, 2014, H.R. 2775. Sections 103 and 104 make clear that prior restrictions on ATF use of funds remain in effect. The law referenced as the source of the continued appropriations is Public Law 113-6. That law, the Consolidated and Further Continuing Appropriations Act, Public Law 113-6 (2013), § 110, substitutes "2013" for "2012" in Public Law 112-55, Division B, § 113(b)(3), thereby continuing ATF appropriations subject to all the same limitations as the prior year. Public Law 113-6 then explicitly states: "That, in the current fiscal year and any fiscal year thereafter, no funds made available by this or any other Act shall be expended to promulgate or implement any rule requiring a physical inventory of any business licensed under section 923 of title 18, United States Code." The referenced licensed businesses are FFLs.

accompanied by genuine ATF-approved forms indicating that the purchaser had acquired a legally-registered firearm, only to have ATF subsequently seize the machineguns from innocent purchasers.

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ATF's long record of shading the truth to mislead courts, Congress, and the public, underscores the serious nature of the procedural irregularities in this rulemaking. In order to permit meaningful public participation, ATF must set aside its secretive tendencies and provide access to the materials it has placed in issue.

## **II. ATF'S PROPOSED RULE RAISES IMPORTANT CONSTITUTIONAL ISSUES**

Because judicial review of any final rule promulgated by ATF may consider not only compliance with the APA but also all alleged violations of the U.S. Constitution, *see Porter v. Califano*, 592 F.2d 770, 780 (5<sup>th</sup> Cir. 1979), it is incumbent upon ATF to take such considerations into account in this rulemaking proceeding.<sup>21</sup> Where, as here, agency rulemaking would inherently impact constitutional rights, that impact is among the matters the APA requires the agency to consider in evaluating regulatory alternatives and to address in a reasoned explanation for its decision. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.2d 1205 (D.C. Cir. 2012); *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999).

### *A. The Second Amendment*

Nowhere in the NPR did ATF demonstrate the slightest awareness that it is proposing to regulate in an area involving fundamental constitutional rights. Congress has not amended the NFA since the U.S. Supreme Court confirmed that "the Second Amendment conferred an

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<sup>21</sup> Agency determinations with respect to constitutional issues, however, are not entitled to any deference on judicial review. *See J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) (*quoting Lead Indus. Ass'n Inc. v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)).

individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Consequently, it would seem exceptionally important for ATF to consider the background constitutional issues in formulating policy, particularly where ATF's proposed rule would add significant new burdens to the exercise of this constitutional right by law-abiding citizens. Where fundamental, individual constitutional rights are at issue, an agency engaged in rulemaking to cannot rely on a conclusory assertion in order to "supplant its burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Dep't of Business & Professional Regulation*, 512 U.S. 136, 146 (1994)

With respect to all the categories of firearms ATF regulates under the NFA, ATF must consider the numerous comments filed pointing out that extending the requirement for certification by CLEO to responsible persons of trust, corporations, and other legal entities constitutes a *de facto* ban of NFA firearms despite the determination of Congress and the particular State legislature that such firearms are appropriate for ownership and use by private citizens. A complete ban was what the Court invalidated in *Heller*. Whatever room remains for reasonable regulation by ATF, twisting the NFA to create a ban would seem to be foreclosed by the Constitution. "A statute which, under the pretense of regulating, amounts to a destruction of the right . . . would be clearly unconstitutional." *Heller*, 554 U.S. at 629 (*quoting State v. Reid*, 1 Ala. 612, 616-17 (1840)).

Entirely apart from the burden resulting from a CLEO certification requirement, it should be clear that at least certain categories of firearms regulated under the NFA have a constitutional claim to less restrictive regulation than ATF proposes (and, indeed, less than is currently imposed). The *Heller* Court identified several purposes served by that right including (1) "to



secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force," (2) "self-defense" which the Court termed "the *central component* of the right itself", and (3) "hunting." *Id.* at 599. In *dicta*, the Court determined that the Second Amendment extended to "arms 'in common use at the time' for lawful purposes like self-defense," *id.* at 624, but did not protect one's right to keep or bear "weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, or "dangerous and unusual weapons," *id.* at 627.<sup>22</sup> After *Heller*, at least certain categories of firearms may no longer be properly regulated under the NFA.

1. *"Silencers" or "Suppressors" Are Not Properly Subject to the NFA*

"Silencers" are not firearms in any conventional understanding of the term. It may have been the case in 1934 that Congress could have concluded they were "dangerous", "unusual", or not "typically possessed by law-abiding citizens", but that is no longer the case. Thirty-nine States have determined that private citizens may own and possess silencers. *See* Exhibit 30. More than thirty States permit silencers to be used in some form of hunting. *Id.* Silencers are the preferred means of hearing protection for many hunters as it does not interfere with the ability to hear prey and other hunters. *See* Verified Statement of Jay J. Quilligan (Exhibit 31), p. 6. Silencers are also the only viable hearing protection in many home-defense situations, where situational awareness is imperative and reverberations from walls increase the risk of hearing loss both for the shooter and any bystanders. *See id.*, pp. 5-7 & Ex. I.

Silencers are used by the military and law enforcement to protect against hearing loss. *See id.*, pp. 4-5 & Ex. A, C, D, E, F. They are used at shooting ranges and on hunting grounds to avoid disturbing neighbors. *See id.*, p 6. Ownership and use of silencers is hardly limited to the

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<sup>22</sup> Those statements stand in contrast with the Court's observation that "the Second Amendment extends, *prima facie*, to *all* instruments that constitute bearable arms." *Heller*, 554 U.S. at 582 (emphasis added).

criminal element as is further evidenced by ATF's report that nearly a half million silencers are registered in the NFRTR. *See* ATF, *Firearms Commerce in the United States, Annual Statistical Update* (2013), p. 14. The primary constraint on the growing demand for silencers among the civilian population is ATF's ability to promptly process applications.

Given the obvious safety benefits from using silencers to protect against hearing loss, *see* Verified Statement of Jay J. Quilligan (Exhibit 31), pp. 3-11 & Ex. G-L, one must ask why they were ever subject to the NFA regulatory regime in the first place. The answer would seem to be an irrational concern that a "silent" firearm poses a risk to public safety. But that answer suggests that car mufflers should be strictly regulated so that pedestrians will be aware of the dangers of road traffic. No one would suggest such an absurd regulation for the reason that our common experience informs us that a car with a muffler is far from silent. It is also true that firearms with silencers are far from silent, even though that may be fact not as widely shared. Empirical data demonstrates that silencers reduce noise levels below the maximum safe exposure level but still are louder than car horns and chain saws. *Id.*, pp. 9-10 & Ex. J; *see also* Comment 1114, pp. 2-3.

While it may be reasonable to subject silencers to a regulatory regime like that for handguns, there is no longer any constitutional basis to subject them to NFA restrictions. Silencers are well-suited to each of the three purposes identified by the *Heller* Court, are no longer "unusual", and are neither dangerous in and of themselves or by virtue of producing a silent firearm discharge.

2. *Short-Barreled Shotguns, Short-Barreled Rifles, and "Any Other Weapons" are Not Properly Subject to the NFA*

Three other classes of firearms regulated under the NFA are no more dangerous than conventional shotguns and rifles. Short-barreled shotguns ("SBSs") and short-barreled rifles

("SBRs") fire the same ammunition, at the same velocity, and at the same rate of fire as guns with longer barrels. SBRs and SBSs seem to be subject to the NFA solely as a historical accident. In terms of possible rationales for regulation, the only feature that distinguishes them from longer versions of the same firearms would seem to be that they may be more easily concealed. Yet, neither SBSs nor SBRs are as easily concealable as a handgun. Only because Congress initially contemplated regulating handguns in a similar manner did it make any sense to distinguish between SBSs and SBRs, on the one hand, and longer shotguns and longer rifles, on the other hand. *See* Comment 1114, p. 4. Yet, Congress did not subject handguns to the NFA, *id.*, thereby producing the anomaly that continues -- without reason -- to this day.

In *United States v. Miller*, 307 U.S. 174 (1939), a case involving prosecution under the NFA, the Court concluded on the record before it that there was no evidence that the SBS at issue

*at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

*Id.* at 178 (emphasis added). Whatever doubts the Court had in 1939 would be easily dispelled today.<sup>23</sup> SBSs as well as SBRs are in common use by law enforcement, *see, e.g.*, Verified

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<sup>23</sup> In fact, doubts might have been resolved differently in 1939 itself but for the fact that in *Miller*, "[t]he defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government." *Heller*, 554 U.S. at 623. Moreover, it appears that *Miller* was a "test case arranged by the government and designed to support the constitutionality of federal gun control" with a cast of characters including Miller, an informant who was previously granted complete immunity by the federal trial court in prior bank robbery prosecutions, a politically-motivated appointed defense counsel who did not object to U.S. Supreme Court review, and a trial court judge who had been an outspoken advocate of gun control yet held the NFA facially unconstitutional without making any factual findings, as well

(footnote continued)

Statement of Alan J. Galarza (Exhibit 32), and the military precisely because in certain situations they are superior to the alternatives. These categories of firearms are not limited to specialized units but are now sufficiently widespread that they are employed by the National Guard and the Naval Militia, making them, by definition, appropriate for militia service.<sup>24</sup> It would seem indisputable that they are among the types of firearms typically owned by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

It is generally understood that in confined quarters SBSs and SBRs may be easier to handle, which makes them particularly useful in home-defense situations. *See* Comment 1114, p. 3. And for someone of petite or slight build, hunting with SBSs and SBRs may be much easier than wielding a gun that is progressively heavier as its length increases. *Id.* Compared to long guns, a SBS or and SBR is "easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; [and] it is easier to use for those without the upper-body strength to life and aim a long gun." *Heller*, 554 U.S. at 629. ATF reports almost a quarter million registered SBSs and registered SBRs combined. *See* ATF, *Firearms Commerce in the United States, Annual Statistical Update* (2013), p. 14. Those facts illustrate that SBSs and SBRs are used for purposes that have nothing to do with perpetrating crime.

Firearms classified as "Any Other Weapon" ("AOW") are similarly misplaced under the NFA. The category does not literally encompass all other weapons as is clear by virtue of the fact that the NFA does not apply to pistols, revolvers, long shotguns, and long rifles. Rather

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(footnote continued)  
as other indicia of collusion. Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U.J.L. & Liberty 48, 50, 56, 63-65 (2008).

<sup>24</sup> 10 U.S.C. § 311.

AOW is a term of art. Following placement of SBSs and SBRs in the original 1934 statutory text, is the phrase "or any other weapon, except a pistol or revolver, . . . if such weapon is capable of being concealed on the person." Traditionally, the AOW class of firearms contains gadget devices that are concealed by being disguised as something other than a firearm such as canes, pens, or briefcases. As with SBSs and SBRs, the fact that handguns are not subject to NFA regulation undermines any rational basis for imposing such requirements on AOWs. Moreover, AOWs generally attract the interest of gun collectors, not criminals. *See* Stephen P. Halbrook, 1 *Firearms Law Deskbook* § 6:14, at 666-67 (2012-2013 ed.). As a result, AOWs are among the types of firearms typically owned by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

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In the event ATF determines to promulgate regulations that do not exclude silencers, SBSs, SBRs, and AOWs from the NFA framework, the serious constitutional issues provide ample reason for ATF to minimize the burdens on persons seeking to acquire and register such firearms through legal means. Given the number of ordinary household items that can be used as a silencer<sup>25</sup> and the ease with which a criminal could make his own SBR or SBS by cutting down a long gun, it is difficult to fathom how it is possible to justify an imposition greater than a NICS check on a legal purchaser of a firearm that will be registered with ATF.

B. *Federalism Concerns*

ATF's proposed rule unnecessarily interferes with State law in several respects. *First*, it undermines State law by purporting to grant local law enforcement officers authority that State

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<sup>25</sup> *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, p. 5 & n.14. ATF has not yet added this comment to the docket.

law denies them. *Second*, it could require many States to rewrite laws regarding the internal governance of corporations, trusts, LLCs, and other legal entities so that instruments valid under State law will comply with the new definitions and obligations ATF proposes to adopt. *Third*, it could require regulated persons to act contrary to State law regarding disclosure of information relating to the private possession of firearms. And, *fourth*, it needlessly imposes significant costs on State and local governments that will detract from core law enforcement functions.

1. *Undermining the Autonomy of States to Set Statewide Firearms Policy*

By purporting to authorize State and local officials to exercise discretion that is not granted to them under State law, ATF interferes with the autonomy of each State to establish its own statewide firearms policy. For example, by statute the legislature of Pennsylvania has declared:

No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

18 Pa. C.S. § 6120(a). To underscore the legislature's preemption of all local regulation of such matters, it also made violation of section 6120 a misdemeanor of the first degree. 18 Pa. C.S. § 6119. It does not matter whether or not the county or municipality has a home rule charter under State law. 53 Pa. C.S. § 2962; 16 P.S. § 6107-C(k). The highest court of the State has confirmed that "[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . [T]he General Assembly, not city councils, is the proper forum for the imposition of such regulations." *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). The Pennsylvania Supreme Court has been "crystal clear" that *only* the General Assembly may establish policy with respect to the ownership, possession, and transfer of firearms, as the entire

field is preempted. *See National Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Cmwlth. 2009).

Pennsylvania law is not unique in this regard. Many other States explicitly preempt local control in these matters. *See, e.g., Cherry v. Municipality of Metro. Seattle*, 808 P.2d 746, 748 (Wash. 1991) (holding Washington's Uniform Firearms Act "is intended to preempt regulatory city, town or county firearms laws and ordinances"); *McMann v. City of Tucson*, 47 P.3d 672, 674 (Ariz. App. 2002) (observing that Arizona's statute declares firearms regulation "is of statewide concern" and prohibits political subdivisions from enacting "any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms or ammunition or any firearms or ammunition components in this state"). ATF's CLEO certification requirement essentially invests individual local officials with *de facto* arbitrary power to establish policies directly contrary to State law, undermining the role of the State in our federal system.

## 2. *Intruding on State Law Governing Corporations, Trusts, and LLCs*

As a general matter, it is State law that governs the internal operations of corporations, trusts, and LLCs. ATF's ill-conceived effort at defining "responsible persons" of such entities interferes with such State law. To the extent ATF's proposed regulation deems certain individuals associated with legal entities to have powers merely by virtue of the title held by such individuals, it threatens to disrupt entire bodies of well-settled law of the several States.

By essentially requiring ATF prior approval before individuals assume roles with corporations, trusts, and LLCs, ATF interferes with the operation of State law. Many of these entities hold assets other than NFA firearms and serve additional purposes. Corporations and LLCs are used to own and operate businesses of all varieties. Trusts are used for estate planning and numerous other purposes. *See Comment of David M. Goldman (1899)*, pp. 14-32.

New corporate officers (perhaps appointed by a new board of directors) owe duties to shareholders under State law but ATF would seemingly suspend the ability of the officers to comply with such requirements for periods of nine months or longer while ATF processes the paperwork the proposed rule would require. And if one of the new officers resided in a jurisdiction where a CLEO refuses to sign forms, ATF may well frustrate the will of the shareholders with respect to matters entirely unrelated to NFA firearms. With respect to trusts, it would seem that ATF's proposal would interfere with the ability of a probate court judge to appoint a successor trustee, either because the court had limited jurisdiction or the judge was not the chief judge of the court. Mindless interference with the ability of States to govern such entities undermines powers reserved to the several States.

### 3. *Undermining State Laws Prohibiting Disclosure*

Many States limit the disclosure of information regarding ownership of firearms. *E.g.*, 18 Pa. C.S. § 6111(i).<sup>26</sup> (And federal law itself limits disclosure of information from tax forms.) The CLEO certification requirement undermines those laws by mandating that an applicant share such information with one or more CLEOs without, in turn, imposing any obligation on the CLEOs to protect that information.<sup>27</sup> In light of the anti-firearm animus demonstrated by some CLEOs, ATF's requirement frustrates State policy.

These concerns are not hypothetical. Recent years have seen local government disclosure of the addresses where residents own firearms. *E.g.*, David Goodman, "Newspaper Takes Down

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<sup>26</sup> See also William Bender, "Gun Shy: City Published Personal Information of Some Gun Owners," *Daily News*, Oct. 23, 2012 (Exhibit 33), p. 2 ("Pennsylvania is among 29 states with laws to protect the confidentiality of gun permit holders").

<sup>27</sup> Federal law does prohibit a *transferor* from disclosing non-public information regarding a transferee, see 18 U.S.C. § 922(s)(5), but, by its terms, that prohibition does not extend to CLEOs who receive information in connection with a request to sign an application.



Map of Gun Permit Holders," *New York Times*, Jan. 18, 2013 (Exhibit 34); Victor Fiorillo, "These Philadelphians Want Gun Permits," *Philadelphia*, Aug. 15, 2012 (Exhibit 35); William Bender, "Gun Shy: City Published Personal Information of Some Gun Owners," *Daily News*, Oct. 23, 2012 (Exhibit 33). And some government officials have been directed to disclose such information about political opponents for purely partisan purposes. *E.g.*, Tom Shortell, "Former Northampton County Sheriff's Deputy Cleared for First-Time Offenders Program," *The Express Times*, Aug. 14, 2013 (Exhibit 36).

#### 4. *Unfunded Mandate on CLEOs*

ATF's proposed regulation would not only retain, but would expand the requirement of CLEO certifications, imposing significant burdens on State and local officials. Were ATF to mandate action by CLEOs it is clear that such a requirement would violate the anti-commandeering principle articulated in *Printz v. United States*, 521 U.S. 898 (1997). Yet, it is no answer to that objection to assert that CLEOs have discretion to determine the level of resources to devote requests for certification or to ignore them altogether. To the extent ATF relies on any such rationale, it only underscores the infringement of Second Amendment rights of individuals that ATF requires to obtain such certification from CLEOs.

The comments submitted in this docket detail cases of CLEOs who will not sign forms to make or transfer NFA firearms because of the burden it places on the limited resources of their agencies. The comment FICG prepared for David M. Goldman [1899] documented one such example in Florida. The sheriff of St. Johns County had for years signed forms but when the volume of work became so great that he anticipated needing to task a second officer to handle background checks for NFA certifications, he decided it was time to make a change. By a posting on the sheriff's Facebook page he encouraged individuals seeking to make or acquire

NFA firearms to establish a trust so as to alleviate the burden on his agency. *See* Comment 1899, pp. 36-37 & Ex. 5. In light of this rulemaking and the large number of additional certifications it would require, the St. Johns County situation was recently revisited in an article in the *Wall Street Journal*. *See* Joe Palazzolo, "Silencers Loophole Targeted for Closure," *Wall Street Journal*, Oct. 3, 2013 (Exhibit 37).

That example is not unique as is demonstrated by other comments filed in this proceeding. Craig Scott observed that the new sheriff for Harris County, unlike his predecessors, at least held out the hope that he might approve forms, provided that he could impose yet additional requirements upon owners of NFA firearms. *See* Comment 1002. The newspaper story Mr. Scott attached confirmed that because previous administrations had refused to process requests the new sheriff starts with a backlog of hundreds of applications. If the proposed rule is promulgated all the applications that previously would have avoided the signature requirement will be added to that backlog and given the number of responsible persons per legal entity, a substantial new burden will fall upon the department.

Additional comments expressed concern with the costs the proposed rule would place on CLEOs. *E.g.*, Comments 0002, 0012, 0030, 0061, 0143, 0187, 0191, 0194, 0221, 0222, 0223, 0224, 0378, 0467. For CLEOs to "even attempt to process the volume of applications by responsible parties, seeking to purchase a suppressor for example which is legal for hunting in the State of Texas, they would be neglecting their primary duties of law enforcement and the pursuit of criminals." Comment 0006.

### **III. ATF'S PROPOSAL EXCEEDS ITS STATUTORY AUTHORITY**

From the outset, it is clear that the NFA was designed to provide a basis for prosecution of "gangsters" with untaxed, unregistered firearms and not as a regulation of law-abiding citizens

who complied with the law. ATF has turned the statutory scheme on its head, imposing ever more draconian burdens on law-abiding citizens who seek to make and acquire NFA firearms while diverting resources to do so from investigating and prosecuting criminals who use illegal means to obtain NFA firearms.

ATF describes the NFA in terms that go beyond the statutory text. According to ATF's Website, the NFA's "underlying purpose was to curtail, *if not prohibit*, transactions in NFA firearms." <http://www.atf.gov/content/firearms/firearms-industry/national-firearms-act> (emphasis added). It describes the \$200 tax imposed by the NFA as having been designed "to discourage *or eliminate* transactions in these firearms." *Id.* (emphasis added). But Congress has never "prohibited" NFA firearms or "eliminated" the ability to transfer them provided the tax is paid and registration procedures are followed.

A. *Congress Prohibited "Undue or Unnecessary" Restrictions*

Congress has, in fact, legislated to *limit* the authority of ATF to impose more burdens on law-abiding citizens. Congress was aware of ATF's over-zealous interpretation of the NFA when it enacted the Firearms Owners' Protection Act ("FOPA"), Pub. L. 99-308, 110 Stat. 449 (1986). It would be an understatement to say that Congress thought ATF had reached the maximum boundary of its rulemaking and enforcement authority. Well aware of ATF's history, *see supra* Part I(H), Congress made clear in FOPA that ATF's regulation and enforcement activities of *legal* owners of firearms -- like those who seek to register firearms under the NFA -- had already gone too far. Congress found that not only were statutory changes needed to protect *lawful* owners of firearms, but that "enforcement policies" needed to be changed as well. FOPA § 1(b). In doing so, Congress reaffirmed that "it is not the purpose of this title to place *any undue or unnecessary* Federal *restrictions or burdens* on law-abiding citizens with respect to the

acquisition, possession, or use of firearms," *id.* (emphasis added), signaling in the strongest possible language that ATF should not impose yet additional burdens on law-abiding citizens in response to mere speculation that criminalizing already criminal activity might have some marginal benefit. Yet, that is precisely what ATF's proposed rule would do.

ATF's proposed rule would add new precautions on top of existing precautions on top of existing criminal liability. To say that such a regulation is "unnecessary" or imposes an "undue" burden is to state the obvious.

- It is already a violation of federal criminal law for a prohibited person to possess a firearm, 18 U.S.C. § 922(g). ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition.
- It is already a violation of federal criminal law for a person to make false statements on the federal forms that would permit him to take possession of a firearm, 18 U.S.C. § 1001. ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition.
- To the extent the instruments establishing the legal entity already contain provisions that, by their own terms, disqualify any responsible person from possessing any of the NFA firearms owned by the legal entity if the responsible person becomes disqualified, an additional safeguard is in place. In that event, the prohibited person is already acting without any authority from the legal entity and, indeed, in violation of his fiduciary duty to the legal entity, its beneficial owners, or both.
- To the extent a responsible person swore under oath in connection with assuming a position as a responsible person that he was not a prohibited person, the prohibited person is already acting in violation of the applicable law regarding statements made under penalty of perjury. *E.g.*, 28 U.S.C. § 1746.
- To the extent a responsible person swore under oath in connection with assuming a position as a responsible person that, upon subsequently becoming a disqualified person, he would notify the other responsible persons, surrender possession of any NFA firearms owned by the legal entity, resign his position, or some combination of any or all of those provisions, the prohibited person is already acting in violation of (a) the applicable law regarding statements made under penalty of perjury and (b) his fiduciary duty to the legal entity, its beneficial owners, or both.

So, for ATF's proposed rule to have *any* marginal benefit at all, one must assume a scenario in which a prohibited person associated with a legal entity is, on the one hand, perfectly willing to violate all the foregoing prohibitions while, on the other hand, he remains scrupulous about obtaining a *registered* NFA firearm rather than simply making his own NFA firearm or turning to the black market. Even then, one must further discount the benefit to take account of other restrictions.

- It is already a violation of federal criminal law for a trustee (or any other "responsible person" associated with a legal entity) to permit a prohibited person to possess a firearm if he has even "reasonable cause" to believe the person is prohibited, 18 U.S.C. § 922(d), (h). ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition and the actions by law-abiding possessors of *registered* NFA firearms.
- To the extent a responsible person made false statements on the federal forms that would permit him to take possession of a firearm with the intent to transfer it to a prohibited person associated with the same legal entity, he would already be acting in violation of federal criminal law, 18 U.S.C. § 1001.
- To the extent a responsible person swore under oath that, upon subsequently learning a different responsible person associated with the legal entity was or became a disqualified person, he would take possession of any NFA firearms held by the prohibited person and owned by the legal entity, that responsible person is already acting in violation of (a) the applicable law regarding statements made under penalty of perjury, *see, e.g.*, 18 U.S.C. § 1746, and (b) his fiduciary duty to the legal entity, its beneficial owners, or both.

So, for ATF's proposed rule to have any marginal benefit, one must also assume that one or more other responsible persons associated with the legal entity would be, on the one hand, perfectly willing to violate all the foregoing prohibitions while, on the other hand, the responsible person remains insistent *both* on transferring a *registered* NFA firearm and on doing so only with respect to someone associated with the legal entity rather than someone who is not a responsible person with respect to the legal entity.

To state the rather unlikely combination of circumstances in which ATF's proposed rule would produce any benefit whatsoever goes far to explaining the apparent embarrassment in quantifying benefits. But the absence of benefits is not simply a matter of policy preferences in this setting, Congress expressly directed ATF not to impose any additional "unnecessary" burdens on law-abiding owners of firearms and the existing statutory penalties eviscerate any possible claim that the proposed regulation is necessary.

B. *Independent of FOPA, ATF Lacks Statutory Authority*

Even without consideration of FOPA, there are ample reasons to doubt that Congress authorized ATF to formulate the proposed regulation. *First*, Congress itself determined that legal entities were appropriate means to own NFA firearms when enacting the NFA itself in 1934. There is simply no "loophole" in the statute for ATF to address. *Second*, Congress did not authorize ATF to add to the statutory requirements for making or acquiring NFA firearms; ATF may merely prescribe the appropriate forms for identification of the parties. *Third*, Congress itself rejected the proposal to require a CLEO certification as part of the statutory scheme.

1. *Congress Determined Legal Entities May Own NFA Firearms*

In the original NFA as enacted in 1934, Congress expressly defined the persons who may own NFA firearms as including corporations and other legal entities. It cannot be maintained that ownership by such entities is merely a modern development or that Congress was ignorant of the difference between natural persons, on the one hand, and legal entities, on the other hand. Any regulation ATF adopts in the guise of regulating which legal entities may own NFA firearms that has the practical result of denying all such entities within a jurisdiction is blatantly inconsistent with the statutory scheme. Moreover, when Congress first enacted the NFA, it expressly provided that "*if the applicant is an individual*" his application "shall include

fingerprints and a photograph" of the applicant. NFA § 4(a) (emphasis added). The congressional determination to limit that requirement to natural persons was not accidental. As has been observed repeatedly in comments filed in this docket, criminals are not inclined to go to the trouble and expense to establish legal entities in order to gain access to *registered* NFA firearms when they can illegally make or acquire firearms at less expense. For almost eighty years ATF has shared that view of the statute. In all that time, ATF has failed to identify any misjudgment by Congress.

2. *Congress Did Not Authorize ATF to Add Substantive Requirements*

Congress enacted a comprehensive scheme for the making or transfer of NFA firearms. The statute itself specifies the exclusive substantive requirements for who may lawfully possess NFA firearms and the criteria for applications to do so. ATF was charged only with the task of preparing the forms to be used in the process and the incidental procedures associated with such processing. *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, pp. 37-39.

Where Congress granted ATF substantive authority it did so explicitly, as in the case of determining which firearms should be considered curios and relics.<sup>28</sup> and which firearms are "not likely to be used as a weapon" or which do or do not serve any "sporting" purpose.<sup>29</sup> Notably, those determinations call for technical expertise with respect to the characteristics of specific firearms, not controversial decisions regarding what persons should be permitted to own or possess firearms. ATF has no more authority to require a CLEO certification than it does to

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<sup>28</sup> *See* 26 U.S.C. § 5845(a) ("The term 'firearm' shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.").

<sup>29</sup> *See* 26 U.S.C. § 5845(f) ("The term 'destructive device' shall not include . . . 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.").

require a person seeking to acquire a NFA firearm to prove that he owns a gun safe, that he resides outside a gun-free school zone, or that he has completed a certain level of training with the type of firearm.

### 3. *Congress Rejected CLEO Certification*

When Congress rejected the proposal to include a *statutory* CLEO certification requirement, *see id.*, pp. 29-30, it did not merely leave to ATF the determination whether such a requirement should be imposed by regulation. Instead, Congress omitted from the comprehensive statutory scheme key provisions necessary for any CLEO certification to function.

Congress did not designate federal funds to serve as an inducement for State and local officials to review applications and provide certification. Congress did not establish a procedure for an applicant to appeal from an improper denial. And Congress did not extend the prohibition on disclosure of applicant information to CLEOs, *see supra* note 27, clearly indicating that Congress did not intend for ATF to interject them into the application process.

It is only because ATF has forced CLEO certification into a comprehensive regime that left no room for such added requirements that ATF now finds a regulatory mess of its own making. Rather than exacerbate the problem by imposing yet more substantive requirements that find no basis in the statute, ATF should return to the regime Congress enacted by eliminating altogether the CLEO certification requirement as it had long announced was its intent. *See supra* Part I(C).

## **IV. POLICY CONSIDERATIONS DO NOT SUPPORT ATF'S PROPOSED RULE**

Even if numerous procedural irregularities did not bar ATF from promulgating a final rule in this proceeding, and neither the U.S. Constitution nor the scope of statutory authority



served as an obstacle, there are ample reasons ATF should dramatically modify its proposed rule. *First*, ATF's assumptions lack statistical validity. *Second*, ATF's reasoning relies on false premises. *Third*, the costs of the proposed rule are much greater than ATF acknowledged.

A. *ATF's Assumptions Lack Statistical Validity*

As pertinent to a statistical inquiry, there are two classes of matters asserted in the NPR that demand investigation but which share certain common flaws. *First*, and most vitally, is the issue of whether ATF identified a statistically significant basis to conclude that the existing system of regulation should be revised. ATF made only three anecdotal references relative to the overall population of matters subject to ATF regulation. 78 Fed. Reg. at 55016, 55023. *Second*, with respect to estimating the costs that would be imposed by ATF's proposed rule, ATF purported to derive values from samples of "randomly selected" applications. ATF concluded "that each legal entity has an average of two responsible persons," *see* 78 Fed. Reg. at 55020, and that "the average number of pages in the corporate or trust documents" required to be submitted is "15 pages," *see* 78 Fed. Reg. at 55021.

1. *There Is No Statistically Valid Evidence of a Problem to Be Addressed*

ATF maintains a registry of NFA firearms. The most recent count of items in the NFRTR exceeds 3.5 million. *See* ATF, *Firearms Commerce in the United States, Annual Statistical Update* (2013), p. 14. Moreover, many of those firearms have been in existence for decades.

Despite the number of NFA firearms, ATF's entire rulemaking effort is apparently premised on no more than three examples of situations over an unspecified number of years in which, according to ATF's unverifiable assertion, a responsible person hypothetically had access to a NFA firearm held by a legal entity other than a FFL. ATF reported that 40,700 such legal

entities sought permission to make or acquire a NFA firearm in 2012 alone. 78 Fed. Reg. at 55020. ATF estimated an average of two responsible persons associated with each of those legal entities, for a total of 81,400 individuals gaining access to NFA firearms in 2012 alone. The number of individuals who have access to NFA firearms through association with a legal entity is cumulative, not simply the number approved in any one year. ATF's publication *Firearms Commerce in the United States Annual Statistical Update* (2013) contains year-by-year data on NFA firearms and associated forms dating back to 1990. *Id.*, Exhibits 6, 7, 7a. But ATF's summary failed to distinguish between forms submitted by non-FFL legal entities and other applicants.

The use of legal entities to hold NFA firearms was authorized by Congress in the NFA itself, enacted in 1934. ATF acknowledged that hundreds of legal entities annually made or acquired NFA firearms. The NPR recited that the number of such forms increased from 840 in 2000, to 12,600 in 2009, to the 40,700 in 2012. 78 Fed. Reg. at 55016. The total number of legal entities with NFA firearms is known only to ATF but would seem to number in the tens of thousands if not hundreds of thousands.<sup>30</sup> The number of individuals with access to NFA firearms by via association with a legal entity would represent a multiple of the number of legal entities.<sup>31</sup>

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<sup>30</sup> If the number of such forms averaged 840 for each year from 2000 through 2008, and averaged 12,600 for each year from 2009 through 2011, the total number of such forms through the end of 2012 would total over 80,000. But that computation assumes, as ATF seemed to assume, that each form represented a unique legal entity rather than that a legal entity submitted two or more forms.

<sup>31</sup> Calculation of the number of individuals with access to NFA firearms as a multiple of the number of legal entities assumes, as ATF seemed to assume, that no individual is associated with two or more legal entities.

With even the 81,400 individuals ATF that counted for calendar year 2012 having access to NFA firearms, three examples represent such a minute fraction that no statistically valid prediction can be made that there are any other instances of this problem. ATF has refused to make available any information regarding the three examples that would permit meaningful inquiry into whether they are at all representative of the problem ATF claims now requires attention.

If, nonetheless, ATF were to go forward with its effort to formulate and impose a new rule, whatever benefits ATF claims would seem to require discount to reflect the very few instances in which there is any reason to believe the new rule would provide additional protection. That is, the *marginal* benefit of added restrictions would be on the order of  $3/81,400$  or, stated otherwise, the marginal cost needs to be multiplied by a factor of  $81,400/3$  to be measured against the total benefit.

## 2. *ATF's Sampling Methods for Cost Estimates Are Invalid*

Both ATF's estimate of the average number of responsible persons per legal entity and its estimate of the average length of documentation of a legal entity fail to demonstrate that they complied with basic safeguards to ensure valid results. 78 Fed. Reg. 55020, 55021. ATF's brief description and refusal to provide documentation of the methodology employed raise more questions than the NPR answers. For any valid result, it is essential that ATF used methods that ensure against selection bias but there is no indication ATF did so.

In one estimate, ATF surveyed a sample of "applications for corporations, LLCs, and trusts," 78 Fed. Reg. at 55020, while in the other estimate ATF surveyed a sample of only "corporation or trust documents," 78 Fed. Reg. at 55021. ATF provided no explanation for including LLC documents in one sample and not the other.

What is most troubling, however, is that in one instance ATF considered a sample "of 39 recent randomly selected paper (hardcopy) applications," 78 Fed. Reg. at 55020, while in the other instance ATF reviewed "documents for 50 recently randomly selected paper (hardcopy) submissions," 78 Fed. Reg. at 55021. Without a valid explanation for the difference in sample sizes the results are highly suspect.

No explanation was offered for either sample size, let alone the discrepancy between the two. A sample size designed to produce a valid result in which one can have confidence requires consideration of whether the population from which the sample is selected is relatively homogeneous. ATF did not express any appreciation of that fundamental concept. ATF refused to disclose the actual data from each entry in the sample thereby concealing the range of variation within the sample. There is no reason to believe that the population of 40,700 applications from which the samples were drawn (if, indeed, they were drawn from the pool of applications in 2012) reflected a homogeneous group. Indeed, the public comments filed in this proceeding suggest a wide diversity as authors indicated the number of trustees (or other responsible persons) and length of legal instruments. The comment FICG submitted on behalf of David M. Goldman documented the wide variations within the population from which ATF purported to randomly select its sample. *See* Comment 1899, Part II(C), Part IV(A) & (B). In such a heterogeneous population, a much larger sample size of the population of 40,700 (if that is from where they were drawn) would be required to produce a statistically valid estimate of the characteristics of an "average" legal entity. *See* Comment of C. Seidler [1737].

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There is no statistically-significant evidence of the problem ATF purports to address with the proposed rule, even if one credits the three anecdotes. In weighing costs and benefits of the

proposed rule, ATF must discount the benefits (or multiply the costs) to reflect the very few examples from the large population of individuals with access to NFA firearms via legal entities. ATF estimates of the number of responsible persons per legal entity and the length of documentation of each legal entity cannot form the basis for any valid evaluation of the costs of the proposed rule as a result of lack of transparency in methodology, inadequate description of the data in the sample, the likelihood of selection bias, the unexplained difference in the sample sizes, and the small sample size relative to the overall population.

B. *ATF Relies on False Premises*

ATF's proposed rule is based on several false premises, including that *registered* NFA firearms constitute a significant threat to public safety, that legal entities exist to frustrate ATF regulation, and that CLEOs refuse to sign forms due to concerns about civil liability.

1. *There Is Little Evidence of the Misuse of Registered NFA Firearms*

As noted above, none of the three examples ATF mentioned in the NPR illustrate that a prohibited person ever gained access to a NFA firearm by virtue of an association with a legal entity, *see* Part I(B), and even if those three instances were credited -- which ATF's refusal to provide underlying information precludes, *see* Part I(A)-(B), -- they do not amount to statistically significant evidence of a broader problem, *see* Part IV(A)(1). The false premise upon which ATF relies, however, is still broader. Regardless of whether NFA firearms are registered to an individual or a legal entity, there is little evidence of the misuse of such firearms in the almost-eighty-year history of the NFA.

Numerous public comments have made the point that criminals are not likely to go through the process of registering a highly-regulated firearm with ATF when there are black market sources, including the criminal's ability to make his own NFA firearm. In addition to

such registration, the criminal would have to pay a premium to obtain a legal firearm, pay a \$200 transfer tax, and wait months for ATF approval. One can search the historical record for evidence of such a scrupulously honest criminal. Instead, the examples of misuse referenced in the public comments fall into two categories. *First*, there are examples of misuse of *unregistered* NFA firearms but those examples only underscore the futility of attacking such misuse by adding regulations to *registered* NFA firearms. *Second*, there are references to two examples where an individual who was *not a prohibited person* lawfully gained access to a NFA firearm only to subsequently use it in the commission of a crime. Because in both instances the individual was not prohibited when he acquired access to the firearm, no part of ATF's proposed rule would have produced a different result. Recently proposed legislation confirms that even gun control proponents recognize the efficacy of regulation under the NFA. *See* Exhibit 11. ATF failed to explain, let alone demonstrate, the need for a change in regulations

## 2. *Legal Entities Serve Many Legitimate Purposes*

ATF seems to have started from the premise that legal entities owning NFA firearms exist exclusively to make use of a "loophole" in the law. In fact, however, legal entities serve many legitimate and beneficiary purposes. The comment FICG prepared for David M. Goldman documents the many reasons trusts are established including tax planning, estate planning, family law and elder law issues, sharing of assets among family members, regulatory compliance, and protection against over-zealous application of the "constructive possession" doctrine. *See* Comment 1899, pp. 14-21. Corporations, LLCs, and other legal entities are formed for a similarly wide-range of purposes, including the management of active business concerns.

Corporations and LLCs, like trusts, are employed by careful, law-abiding citizens to avoid the trap of "constructive possession." The NFA makes it unlawful for any person "to

possess a firearm that is not registered to him in the [NFRTR]." 26 U.S.C. § 5861(d). It does not matter whether or not the person in possession is prohibited from possessing firearms generally. And possession includes not only "actual possession" but also "constructive possession." As a result, when an individual lawfully obtains a NFA firearm and properly registers it in his individual name, he potentially puts at risk anyone else who, viewed *ex post*, on a fact-specific inquiry, is deemed to know of the NFA firearm and have access to it (including residing under the same roof as the person to whom the firearm is registered or working in the same business establishment as the person to whom the firearm is registered). *See United States v. Meza*, 701 F.3d 411, 419 (5<sup>th</sup> Cir. 2013); *see also United States v. Fambro*, 526 F.3d 836, 839 (5<sup>th</sup> Cir.2008); *United States v. Booker*, 436 F.3d 238, 242 (D.C. Cir. 2006); *United States v. Mergerson*, 4 F.3d 337, 349 (5<sup>th</sup> Cir.1993); *United States v. Morris*, 576 F.3d 661, 666 (7<sup>th</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 1313 (2010).

In light of the severe criminal prohibitions for "possession" of a NFA firearm that is registered to one's co-habiting spouse or to a fellow manager of a business, it is simple prudence that drives many owners of NFA firearms to use a legal entity rather than continuing to hold the firearm as an individual. The cost of establishing a legal entity and naming oneself and one's spouse as trustees or partners in comparison to potential imprisonment for up to ten years, fines of up to \$250,000, and forfeiture of the firearm. *See* 18 U.S.C. § 3571; 26 U.S.C. §§ 5871 & 5872. The same is true of a business owner who form a corporation or LLC and designates his managers as employees authorized to use the firearm. Even if ultimately vindicated, the financial cost and emotional toll of a criminal defense can be devastating. The proposed rule could expose hundreds of thousands of families and businesses to the potential of such liability.

With prosecutions actually brought against an individual who merely held a suppressor for a few minutes and another against an individual who grabbed a short-barreled shotgun to protect the life of another, the fear of such liability at the hands of over-zealous federal officials is very real. *See United States v. Valentich*, 737 F.2d 880, 881 (10<sup>th</sup> Cir. 1984); *United States v. Newcomb*, 6 F.3d 1129, 1134 (6<sup>th</sup> Cir. 1993). As a result, even when it is contemplated that a NFA firearm will only ever be used by one individual, law-abiding citizens may feel compelled to establish a legal entity to ensure compliance with the law, particularly if a spouse or co-worker has the combination to the gun safe or knows where the key is kept.

### 3. *ATF Misapprehends Why CLEOs Refuse to Sign Forms*

ATF acknowledges that one of the driving forces that prompted many individuals to establish trusts and legal entities in order to make and acquire NFA firearms has been the refusal of many CLEOs to sign forms. 78 Fed. Reg. at 55017. Rather than eliminate the CLEO certification on forms submitted by *individuals*, as ATF repeatedly signaled was its intent, the proposed rule would extend the certification requirement to forms submitted by legal entities thereby compounding the problem. Moreover, ATF does not merely propose that a designated person obtain CLEO certification on behalf of the legal entity, the proposed rule would require each and every "responsible person" to obtain CLEO certification. The only way ATF avoided the recognition that such a proposal would effectively preclude individuals in many jurisdictions from making or obtaining firearms that both Congress and the respective State legislature determined are appropriate for private ownership -- either as an individual or now in connection with a trust or other legal entity -- was to suggest CLEOs had not signed in the past due to concern about civil liability and a rephrasing of the certification would now produce a different result. *Id.*



ATF purportedly based its conclusion on the reason why CLEOs do not sign forms with the current language on "numerous statements from chiefs of police, sheriffs, and other CLEOs expressing discomfort with the portion of the certificate that requires them to state that they have no information to suggest that the individual will use the firearm for other than lawful purposes." *Id.* Once again, however, ATF has refused to subject the referenced statements to public scrutiny. *See* Part I(A). Contrary to ATF's unsupported assertion, numerous public comments in this proceeding document in detail the refusal of CLEOs to sign the certificate for entirely different reasons so that any change in wording cannot reasonably be expected to produce a different result.

Numerous comments from this docket were identified in the comment FICG prepared for David M. Goldman to illustrate that many CLEOs simply oppose civilians having firearms. *See* Comment 1899, pp. 34-36. The Verified Statement of Alan J. Galarza (Exhibit 32) demonstrates that even an active duty law enforcement officer could not obtain the signature of a CLEO in his own office. The Verified Statement of Thomas F. Braddock, Jr. (Exhibit 38) documents the refusal of CLEOs in Luzerne County, Pennsylvania, to sign ATF Forms based on the belief that civilians should not own NFA firearms. His experience is further confirmed by the independent experience of another resident of Luzerne County. *See* Comment of Anthony Smith [1269].

The comment FICG prepared for David M. Goldman also documented instances of CLEOs who will not sign forms to make or transfer NFA firearms because of the burden it places on the limited resources of their agencies. *See* Comment 1899, pp. 36-37. Subsequently filed comments validate that observation. *E.g.*, Comment 1908.

Because ATF relied on a false premise as to the reason CLEOs do not currently sign forms, its proposed change in the wording of the certification is not likely to prompt many

CLEOs to change their approach to the process. When asked directly whether the change in wording would prompt a different attitude, CLEOs have given no indication that it would do so. *See* Verified Statement of Thomas J. Braddock, Jr. (Exhibit 38), p. 2; Letter from Cumberland County (North Carolina) Sheriff's Office (Exhibit 39); Declaration of Ernest J. Myers (Exhibit 40). The response from the Orlando (Florida) Police Department is illustrative:

Unfortunately, we do not believe the proposed language amendment will change our position with respect to whether the Orlando Police Chief should execute these forms for firearms transfers. It remains our position that the local law enforcement chief executive officer should not be involved in, or liable for, individual firearms transfers.

Exhibit 40. While the number of CLEOs who responded to this inquiry within the limited time permitted by ATF, *see* Part I(F)(2), may seem small, the significant point is that ATF apparently failed to even ask the question, preferring willful ignorance to meaningful input from CLEOs.

C. *ATF Underestimates the Cost of the Proposed Rule*

Virtually every cost ATF identified was grossly underestimated and ATF failed to even acknowledge several of the largest costs its proposed rule would impose. Only the most egregious errors are addressed here.

1. *Number of Responsible Persons Per Legal Entity*

ATF's estimate of two responsible persons per legal entity cannot be credited. *See* Part IV(A)(2). The comment FICG prepared for David M. Goldman demonstrated that either ATF drew too small a sample from a highly heterogeneous population or that most legal entities do not support ATF's concern of multiple individuals having access to firearms through a single legal entity. *See* Comment 1899, pp. 42-43. The alternative explanation is that ATF engaged in gross selection bias. Any of the possible explanations undermine the estimate. In contrast, Mr. Goldman provided a significantly higher estimate based on his extensive experience. Numerous

comments supported Mr. Goldman's explanation that ATF underestimated a key multiplier of the costs to legal entities. The Comment of J.A.K.<sup>32</sup> describes a trust that dramatically departs from ATF's estimated average. That trust currently has twenty-one responsible persons and that number will only increase over time.

## 2. *Length of Documentation of Legal Entity*

ATF's estimate of fifteen pages as the length of documentation of a legal entity suffers from the same defects. *See* Part IV(A)(2). The comment FICG prepared for Mr. Goldman again demonstrated that ATF's "sample" was either too small or that there is a vast differentiation in the complexity and safeguards of trusts (and other legal entities) that ATF failed to consider in proposing a one-size-fits-all rule. *See* Comment 1899, pp. 43-45. Again, the alternative explanation is such gross manipulation of the sampling method as would explain ATF's refusal to disclose its methodology or any underlying work papers. *See* Parts I(A), IV(A)(2). The Comment of J.A.K. describes a trust that illustrates how far ATF is from the mark. J.A.K.'s trust "is about fifty pages in length plus additional assignments, and declarations that comprise another 20+ pages."

## 3. *Cost of Fingerprints and Photographs*

J.A.K. also reported significantly higher costs for fingerprinting and photographs than ATF considered. Where ATF relied on a cost of \$24 for fingerprinting, *see* 78 Fed. Reg. at 55021, J.A.K. reported a cost of \$35. Where ATF relied on a cost of \$8 for photographs, *id.*, J.A.K. reported a cost of \$15. Because ATF has provided no supporting documentation, *see* Part I(A), it is unclear whether ATF surveyed only providers of these services in highly-competitive,

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<sup>32</sup> J.A.K. has submitted a comment to ATF using the specified procedure to protect the author's identity. The comment bears reference number 1jx-894b-gm85 and has not yet been assigned a docket number.

urban markets. In more rural areas, it may be considerably more difficult to obtain these services and the time required to do so may also be much greater than ATF assumes. One commenter from rural Pennsylvania reported the need to contact six police departments, taking hours, before finding someone willing to fingerprint him. *See* Comment of Anthony Smith (1269).

#### 4. *Lost Tax Revenue*

As many comments already filed in this proceeding have observed, ATF failed to account for additional significant costs such as the lost taxes from fewer NFA transfers and on the income lost on the sale of NFA firearms. *E.g.*, 0002, 0030, 0034, 0058, 0061, 0236, 1899, pp. 45-46. ATF estimated it received 40,565 ATF Forms 1 or 4 submitted in 2012 for non-FFL legal entities. *See* 78 Fed. Reg. at 55,021. For every Form 1 that ATF's proposed rule would discourage, the U.S. Treasury will not receive a \$200 tax payment. For every Form 4 that is not submitted because of added burdens imposed by the proposed rule, a \$200 tax payment (\$5 in the case of Any Other Weapons) will be lost. If even half that number of applications would not be submitted due to the added processing burdens of the proposed regulations, that would seem to represent an annual loss of more than \$8 million per year in stamp tax alone, in addition to the lost income taxes on manufacturers, distributors, and dealers. *See also* 0290, 0355.

To the extent a decline in business would cause small FFL dealers and custom manufacturers to cease dealing in NFA firearms, the U.S. Treasury would forego an annual payment of at least \$500 as they surrendered Special Occupational Taxpayer ("SOT") status. Every small custom manufacturer that determines it is no longer profitable to continue in business would cease annual payments of at least \$2,250 to the U.S. Treasury under the International Traffic in Arms Regulations ("ITAR"). *See* 22 C.F.R. § 122.3. Less directly, there would be a loss in income tax revenue both for the entity operating the FFL as well as for the

individual owners and employees. All those sums would be in addition to the \$8 million lost on NFA tax stamps.

#### 5. *Hearing Loss*

As many comments already filed in this proceeding make clear, there are many citizens who encounter the restrictions of the NFA solely because they seek to make or acquire suppressors (or "silencers") for hearing protection while engaged in lawful, recreational shooting. The importance of silencers to protect against hearing loss has already been extensively discussed above, in the comment FICG prepared for Mr. Goldman, in the Comment of Hill Country Class III, LLC d/b/a Silencer Shop, and in other comments. *E.g.*, Part II(A)(1), Comment 1899, pp. 46-48.

Jay J. Quilligan, M.D., who specializes in ear, nose, and throat issues and who evaluated soldiers for hearing loss, puts a dollar estimate on those costs. Considering only the direct costs of medical care, testing, and hearing aids, Dr. Quilligan determined a minimum cost of \$15 million. *See* Verified Statement of Jay J. Quilligan, M.D. (Exhibit 31), p. 11. Because hearing loss is cumulative with exposure, Dr. Quilligan explains that the incidence and severity of hearing loss will quickly multiply that figure. *See id.* Given the number of individuals exposed to the harmful noise from firearm discharge,<sup>33</sup> when disability is added to the direct medical costs, Dr. Quilligan explained that the result is "staggering" and "likely to exceed \$100 million."

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<sup>33</sup> The National Shooting Sports Foundation recently estimated the number of licensed hunters at 14,630,000. *See* Exhibit 41. Total recreational shooters exceed 30 million. *See* Exhibit 31, Ex. I, pp. 93-94. Even that larger figure does not include bystanders.

*Id.* Considering the "Value of a Statistical Life" method for preventing injuries, as this Administration employs in other contexts, amply supports that conclusion.<sup>34</sup>

6. *Failure to Distinguish Small Entities*

Many non-FFL legal entities (particularly corporations and LLCs) are likely to be small businesses that either maintain NFA firearms because they provide security services to other businesses or for defending the property and employees of the small business itself. Many CLEOs are likely representatives of small governmental entities. ATF made no effort to identify the number of such small businesses and small governmental entities. Having failed to do so, it is difficult to understand how ATF could certify compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.

The very purpose of the Regulatory Flexibility Act is to encourage agencies to consider whether the costs of a proposed rule may fall disproportionately upon small entities. There is no indication ATF did more than pay lip-service to that requirement. Costs that may seem minor to a large corporation can destroy a small business. Costs that a large metropolitan police department or State-wide agency might be able to absorb could easily have a disproportionate impact on a small, rural police department. ATF should give meaningful consideration to *flexibility* in its proposed regulation so as to accommodate small entities.

D. *The Proposed Rule is Unworkable*

As pointed out in the comment FICG prepared for David M. Goldman, the proposed rule is simply unworkable. *See* Comment 1899, pp. 39-40. The overly broad concept of a "responsible person" creates a host of practical problems discussed in many of the comments

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<sup>34</sup> *See* Memorandum from Polly Trottenburg & Robert S. Rivkin to Secretarial Officers & Modal Administrators, "Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses" (Feb. 28, 2013) (Exhibit 42), pp. 8-9.

filed in this docket. Where responsible persons reside in different jurisdictions, the traps and burdens are manifest, especially in light of ATF's processing time. *E.g.*, Comments 1340, 1908, 1961; Comment of Glenn D. Bellamy *et al.*, pp. 19-20.<sup>35</sup> The Comment of J.A.K. documents in detail the thwarted efforts of a settlor to communicate with CLEOs in other jurisdictions where "responsible persons" associated with the trust reside. All of the other problems associated with the proposed rule are exacerbated by ATF's failure to carefully define a "responsible person".

E. *ATF Inadequately Addresses the Effect on Decedent's Estates*

Among the legal entities addressed by ATF's proposed rule are decedent's estates, although ATF does so in an entirely different manner than the remainder of its proposed rule. ATF's proposed rule, proposed section 479.90a, allows a transfer of an NFA item to proceed tax-free on a Form 5, rather than on a Form 4, for estates, which is consistent with its current practice and procedure. *See NFA Handbook* § 9.5.3.1. ATF's rationale for this distinction is that an estate administrator only holds the items temporarily, for a time determined by State law, and the administrator represents the decedent. 78 Fed. Reg. at 55018. ATF also relies upon the fact that the transfer is effectuated "by operation of law," in that it is an involuntary transfer to a person, as defined in section 479.11, according to the estate planning document, regardless of whether through a will, trust or other form of estate planning document or through the intestacy law of that State, whereby a beneficiary of any type is named. *Id.*

However, in its proposed rule, ATF has failed to fully document and codify its current practices and procedures, making it unclear as to whether its current practices and procedures will apply under proposed new regulation 479.90a. ATF's failure to codify its current practices and procedures, on the one hand, or to explain the reasons for a departure therefrom, on the other

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<sup>35</sup> This comment has not yet been posted to the docket.

hand, deprives the public of a meaningful opportunity to comment on the proposal for reasons apart from those set forth above. *See* Part I.

1. *Section 479.90a Fails to Indicate That It Is Applicable to Estates and Trusts, Equally*

ATF's newly proposed section 479.90a, in relation to administration and transfer of NFA firearms in an estate, fails to acknowledge and codify ATF's current practice and procedure of equally applying the same rules, regulations and exceptions to distributions from trusts, as are applied to estates. The section is entitled "Estates" and the entire section speaks of estates and includes terms, such as executor, administrator, and personal representative, which are directly related to an estate, but fails to specify that such is also applicable to trusts and trust administration. ATF has long treated estates and trusts in the same manner regarding administration and distribution to an ultimate beneficiary. The title should be changed to "Estates and Trusts" and the term "trustee" should be included along with executor, administrator and personal representative.

2. *Possession of NFA Firearms During the Pendency of Estate and Trust Administration*

ATF's proposed section 479.90a provides that "the executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate (collectively 'executor') may lawfully possess the decedent's NFA firearm during the term of probate without such possession being treated as a transfer from the decedent." 78 Fed. Reg. at 55020. Section 479.90a fails to expressly state that a "trustee" may maintain possession during the pendency of the administration of the estate or trust without a transfer occurring. If any final rule is promulgated by ATF, it should include "trustee" along with executor, administrator and personal representative in section 479.90a.



3. *Section 479.90a Should Expressly Address the Role of an Attorney*

In the context of estate administration, proposed section 479.90a provides that the "executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate" can maintain lawful possession during the pendency of the estate without constituting a transfer. The list of persons so authorized, however, fails to include the attorney for the estate or trust, as is ATF's current practice.

In administering an estate or trust, issues can arise requiring the attorney to take possession of the firearms so to effectuate distribution to the beneficiaries. Such issues can arise when an executor/executrix, personal representative, attorney in fact, or trustee resides in a different State than that in which the estate or trust is located. For example, an executor of an estate, who resides in New Jersey, could be appointed as executor of an estate in Pennsylvania, for a Pennsylvania decedent, who owned NFA firearms. Clearly, the New Jersey executor cannot submit an ATF Form 5320.20 and gain ATF approval to move the NFA firearms to New Jersey, as NFA firearms are unlawful in New Jersey. Although ATF has permitted individuals to utilize safety deposit boxes for storage of NFA firearms, most, if not all, banks now prohibit storage of operable firearms in a safety deposit box. A similar situation may arise when an executor/executrix, personal representative, attorney in fact, or trustee is a prohibited person under State or federal law. Permitting the attorney representing the estate or trust to lawfully take possession of the firearms, pending final distribution to the beneficiaries, would obviate the need for proceedings to remove the prohibited person, thereby saving estates and trusts a substantial sum in fees and costs.

4. *Transfers of NFA Firearms from Estates and Trusts*

ATF's asserts that "[t]he new section [489.90a] also would clarify that the executor may transfer firearms held by the estate on a tax-free basis when the transfer is to a beneficiary of the estate; when the transfer is to persons outside the estate, the executor must pay the appropriate transfer tax." 78 Fed. Reg. at 55020. While adding some clarity in one regard, this statement raises other issues. It is currently ATF's practice that the tax-free transfers to a beneficiary of an estate do not require a CLEO signature.

As stated in the *NFA Handbook* in the section captioned "distributions to heirs"

Although these distributions are not treated as "transfers" for purposes of the NFA, Form 5 must be filed by an executor or administrator to register a firearm to a lawful heir and the form must be approved by ATF prior to distribution to the heir ... When a firearm is being transferred to an individual heir, his or her fingerprints on FBI Forms FD-258 must accompany the transfer application. The application will be denied if the heir's receipt or possession of the firearm would violate Federal, State, or local law. *The law enforcement certification on the form need not be completed.*

NFA Handbook § 9.5.3.1. As ATF considers the transfer from an estate or trust transfer to be an involuntary transfer by operation of law, whereby it is necessary to document in the NFRTR, as soon as practically possible, the individual or entity currently in possession of the NFA firearm, this exception to the general requirement of an individual to submit a CLEO signature is warranted and necessary. Accordingly, if ATF does not abandon the CLEO certification requirement altogether, this exception to the CLEO certification requirement should be codified in the final rule.

Proposed section 479.90a fails to define in any coherent manner what constitutes a person "outside the estate," although it excludes those persons from a tax-free transfer. Without defining what constitutes a person "outside of the estate," the proposal provides no guidance on

what ATF seeks to implement and will likely result in unequal application in the absence of a specific definition. Consider the situation of a beneficiary who either resides in a jurisdiction that prohibits private ownership of NFA firearms or is unable to obtain a CLEO signature (in the event ATF neither abandons the CLEO certification requirement altogether nor codifies the existing exception to that requirement), so that the estate or trust is required to liquidate the firearm and provide the value thereof to the beneficiary. In that event is the transfer of the NFA firearm to the FFL or, if within the same state, to the purchaser, a transfer to a person "outside the estate?" This would be to treat the same beneficiary differently, resulting in extra tax being due and an overall loss in value to the beneficiary.

If a named beneficiary executed a valid disclaimer, *see* 26 U.S.C. § 2518, so that the NFA firearm passed to a different individual, would that be considered a transfer to a person "outside the estate"? If a valid estate planning document granted a limited power of appointment, is the person designated pursuant to such a power a person "outside the estate" even if within the limited class of individuals specified by the decedent? In the case of a minor beneficiary, would the transfer of the NFA firearm to a trustee to obligated to hold that asset for the specific benefit of the minor beneficiary be a transfer to a person "outside of the estate"?

It seems obvious ATF never considered the cost incurred by a beneficiary in any of these situations either when formulating the proposed rule or when estimating its costs. If forced to liquidate the NFA firearm, the estate, trust, or beneficiary must pay a \$200 transfer tax *per item*. Where the decedent was a collector of firearms that cost could amount to a considerable sum. A ten-item collection would thus cost the estate, trust or beneficiary \$2,000 in taxes. While it is easy to *imagine* a scenario in which ATF's proposed rule adds hundreds of thousands, if not

millions, of dollars to the cost of implementation, without any analysis by ATF, it is impossible to know the actual cost.

## **V. LESS BURDENSOME ALTERNATIVES TO ATF'S PROPOSED RULE**

While ATF has not demonstrated that there is any problem to be addressed by its proposed rule, as explained in Part I(B), III(B), and IV(B) above, whatever concerns ATF may reasonably advance could be addressed by alternatives that impose less cost and involve less intrusion into the affairs of law-abiding citizens.

### *A. A More-Nuanced Approach to Legal Entities*

ATF seemingly fails to consider the wide variety of trusts and other legal entities that may be distinguished by differences in purposes and structure. Certainly many, if not most, legal entities have indicia that should alleviate concern that they may be misused to permit improper access to NFA firearms. ATF's one-size-fits-all solution fails to recognize the many variations in the instruments that establish legal entities.

As explained at length in the comment FICG prepared for David M. Goldman, some instruments include important safeguards that go far to alleviate ATF's stated concern. *See* Comment 1899, pp. 29-32. For example, many trusts add to the existing criminal prohibitions by imposing fiduciary duties upon the trustees that explicitly require (1) disclosure should any one of the trustees become a prohibited person, (2) automatic resignation as trustee if a person becomes prohibited, (3) prompt surrender of any trust assets held by the individual who became prohibited, (4) action by the other trustees to collect trust assets from the prohibited person, and (5) action by the other trustees to assure the prohibited person does not receive actual possession of any firearms held by the trust. Such provisions also serve the important function of educating the trustees of their continuing obligations long after the trust has acquired a NFA firearm and

the trustees have been in place, something that ATF cannot address directly. *See also* Comment of J.A.K., p. 4 (outlining steps taken to educate the family about NFA regulation).

ATF has not explained why instruments that contain some combination of these added safeguards do not adequately address its concerns. Inasmuch as ATF proposes to require the submission of the documentation establishing each legal entity, it would seem that a preliminary determination should be made whether a particular legal entity does not incorporate sufficient safeguards before imposing additional regulatory burdens upon that entity.

In sum, because each trust, like each corporation and LLC, is designed to address the particular needs of a given situation under the laws of the specific applicable State, rather than try to impose a uniform mandate on such varied entities, ATF should first determine that those who create and operate a particular legal entity have not taken appropriate safeguards. Only after such a determination should ATF impose any sort of default requirements. Such safeguards could include the nature and purpose of the legal entity, the presence of a corporate trustee or manager, and specially-designed provisions addressing firearms issues. Even when ATF determined that a particular legal entity should be subject to additional scrutiny, there is no reason to require that everyone associated with the entity be treated as a responsible person.

B. *More Nuanced-Approach with Respect to Responsible Persons*

There are many different roles with respect to trusts, as detailed in the comment FICG prepared for Mr. Goldstein, and ATF has not properly distinguished between individuals in those different roles when defining a "responsible person." *See* Comment 1899, pp. 21-26. The same is true of other forms of legal entities. A great deal of clarification is needed to prevent the definition from being so vague and over-broad as to be unworkable.

One way to appropriately narrow the definition of a "responsible person" can be found in the very context from which ATF seems to borrow the concept. If the concept of a "responsible person" is borrowed from the FFL context for the NFA ownership context, it is likely that many professionals preparing instruments for legal entities will -- just as they do for their FFL clients -- carefully designate one or more responsible persons, imposing special fiduciary duties upon them, perhaps even requiring that they provide a record of fingerprints and photographs, or undergo some sort of periodic background check. The point is that those who best know the particular legal entity and individuals associated with it make the initial determination of who should be designated a responsible person.

Just as every employee of an FFL is not required to be a responsible person on the license despite handling NFA firearms, so too there is no reason to require everyone associated with a trust or other legal entity to be designated a responsible person. And just as the responsible person of a FFL is required to take precautions to prevent a prohibited person from gaining access to NFA (or other) firearms, so too ATF could require the designated responsible person with respect to a legal entity to take precautions to prevent a prohibited person from gaining access to NFA firearms.

In the case of FFLs, if someone designated as a responsible person on the license becomes prohibited, ATF does not require the FFL to choose between surrendering the license or divesting itself of ownership of all firearms (which for a FFL would amount to much the same thing). Instead, ATF recognizes that the other individuals named on the license have every incentive to immediately restrict access of the prohibited person so he has no actual possession and to promptly remove him from the license so that he will not even have constructive

possession. If such a regime is adequate with respect to retailers of NFA firearms, it is unclear why anything more is required of the end-users.

It should be sufficient for legal entities to designate one or more responsible persons who would undergo a background check without requiring that everyone associated with the legal entity go through such a process. Simply because some form of background check is appropriate with respect to one or more responsible persons, it does not follow that the check reflected in ATF's proposed rule is appropriate.

C. *More Nuanced Approach with Respect to Background Checks*

ATF's proposed rule fails to consider the different forms of background checks available, creating a false dichotomy between the suggestion that there is no check at all on responsible persons if there is not a check based on the technology of the 1930s. As many comments already filed in this proceeding have observed, the availability of NICS has rendered CLEO certification obsolete. ATF concluded otherwise in the preamble to its proposed rule but without providing a reasoned explanation. 78 Fed. Reg. at 55017. ATF acknowledges that even in the absence of a CLEO certification, ATF already has "a fuller picture of any individual than was possible in 1934." *Id.* Rather than treat the existence of a superior system as dispositive, however, ATF speculated -- as one may do with any system of background checks -- that the results "may" be more accurate by adding additional layers of certification. A reasoned explanation, however, requires consideration of the *likelihood* that CLEO certification would identify any proper basis for denying an application other than the information available through a NICS check. As ATF does not specify any minimum level of investigation that a CLEO must conduct, it is difficult to understand why ATF assumes it would divulge any additional information in an age when few

CLEOs personally know an appreciable percentage of individuals within the jurisdiction.<sup>36</sup> Indeed, even in the context of FFLs, ATF does not require CLEO certification. What is the possible justification for imposing burdens on an end-user of a firearm that ATF does not impose on the dealers of those firearms?

In the event that ATF concludes that, at least in some circumstances, responsible persons must submit fingerprints, it is not clear why the use of physical cards is necessary. Other federal agencies rely upon digital fingerprint technology. Stuart Fleming described systems used by the Securities & Exchange Commission and the Transportation Security Agency. Together with the use of digital photography, such a step could permit use of eForms. *See* Comment 0993.

For those responsible persons with respect to whom ATF determines that a background check is appropriate, it is not clear that every class of NFA firearm requires the same level of scrutiny. The burdens of more-intrusive background checks associated with respect to some firearms may far outweigh the benefits

D. *A More-Nuanced Approach with Respect to NFA-Regulated Firearms*

ATF's proposed rule draws no distinctions among the various classes of "firearms" regulated under the NFA. In other contexts, however, ATF recognizes that a one-size-fits-all approach to regulation is not warranted. For example, ATF only restricts transportation of certain NFA firearms through the use of authorization in response to submission of a Form 5320.20 -- machine guns, destructive devices, SBRs, and SBSs. *See* 27 C.F.R. § 478.28. The omission of silencers and AOWs was not inadvertent. *See* ATF, "When Permission is Required

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<sup>36</sup> To the extent ATF asserts that sometimes, with respect to some jurisdictions, the information in NICS is not "as complete as possible," 78 Fed. Reg. at 55017, ATF (as a component of the Department of Justice) should not impose additional burdens simply due to the fact that another component of the same Department has not fulfilled its mandate. Moreover, in other contexts, DOJ describes NICS as highly successful. *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, pp. 10-15.



to Move NFA Firearms," FFL Newsletter (Mar. 2013) Vol. 2. ATF should consider a similar approach rather than subject *all* NFA firearms to more burdensome requirements.

The only rationale ever advanced for regulating SBRs and SBSs differently than rifles and shotguns generally has been that the shorter versions were more concealable. But handguns are even more concealable and a simple NICS check is considered sufficient for them. If ATF were to permit legal entities to acquire SBRs and SBSs on a NICS check, a FFL could file an eForm 4 (or eForm 1), the transaction could be processed promptly, and NFA Branch resources could be reallocated to other matters. Given the ease with which a criminal could make his own SBR or SBS by cutting down a long gun, it is difficult to fathom how it is possible to justify an imposition greater than a NICS check on a legal purchaser of a firearm that will be registered with ATF. For similar reasons, AOWs should be eligible for the same treatment. *See* Part II(A)(2).


Silencers (or "suppressors") are important safety devices that ATF should subject to minimal regulation within the NFA framework. Beyond collecting the information currently required when a legal entity submits a Form 4 (or Form 1) and requiring a NICS check, however, there is no justification for imposing the substantial costs associated with increased hearing loss. Indeed, by decreasing the lengthy wait time by permitting purchases of suppressors to take advantage of the eForms and NICS systems, ATF would not only free NFA Branch resources to deal with other matters, a likely increase in sales would generate additional tax revenue. Avoiding the imposition of additional regulatory burdens with respect to the making and acquisition of suppressors would also alleviate the largest category of costs associated with the proposed rule.

## CONCLUSION

ATF has made a mockery of this proceeding, engaging in numerous tactics designed to deny meaningful public participation. As a result ATF cannot promulgate any final rule that hopes to survive judicial review without starting fresh. In doing so, ATF should consult with a broad cross-section of interests familiar with the laws governing trusts, estates, and business entities rather than a select few. Independent of such problems, moreover, there is ample reason to question whether ATF regulation of certain firearms under the NFA is consistent with the Second Amendment and federalism concerns. ATF's proposal stretches far beyond any statutory authority. If ATF were to overcome those problems, the fact remains that its proposal is built upon statistically invalid assumptions and false premises. ATF failed to quantify *any* benefit from the proposed rule and substantially undercounted the cost it would impose, including a failure to consider at all some of the largest costs. The proposed rule is demonstrably unworkable and many less-burdensome alternatives exist to address any legitimate concerns.

Even the one portion of the proposal that heads in the right direction -- dealing with decedent's estates -- fails to define terms with sufficient specificity as to permit meaningful comment. If that section is intended to codify existing ATF practices, it fails in several key respects. Alternatively, if that section is intended to depart from ATF's established practices, there is no stated justification for doing so and the result is a proposal that is internally inconsistent in the manner in which it treats fiduciaries..

Respectfully submitted,



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Joshua Prince

*General Counsel*

Thomas H. Odom  
Firearms Industry Consulting Group,  
a Division of Prince Law Offices, P.C.  
646 Lenape Road  
Bechtelsville, PA 19505  
888-313-0416

December 9, 2013

## LIST OF EXHIBITS

- Exhibit 1: FICG letter to ATF dated Sept. 1, 2013
- Exhibit 2: ATF e-Mail Response to FICG dated Sept. 4, 2013
- Exhibit 3: FICG letter to ATF dated Sept. 9, 2013
- Exhibit 4: FICG letter to ATF dated Oct. 3, 2013
- Exhibit 5: FICG letter to ATF dated Sept. 29, 2013
- Exhibit 6: FICG FOIA Appeal to DOJ dated Oct. 22, 2013
- Exhibit 7: ATF response "granting" FICG's FOIA Request dated Oct. 28, 2013
- Exhibit 8: FICG letter to DOJ dated Oct. 30, 2013
- Exhibit 9: DOJ response to FOIA Appeal dated Nov. 1, 2013
- Exhibit 10: DOJ *sua sponte* redocketing of FOIA Appeal dated Nov. 13, 2013
- Exhibit 11: Senator Diane Feinstein summary of proposed legislation  
[http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File\\_id=10993387-5d4d-4680-a872-ac8ca4359119](http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=10993387-5d4d-4680-a872-ac8ca4359119)
- Exhibit 12: Verified Statement of Robert K. Merting, Esq.  
Robert K. Merting Blog Post Re: Conversation with ATF  
(<http://rkmerting.com/closing-the-loophole-2/> (visited Sept. 12, 2013)).
- Exhibit 13: FICG letter to ATF dated Sept. 2, 2013 (Docket 0096)
- Exhibit 14: FICG letter to ATF dated Sept. 10, 2013
- Exhibit 15: FICG letter to ATF dated Sept. 29, 2013
- Exhibit 16: ATF e-Mail to FICG dated Nov, 9, 2013
- Exhibit 17: FICG letter to ATF dated Oct. 11, 2013 (Docket 1488)
- Exhibit 18: FICG letter to ATF dated Nov. 7, 2013 (Docket 2198)
- Exhibit 19: FICG letter to ATF dated Nov. 18, 2013 (Docket 2404)
- Exhibit 20: Proof of ATF Receipt of Goldman Comment on Oct. 21, 2013

- Exhibit 21: FICG e-mail to ATF dated Nov. 14, 2013
- Exhibit 22: FICG Submission to [www.regulations.gov](http://www.regulations.gov) and Result
- Exhibit 23: FICG e-Mail Exchange with John Brown dated Oct. 1, 2013
- Exhibit 24: FICG letter to NFATCA dated Oct. 31, 2013
- Exhibit 25: Excerpts of Trial Transcript in *United States v. Rodman*,  
CR-10-01047-PHX-ROS (DKD) (D. Ariz.)
- 25(A): Testimony of Richard Vasquez, Nov. 28, 2012,  
pp. 202, 208-209, 215-232, 251, 255-256, 270, 278
- 25(B): Testimony of Ernest Lintner, Nov. 28, 2012,  
pp. 282, 332-334
- 25(C): Testimony of Gary Schaible, Nov. 29, 2012,  
pp. 371, 396-414
- 25(D): Testimony of Daniel Pickney, Nov. 29, 2012,  
pp. 444-45, 459, 474-76
- 25(E): Testimony of John Brown, Nov. 29 & Dec. 4, 2012,  
pp. 553, 563-66, 611-12, 622-27, 650
- Exhibit 26: NFATCA letter to ATF received Nov. 4, 2013 [1895]
- Exhibit 27: Motion in Limine filed in *United States v. Friesen*,  
CR-08-041-L (W.D. Okla. Mar. 19, 2009).
- Exhibit 28: John Bresnahan & Seung Min Kim, "Attorney General Eric Holder Held  
in Contempt of Congress," *Politico*, June 26, 2012  
<http://dyn.politico.com/printstory.cfm?uuid=EE3F7B0A-6740-499F-8836-47489F9B7A17>
- Exhibit 29: Julian Hattem, "Feds Consider New Gun Regs," *The Hill*, Nov. 20, 2013.  
<http://thehill.com/blogs/regwatch/pending-regs/190919-feds-eying-rules-for-lost-stolen-guns>
- Exhibit 30: Silencer Legality & Ownership Map,  
<http://americansilencerassociation.com/education/>

Exhibit 31: Verified Statement of Jay J. Quilligan, M.D.

- A -- Leroy Thompson, "Tactical Use of Rifle Suppressors," *SWAT Magazine* (Oct. 2009).
- B -- Al Poulson, "Quicksilver Titanium Ultralight Silencers," *Small Arms Review* (Nov. 2004),
- C -- Al Poulson, "QSMS .223 Suppressor," *Guns & Weapons for Law Enforcement* (Jan. 2003).
- D -- Army Evaluation Task Force, QSM Suppressor Evaluation Memorandum (July 24, 2007).
- E -- Letter from Officer Dan Swanson, Rochester (Minn.) Police Department (Aug. 30, 2008).
- F -- Letter from Sgt. Chad S. Horton, U.S. Army (2006)
- G -- Article by Matthew Parker Branch, M.D.
- H -- Michael Stewart, et. al., "Risks Faced by Recreational Firearm Users," *Audiology Today* 38 (Mar.-Apr. 2011).
- I -- Gregory A. Flamme, et al., "Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise," *22 J. Am. Acad. Audiology* 93 (2011)
- J -- American Hearing Research Foundation  
<http://american-hearing.org/disorders/noise-induced-hearing-loss/#frequency>
- K -- Article by Michael Stewart, Ph.D.  
<http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/>
- L -- M.E. Ylikoski & J.S. Ylikoski, "Hearing Loss and Handicap of Professional Soldiers Exposed to Gunfire Noise," *20 Scand. J. Work Environ. Health* 93 (Apr. 1994).  
<http://www.ncbi.nlm.nih.gov/pubmed/8079140>

Exhibit 32: Verified Statement of Alan J. Galarza

Exhibit 33: William Bender, "Gun Shy: City Published Personal Information of Some Gun Owners," *Daily News*, Oct. 23, 2012. [http://articles.philly.com/2012-10-23/news/34655309\\_1\\_gun-owners-uniform-firearms-act-gun-rights-advocates](http://articles.philly.com/2012-10-23/news/34655309_1_gun-owners-uniform-firearms-act-gun-rights-advocates)

- Exhibit 34: David Goodman, "Newspaper Takes Down Map of Gun Permit Holders," *New York Times*, Jan. 18, 2013.  
[http://www.nytimes.com/2013/01/19/nyregion/newspaper-takes-down-map-of-gun-permit-holders.html?\\_r=0](http://www.nytimes.com/2013/01/19/nyregion/newspaper-takes-down-map-of-gun-permit-holders.html?_r=0)
- Exhibit 35: Victor Fiorillo, "These Philadelphians Want Gun Permits," *Philadelphia*, Aug. 15, 2012. <http://www.phillymag.com/news/2012/08/15/philadelphia-gun-permit-appeals-reasons/>
- Exhibit 36: Tom Shortell, "Former Northampton County Sheriff's Deputy Cleared for First-Time Offenders Program," *The Express Times*, Aug. 14, 2013.  
[http://blog.lehighvalleylive.com/northampton-county\\_impact\\_print.html?entry=/2013/08/former\\_northampton\\_county\\_sher\\_1.html](http://blog.lehighvalleylive.com/northampton-county_impact_print.html?entry=/2013/08/former_northampton_county_sher_1.html)
- Exhibit 37: Joe Palazzolo, "Silencers Loophole Targeted for Closure," *Wall Street Journal*, Oct. 3, 2013.
- Exhibit 38: Verified Statement of Thomas F. Braddock, Jr.  
A -- E-Mail from Pennsylvania State Police, dated Nov. 18, 2013  
B -- Letter from Court Administrator, dated Nov. 19, 2013
- Exhibit 39: Letter from Cumberland County (North Carolina) Sheriff's Office, dated Nov. 7, 2013
- Exhibit 40: Declaration of Ernest J. Myers
- Exhibit 41: National Shooting Sports Foundation, Infographic: Hunting in America
- Exhibit 42: Memorandum from Polly Trottenburg & Robert S. Rivkin to Secretarial Officers & Modal Administrators, "Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses" (Feb. 28, 2013)

# **Exhibit**

**1**



# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Tom Odóm



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Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

September 01, 2013

Ms. Brenda Raffath Friend  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

**RE: ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Ms. Friend,

I am writing in connection with the above-referenced draft proposed rule posted on the Department of Justice Website last week that identifies you as the contact person. The draft makes reference to numerous sources purportedly considered by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") in formulating the proposal.

I have examined the Federal e-Rulemaking portal, [www.regulations.gov](http://www.regulations.gov), but do not find any docket entries for either ATF 41P or RIN 1140-AA43. In order to ensure an adequate opportunity to comment on the ATF proposal, I respectfully request that you immediately make available the following documents together with any others upon which ATF relied in preparing the proposal:

1. The National Firearms Act Trade and Collectors Association ("NFATCA") petition for rulemaking dated December 3, 2009, together with other documents exchanged with NFATCA or disclosing consultations with NFATCA on the subjects on the petition.

## FIREARMS INDUSTRY CONSULTING GROUP

2. The "numerous statements" that ATF has received from Chief Law Enforcement Officers ("CLEOs") regarding purported reasons CLEOs decline to sign applications.
3. Documents regarding the denial of an unidentified person's application for transfer of a silencer and that individual's subsequent effort to procure transfer of the same silencer to a trust as to which the individual was the settlor.
4. Documents regarding the situation in Texas in which ATF became aware that "a member of a LLC was an illegal alien, living in the United States under an assumed name, and had a felony warrant outstanding" at the time "the LLC had 19 firearms registered to it".
5. Documents regarding the situation in Tennessee in which "ATF became aware of applications submitted to transfer two NFA firearms to a trust in which one of the trustees was a convicted felon."
6. Documents demonstrating the basis for ATF's "estimate" that, on average, legal entities have only two responsible persons, including the methodology for the survey of thirty-nine applications.
7. Documents reflecting the methodology for the selection of the sample upon which ATF based the estimate of an average of only 15 pages per submission for the proof of the existence and validity of a legal entity (e.g., partnership agreements, articles of incorporation and corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures).

Please send the documents to me or advise me where I may access them now. All communications should be sent to:

**Joshua Prince, Esq.**  
**Firearms Industry Consulting Group**  
**646 Lenape Rd**  
**Bechtelsville, PA 19505**  
**610-845-3803**  
**Joshua@PrinceLaw.com**

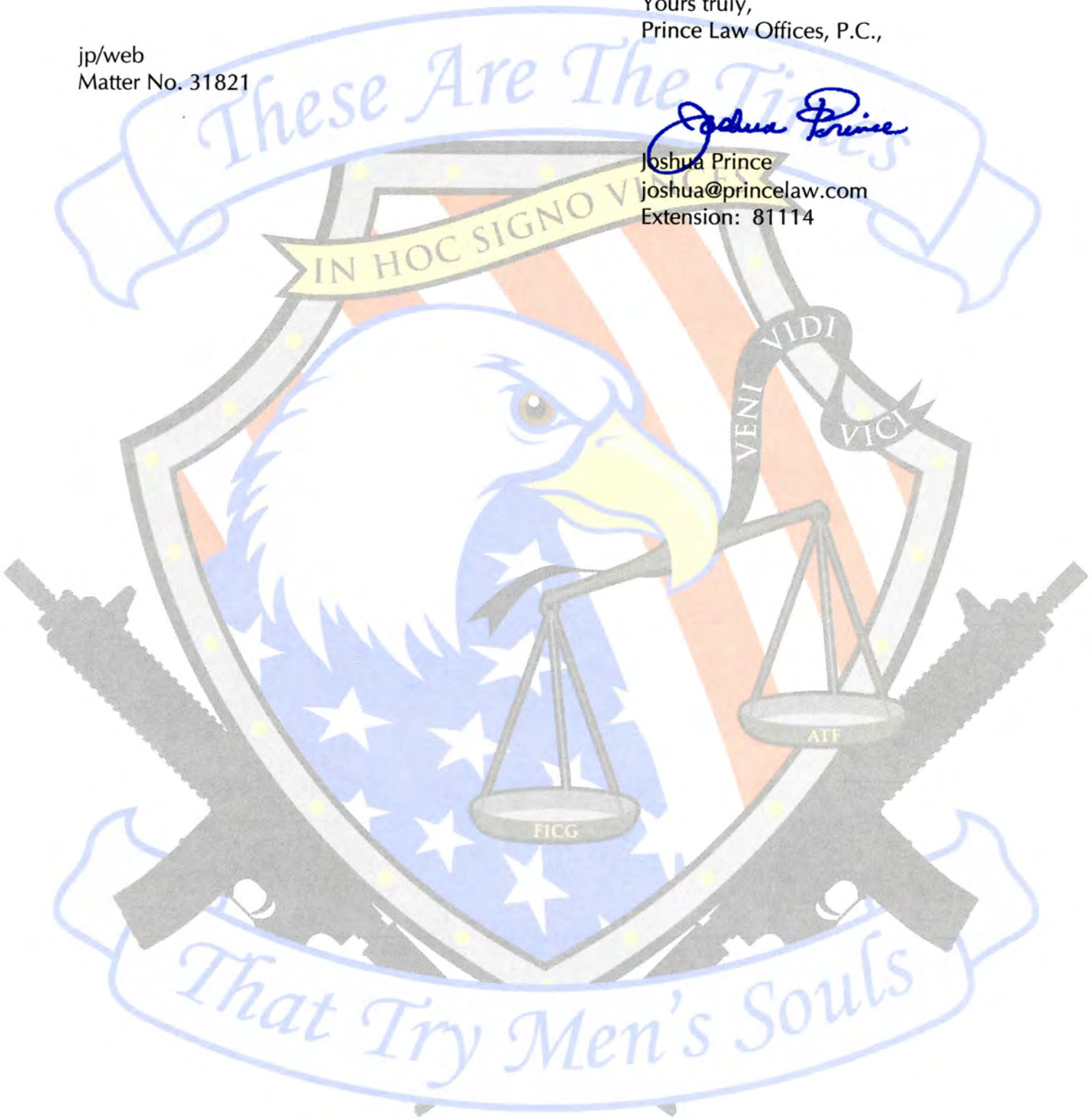
Thank you for your attention to this matter.

FIREARMS INDUSTRY CONSULTING GROUP

jp/web  
Matter No. 31821

Yours truly,  
Prince Law Offices, P.C.,

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114



# **Exhibit**

**2**

31821  
CEA

Josh

<Brenda.R.Friend@usdoj.gov>

September 4, 2013 5:06 PM

To: Joshua Prince

Your Faxes Dated September 1 and 2, 2013

---

Mr. Prince,

I am in receipt of your two facsimile transmissions dated September 1 and 2, 2013. I have given the one dated September 1, 2013 to ATF's Freedom of Information Act Disclosure Division. The September 2, 2013 fax will be treated as a public comment to the proposed rule and, as such, will be addressed to the extent appropriate, as part of the rulemaking process. You are welcome to submit other public comments. The proposed rule is expected to publish this week in the Federal Register.

Thank you,

Brenda Friend

---

**\*\*\*\*\* NOTICE: This e-mail message and any attached files are intended solely for the use of the addressee(s) named above in connection with official business. This communication may contain Sensitive But Unclassified information that may be statutorily or otherwise prohibited from being released without appropriate approval. Any review, use, or dissemination of this e-mail message and any attached file(s) in any form outside of the Bureau of Alcohol, Tobacco, Firearms & Explosives or the Department of Justice without express authorization is strictly prohibited.**

# **Exhibit**

**3**

# FIREARMS INDUSTRY CONSULTING GROUP

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Fax	1-610-845-3903

September 09, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

**RE: ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

To the extent your previous e-mail response to my requests of September 1, 2013 and September 2, 2013, were premised on them being premature because the Notice of Proposed Rulemaking had not yet been published in the *Federal Register*, I hereby renew the requests. In the alternative, to the extent you deem both the earlier requests and this renewal to be noting more than requests under the Freedom of Information Act ("FOIA"), I respectfully request the FOIA reference number assigned to my September 1, 2013 request. For your convenience, I am enclosing a copy of my original requests of September 1, 2013 and September 2, 2013.

Thank you for your time and consideration in this request.

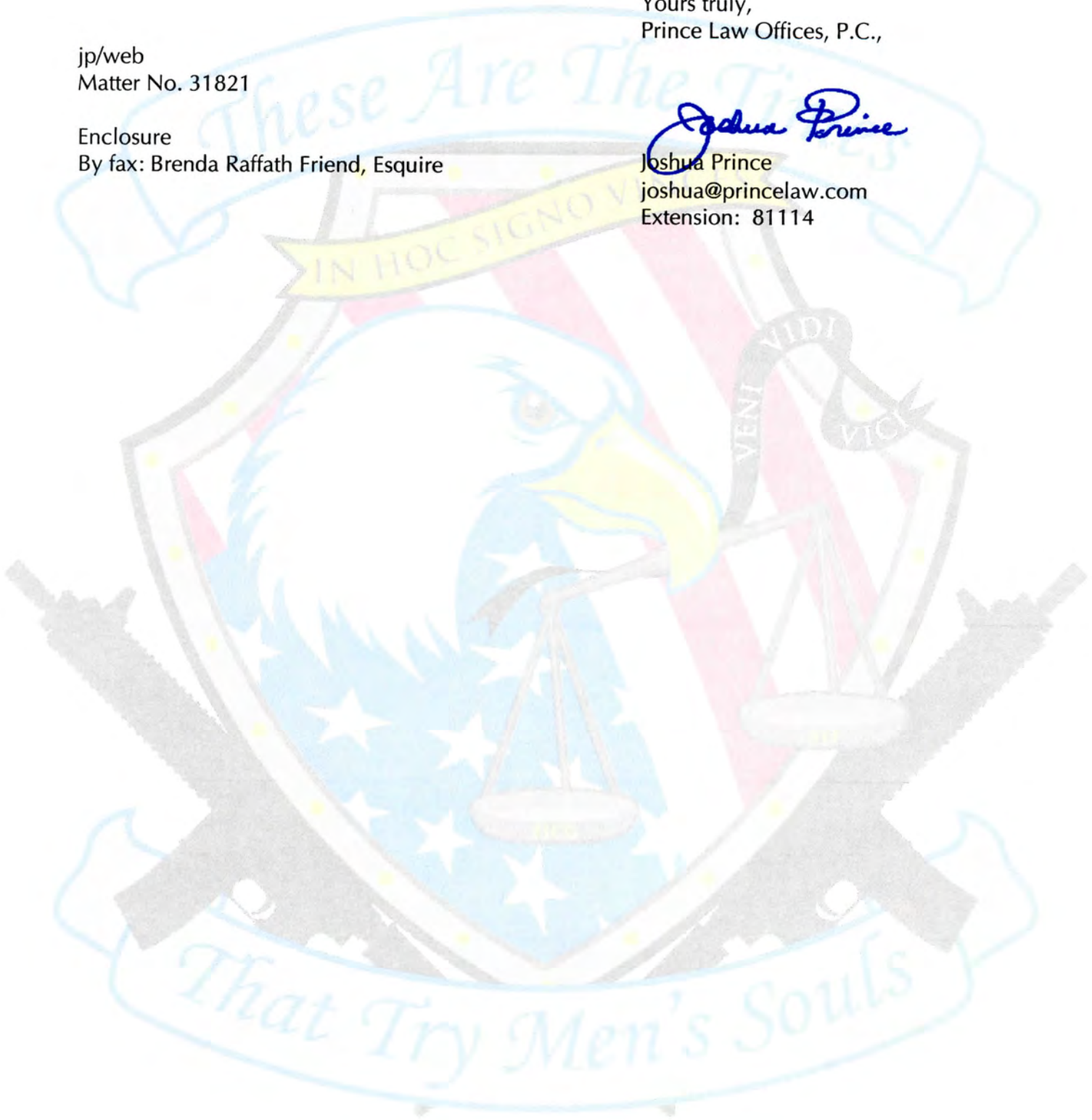
FIREARMS INDUSTRY CONSULTING GROUP

Yours truly,  
Prince Law Offices, P.C.,

jp/web  
Matter No. 31821

Enclosure  
By fax: Brenda Raffath Friend, Esquire

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114





# **Exhibit**

**4**

# FIREARMS INDUSTRY CONSULTING GROUP

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October 03, 2013

Ms. Stephanie M. Boucher  
Disclosure Division  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **Re: ATF 41P -- Notice of Proposed Rulemaking**

Dear Ms. Boucher and Attorney Friend,

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") is in the midst of the public comment phase in rulemaking ATF 41P. On September 27, 2013, I made arrangements through the Disclosure Division to visit the public reading room on Monday, September 30, for the express purpose of reviewing the entire docket in ATF 41P. I spoke with Team Leader Peter J. Chisholm in coordinating that visit. I made clear and he acknowledged understanding that I wanted to review everything that had been filed in the docket, not just public comments.

When I arrived at ATF at the appointed time on September 30, all that was made available to me were the public comments. I asked Team Leader Chisholm to confirm that that was the case. He did. I asked again for anything and everything that ATF had placed into the docket. Team Leader Chisholm confirmed that I had everything. I pointed out that the Federal Register notice was not even provided and I asked Team Leader Chisholm to sign an acknowledgment that I had

## FIREARMS INDUSTRY CONSULTING GROUP

requested the entire docket and been provided only the public comments. After consulting with Chief Boucher, he declined saying that he agreed with everything in the tendered statement but had been directed not to sign because ATF was not required to do so.

I had made perfectly clear to Team Leader Chisholm when I first spoke to him that I was driving two-and-a-half hours each way to inspect the docket. Despite my diligent efforts, it appears that one or both of you are ignoring your obligations to the public and transforming the public comment period into some form of bad performance art.

*First*, the comments I did receive were consecutively numbered starting with 2, mirroring the numbers assigned to those comments when posted on [www.regulations.gov](http://www.regulations.gov). On [www.regulations.gov](http://www.regulations.gov), the obvious reason for starting with 2 was that the first entry recorded into the docket was the Notice of Proposed Rulemaking itself ("NPR"). Yet, not even the NPR was made available in response to my request to see the entire docket. The federal Freedom of Information Act, 5 U.S. Code § 552 (hereinafter "FOIA"), applies not only to written requests for documents; it also mandates that agencies make documents available for inspection, *id.* § 552(a)(2), as well as requiring the publication of others, *id.* § 552(a)(1). I do not see how either of you could conclude that you made a good faith effort to comply with your obligations under FOIA. The failure to include the NPR in the documents provided me leaves me still wondering what else was excluded. The failure to sign a factually correct statement compounds the problem. Not only have I been denied access to materials to which FOIA entitles me, I have been denied a written determination of that fact.

*Second*, upon review of the materials that were provided to me, it was evident that written communications (what FOIA calls "documents") to and from Attorney Friend concerning rulemaking ATF 41P and so captioned had been omitted. I know of some of these documents and can identify them in detail. I know they were sent and received. What I do not know is on what possible basis they were excluded from the docket and what other similar documents may exist of which I have no direct knowledge. Among this class of documents, I know of the following:

- Letter to Ms. Friend from Joshua Prince requesting documents referenced in the NPR (Sept. 1, 2013)
- E-mail from Ms. Friend to Joshua Prince responding to his letter requesting those documents (Sept. 4, 2013)
- Letter to Ms. Friend from David M. Maloney, Sr., of the Pennsylvania House of Representatives (Sept. 6, 2013)
- Letter to Ms. Friend from Joshua Prince renewing his request for the documents referenced in the NPR (Sept. 9, 2013)

## FIREARMS INDUSTRY CONSULTING GROUP

- Letter to Ms. Friend from Joshua Prince regarding misleading information posted by ATF on [www.regulations.gov](http://www.regulations.gov) (Sept. 10, 2013)
- Letter to Ms. Friend from Joshua Prince regarding delays in the posting of comments to [www.regulations.gov](http://www.regulations.gov) (Sept. 11, 2013)

I have reason to believe that there are more such written communications to and from Ms. Friend, the designated contact person for ATF 41P. The public has a right to know of the issues raised in *all* such documents, not just those ATF arbitrarily decides place in the docket.

I respectfully request that you promptly (1) place this letter in the docket for ATF 41P, (2) ensure the specific documents referenced above are placed in the docket for ATF 41P, (3) locate and place all similar documents in the docket for ATF 41P, and (4) locate and place the pertinent ATF-generated documents in the docket for ATF 41P.

Yours truly,  
Prince Law Offices, P.C.,

  
Tom Odom  
todom@princelaw.com

to/web  
Matter No. 31821  
By email: Ms. Stephanie M. Boucher  
By fax: Brenda Raffath Friend, Esquire

# **Exhibit**

**5**

# FIREARMS INDUSTRY CONSULTING GROUP

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September 29, 2013

Ms. Stephanie M. Boucher  
Disclosure Division  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

RE: **FOIA Request No. 13-1479 -- Request for Expedited Handling**

VIA EMAIL: [foiamail@atf.gov](mailto:foiamail@atf.gov)

Dear Ms. Boucher:

By letter dated and transmitted by facsimile on September 1, 2013, I requested that the Bureau of Alcohol, Tobacco, Firearms and Explosives (hereinafter "ATF") provide certain documents referenced in a publicly-circulated draft of a proposed rule that the Attorney General had signed. I directed that letter to Brenda Friend, the contact person listed in the Federal Register with respect to the currently-pending rulemaking assigned docket number ATF 41P. By e-mail dated September 4, 2013, Ms. Friend advised me that she sent my letter to the Disclosure Division to be processed as a request pursuant to the federal Freedom of Information Act, 5 U.S. Code § 552 (hereinafter "FOIA"). Subsequently, I received your letter acknowledging receipt and assigning the inquiry the reference number shown above.

Inasmuch as I had not drafted the letter intending it to be treated as a FOIA request, the letter omitted certain information I request you consider in handling the matter:

**Request for Expedited Handling:** In the ATF 41P rulemaking, ATF provided ninety days for submission of public comments. That period expires on December 9, 2013. For the public to have a meaningful opportunity to participate in the rulemaking process it is essential to

## FIREARMS INDUSTRY CONSULTING GROUP

understand the basis for the proposed rule and ATF's evaluation of costs and benefits associated with the proposed rule. If these materials are not made available promptly, there will be inadequate opportunity to digest them and formulate meaningful comments. As explained below, my colleagues and I have been taking the lead in educating interested persons about the proposed rule. Please contact me immediately with regard to measures undertaken to expedite this request.

Request for Forwarding: If the requested documents are not available from ATF, I respectfully request that you forward this request to the appropriate agency that maintains the requested records or advise me of the identity of any such agency.

Status of Requestor: All of the requested documents relate directly to the notice of proposed rulemaking. Since this rulemaking was announced, my colleagues and I have posted more than a dozen blog articles with reference to it. We have made multiple appearances on radio shows and Internet video. A publisher asked me to put together written materials for dissemination. Other interested persons are looking to us to explain the proposed rule, its basis, and its consequences. There is ample public interest in the matter as is evidenced by the more than 800 comments filed in less than three weeks that the docket has been open. As a result, I ask that you classify this request as made on behalf of a freelance journalist.

Temporal Scope of Request: My letter listed seven numbered categories of documents. For requests one, six, and seven, please limit your search for responsive documents to the period January 1, 2008 to the present. For the other requests, I cannot specify a maximum period to search as the Federal Register notice did not provide any details regarding the timing of the referenced events.

Request for "Vaughn Index": In the event all or any part of an otherwise responsive document is withheld subject to a claim that one or more FOIA exemptions apply, please provide an index identifying the document or part thereof, by author(s), addressee(s), date, subject matter, and the specific exemption asserted as a basis for failing to produce the complete document. If a document is withheld only in part, please mark the redacted document to indicate the deletion.

Request for Fee Waiver: In light of my status as a journalist, I respectfully request that you waive fees for the cost of searching for responsive documents. As noted above, my colleagues and I have been the national leaders in examining the proposed rule and its consequences. A publisher asked me to put materials together and ATF is the only possible source for this information. Certainly the gun control debate more generally has been a hot topic in the media.

Financial Limit to Search and Duplication Costs: If search and copying fees are estimated to exceed \$250.00, please contact me before processing this request. You may reach me by telephone at 610-845-3803 extension 81114 or via e-mail at Joshua@PrinceLaw.com

Waiver of Inspection: If search and copying costs are not estimated to exceed \$250.00, please send a copy of the documents to me at the address referenced above.

## FIREARMS INDUSTRY CONSULTING GROUP

Request for Timely Action: As mandated by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), I request your reply within twenty business days from the initial receipt of my request. The requested documents relate to a matter of current public concern so that time is of the essence.

Offer of Assistance: In the event you have any questions concerning this request, please contact me as soon as possible, by telephone at 610-845-3803 extension 81114 or via e-mail at Joshua@PrinceLaw.com. I would be pleased to clarify any perceived ambiguity informally or to discuss ways to narrow my request so as to ensure a timely response.

Thank you in advance for your attention to this matter.

Yours truly,  
Prince Law Offices, P.C.,

jp/web  
Matter No. 31821  
By email: Ms. Stephanie M. Boucher

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114



# **Exhibit**

**6**

# FIREARMS INDUSTRY CONSULTING GROUP

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October 22, 2013

Ms. Melanie Ann Pustay  
Attention U.S Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue N.W.  
Washington, DC 20530-0001

RE: **FREEDOM OF INFORMATION ACT APPEAL**  
**Appeal of Nos 13-1479, 13-1486, 13-1532 & Unknown**

Dear Director Pustay,

We are writing to appeal the constructive denial of our requests under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to which the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") assigned reference numbers 13-1479, 13-1486, and 13-1531 as well as an additional request that, despite having been submitted earlier in time and resubmitted a second time, has yet to be assigned a reference number or otherwise acknowledged. All four requests relate to an ATF rulemaking proceeding underway and the documents sought are urgently needed to effectively participate in the public comment process. As a result, **we respectfully request expedited consideration of these appeals.** The bases for the request for expedited consideration are fully set forth in the September 29, 2013 letter attached hereto as Exhibit 1.

**No. 13-1479.** By letter dated and transmitted by facsimile on September 1, 2013, Joshua Prince requested that ATF produce certain documents referenced in a publicly-circulated draft of a proposed rule that the Attorney General had signed. See Exhibit 2. That letter was addressed to Brenda Friend, the contact person listed in the Federal Register as the contact person with respect to the currently-pending rulemaking assigned docket number ATF-41P. By e-mail dated

## FIREARMS INDUSTRY CONSULTING GROUP

September 4, Ms. Friend explained that she sent the September 1 letter to the Disclosure Division to be processed as a FOIA request. See Exhibit 3. Joshua Prince sent a second letter requesting the same information once the notice of proposed rulemaking ("NPR") was published in the Federal Register. See Exhibit 4. It was treated in the same manner.

On September 29, Mr. Prince e-mailed a letter to the Disclosure Division explaining the urgency of the situation and requesting expedited treatment of his FOIA request. See Exhibit 1. To date, Mr. Prince has not been advised of the time within which a search for documents would be initiated, let alone completed. We now appeal the constructive denial of the requested documents, the constructive denial of the request for a fee waiver, and the constructive denial of the request for expedited processing.

**No. 13-1486.** By letter dated and transmitted by e-mail to ATF's electronic FOIA portal on September 2, 2013, Joshua Prince requested that ATF produce documents relating to Federal Firearms Licensees with responsible persons or employees who had been determined to be prohibited from owning or possessing firearms. See Exhibit 5. No response of any kind has been received, not even an acknowledgment of receipt. A telephone inquiry today ascertained the reference number as well as the fact it had not yet been assigned to an ATF staffer to begin a search. We now appeal the constructive denial of the requested documents and the constructive denial of the request for fee waiver.

**No. 13-1532.** By letter dated and transmitted by e-mail to ATF's electronic FOIA portal on September 16, 2013, Thomas H. Odom requested that ATF produce documents relating to its e-Forms initiative that had been addressed in several ATF newsletters. See Exhibit 6. ATF assigned this request reference number 13-1531. No response of any kind had been received. We now appeal the constructive denial of the requested documents and the constructive denial of the request for fee waiver.

**No. 13-[unknown].** By letter dated and transmitted by e-mail to ATF's electronic FOIA portal on August 27, 2013, Thomas H. Odom requested that ATF produce documents relating to misuse of firearms regulated under the National Firearms Act. See Exhibit 7. The record of the "sent" e-mail is attached. See Exhibit 8. When no acknowledgment of receipt had been received and telephone inquiries were unable to ascertain what reference number had been assigned to the request, Mr. Odom resubmitted the request on September 20, 2013. The record of the second "sent" e-mail is attached. See Exhibit 9. No response of any kind has been received and a telephone inquiry today could not even ascertain a reference number for this request. We now appeal the constructive denial of the requested documents and the constructive denial of the request for fee waiver.

**September 30, 2013.** As memorialized by the October 3, 2003, letter of Thomas H. Odom to Stephanie M. Boucher, the chief of the ATF Disclosure Division, he had also been denied the ability to review documents in the ATF reading room relating to the rulemaking proceeding. See Exhibit 10. Despite advance arrangements, no documents were made available other than comments submitted by members of the public. Obviously, the docket contains ATF's own

## FIREARMS INDUSTRY CONSULTING GROUP

information in the form of the Federal Register notice if nothing else. Moreover, as Mr. Odom memorialized, correspondence relating to the proceeding was not filed in the materials made available. Further exacerbating the problem, Ms. Boucher reportedly instructed her subordinate, Team Leader Peter J. Chisholm not to sign a description of the materials presented for inspection in the reading room. Inasmuch as the same Freedom of Information Act that governs ATF's failure to respond to the four requests as described above also mandates that ATF make available certain documents in its reading room, we now appeal the constructive denial of access to materials not made available in the reading room.

I respectfully request your prompt consideration of these appeals. The requested documents relate to matters of current public concern so that time is of the essence. At the latest, as mandated by FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), I request your reply within twenty business days.

Thank you in advance for your attention to this matter.

Yours truly,  
Prince Law Offices, P.C.

jp/web  
Matter No. 31821

Enclosure  
By fax: Ms. Melanie Ann Pustay

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114

# **Exhibit**

**7**



**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

---

OCT 28 2013

[www.atf.gov](http://www.atf.gov)

REFER TO: 13-1479

Mr. Joshua Prince, Esq.  
Firearms Industry Consulting Group  
646 Lenape Road  
Bechtelsville, Pennsylvania, 19505

Dear Mr. Prince:

This is our final response to your Freedom of Information Act (FOIA) request for access to information maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Your request is granted.

If we can be of further assistance, please do not hesitate to write again or call 202-648-8740.

Sincerely,

*Stephanie M. Boucher*

Stephanie M. Boucher  
Chief, Disclosure Division

Enclosure

DOCUMENT COVER SHEET:

PART I—Document Cover Sheet

1. Requesters Name <i>Joshua Prine</i>	2. File Number <i>13-1479</i>	3. Requested documents were referred by the following agency:
4. Documents are being released: [ ] at cost [ <input checked="" type="checkbox"/> ] without cost	5. Package ends with document #: <i>16</i>	<i>NA</i>



## DEPARTMENT OF JUSTICE

## Bureau of Alcohol, Tobacco, Firearms, and Explosives

## 27 CFR Part 479

[Docket No. ATF 41P; AG Order No. 3398-2013]

RIN 1140-AA43

**Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity With Respect To Making or Transferring a Firearm**

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations that concern the making or transferring of a firearm under the National Firearms Act (NFA). The proposed changes include: Defining the term "responsible person," as used in reference to a trust, partnership, association, company, or corporation; requiring "responsible persons" of such legal entities to submit, *inter alia*, photographs and fingerprints, as well as a law enforcement certificate, when the legal entity files an application to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm; modifying the information required in a law enforcement certificate, so that the certificate no longer requires a statement from the certifying official that he or she has no information indicating that the maker or transferee of the NFA firearm will use the firearm for other than lawful purposes; and adding a new section to ATF's regulations to address the possession and transfer of firearms registered to a decedent. The new section would clarify that the executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate may possess a firearm registered to a decedent during the term of probate without such possession being treated as a "transfer" under the NFA. It also would specify that the transfer of the firearm to any beneficiary of the estate may be made on a tax-exempt basis.

**DATES:** Written comments must be postmarked and electronic comments must be submitted on or before December 9, 2013. Commenters should be aware that the electronic Federal Docket Management System will not

accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

**ADDRESSES:** You may submit comments, identified by docket number (ATF 41P), by any of the following methods—

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Fax:** (202) 648-9741.

- **Mail:** Brenda Raffath Friend, Mailstop 6N-602, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE., Washington, DC 20226; **ATTN: ATF 41P.**

**Instructions:** All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to the Federal eRulemaking portal, <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE., Washington, DC 20226; telephone: (202) 648-7070.

**SUPPLEMENTARY INFORMATION:****I. Background**

The Attorney General is responsible for enforcing the provisions of the NFA, 26 U.S.C. Chapter 53.<sup>1</sup> The Attorney General has delegated that responsibility to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). Regulations implementing the provisions of the NFA are set forth in 27 CFR part 479, which contains the procedural and substantive requirements relating to the importation, making, exportation, transfer, taxing, identification, registration of, and the dealing in,

<sup>1</sup> Provisions of the NFA discussed below refer to the "Secretary" rather than the "Attorney General"; however, the relevant functions of the Secretary of the Treasury have been transferred to the Department of Justice, under the general authority of the Attorney General. 28 U.S.C. 599A(c)(1). For ease of reference, we will substitute "Attorney General" for "Secretary" when discussing these statutes.

machine guns, destructive devices, and certain other firearms.

**A. Application To Make a Firearm**

Section 5822 of the NFA, 26 U.S.C. 5822, provides that no person shall make a firearm unless the person has: (I) Filed with the Attorney General a written application, in duplicate, to make and register the firearm; (II) paid any tax payable on the making, and evidenced such payment by affixing the proper stamp to the original application form; (III) identified the firearm to be made in the application form, in such manner as prescribed by regulation; (IV) identified himself in the application form, in such manner as prescribed by regulation, except that, if such person is an individual, the identification must include the individual's fingerprints and photograph; and (V) obtained the approval of the Attorney General to make and register the firearm and shows such approval on the application form. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law. For purposes of title 26, United States Code, the term "person" means "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. 7701(a)(1).

Regulations implementing section 5822 are set forth in 27 CFR part 479, subpart E. Section 479.62 provides, in pertinent part, that no person may make a firearm unless the person has filed with the Director a written application on ATF Form 1 (5320.1), *Application to Make and Register a Firearm*, in duplicate, and has received the approval of the Director to make the firearm. Approval of the application will effectuate registration of the firearm to the applicant. The application must identify the firearm to be made by serial number and other specified markings and information. In addition, the applicant must be identified on the form by name and address and, if other than a natural person (e.g., a corporation or trust), by the name and address of the principal officer or authorized representative of the entity, as well as the employer identification number of the entity. If an individual, the identification must also include certain information prescribed in § 479.63.

Section 479.63 states that if the applicant is an individual, a photograph of the applicant, approximately 2 x 2 inches and taken within 1 year prior to the date of the application, must be affixed to the indicated space on each copy of the Form 1. The regulation also provides that a completed Federal Bureau of Investigation (FBI) Form FD-



258 (Fingerprint Card), containing the fingerprints of the applicant, must be submitted in duplicate with the application.

In addition, section 479.63 provides that the law enforcement certificate located on Form 1 must be completed and signed by the local chief of police or county sheriff, the head of the state police, the state or local district attorney or prosecutor, or such other person whose certificate may be acceptable to the Director. The certifying official must state, *inter alia*, that he or she has no information indicating that possession of the firearm by the maker would be in violation of state or local law or that the maker will use the firearm for other than lawful purposes. The certifying official must have jurisdiction over the area within which the maker resides. The purpose of this requirement is to ensure that the official will have access to criminal records concerning the maker, and knowledge of the state and local laws governing the transfer, receipt, and possession of the firearm by the maker.

Under the current regulations, the requirements for fingerprints, photographs, and law enforcement certificate specified in § 479.63 are not applicable to an applicant who is not an individual, e.g., a corporation or other legal entity.

Section 479.64 sets forth the procedure for approval of an application to make a firearm. As specified, the Form 1 application must be forwarded, in duplicate, by the maker of the firearm to the Director, in accordance with the instructions on the form. If the application is approved, the Director will return the original to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm may not, under any circumstances, make the firearm until the application has been forwarded to the Director and has been approved and returned by the Director with the NFA stamp affixed. If the application is disapproved, the original Form 1 and the remittance submitted by the applicant for the purchase of the stamp will be returned to the applicant with the reason for disapproval stated on the form.

#### B. Application for Transfer of a Firearm

Section 5812(a) of the NFA, 26 U.S.C. 5812(a), provides that a firearm may not be transferred unless: (I) The transferor of the firearm has filed with the Attorney General a written application, in duplicate, for the transfer and registration of the firearm to the transferee, using the prescribed

application form; (II) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (III) the transferee is identified in the application form, in such manner as the Attorney General may prescribe by regulation, except that, if such person is an individual, the identification must include the individual's fingerprints and photograph; (IV) the transferor of the firearm is identified in the application form, in such manner as the Attorney General may prescribe by regulation; (V) the firearm is identified in the application form, in such manner as the Attorney General may prescribe by regulation; and (VI) the application form shows that the Attorney General has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law. Section 5812(b) provides that the transferees may not take possession of the firearm unless the Attorney General has approved the transfer and registration of the firearm to the transferee.

Regulations implementing section 5812 are set forth in 27 CFR part 479, subpart F. In general, § 479.84 provides that no firearm may be transferred in the United States unless an application, ATF Form 4 (5320.4), *Application for Tax Paid Transfer and Registration of Firearm*, has been filed in duplicate with, and approved by, the Director. Form 4 must be filed by the transferor and must identify the firearm to be transferred by type, serial number, and other specified markings and information. The application must identify the transferor by name and address and must include the transferor's Federal firearms license and special (occupational) tax stamp, if any. If the transferor is other than a natural person, the title or status of the person executing the application must be provided. The application must identify the transferee by name and address and, if the transferee is a natural person not qualified as a manufacturer, importer, or dealer under part 479, the person must be further identified in the manner prescribed in § 479.85.

Section 479.85 states that if the transferee is an individual, such person must securely attach to each copy of the Form 4, in the space provided on the form, a 2 x 2 inch photograph of the transferee taken within 1 year prior to the date of the application. The transferee must also attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). In addition, a certificate by the local chief

of police, county sheriff, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, must be completed on each copy of the Form 4. The certifying official must state, *inter alia*, that he or she has no information indicating that the receipt or possession of the firearm would place the transferee in violation of state or local law or that the transferee will use the firearm for other than lawful purposes. The certifying official must have jurisdiction over the area within which the transferee resides. The purpose of this requirement is to ensure that the official will have access to criminal records concerning the transferee, and knowledge of the state and local laws governing the transfer, receipt, and possession of the firearm by the transferee.

Under the current regulations, the requirements for fingerprints, photographs, and law enforcement certificate specified in § 479.85 apply only to natural persons not qualified as a manufacturer, importer, or dealer under part 479; they do not apply to transferees who are not natural persons, e.g., corporations or other legal entities.

#### C. Transfer Tax Exemption Available

Section 5852(e) of the NFA, 26 U.S.C. 5852(e), provides that an unserviceable firearm may be transferred as a curio or ornament without payment of the transfer tax imposed by section 5811, under such requirements as the Attorney General may by regulations prescribe.

Section 5853(a) of the NFA, 26 U.S.C. 5853(a), provides that a firearm may be transferred without the payment of the transfer tax imposed by section 5811 to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

Regulations implementing sections 5852(e) and 5853(a) are set forth in 27 CFR 479.90 and 479.91. These sections provide, in pertinent part, that the exemption from the transfer tax for the transfer of an unserviceable firearm as a curio or ornament or for a transfer to or from certain government entities may be obtained by the transferor of the firearm by filing with the Director an application, ATF Form 5 (5320.5), *Application for Tax Exempt Transfer and Registration of Firearm*, in duplicate. The application must: (I) Show the name and address of the transferor and of the transferee; (II) identify the Federal firearms license and special (occupational) tax stamp, if any,

of the transferor and of the transferee; (III) show the name and address of the manufacturer and the importer of the firearm, if known; (IV) show the type, model, overall length (if applicable), length of barrel, caliber, gauge or size, serial number, and other marks of identification of the firearm; and (V) contain a statement by the transferor that the transferor is entitled to the exemption because either the transferor or the transferee is a governmental entity coming within the purview of § 479.90(a) or the firearm is unserviceable and is being transferred as a curio or ornament. In the case of the transfer of a firearm by a governmental entity to a transferee who is a natural person not qualified as a manufacturer, importer, or dealer under part 479, the transferee must be further identified in the manner prescribed in § 479.85.

## II. Petition

ATF received a petition for rulemaking, dated December 3, 2009, filed on behalf of the National Firearms Act Trade and Collectors Association (NFATCA). The petition requests amendments to §§ 479.63 and 479.85, as well as to corresponding ATF Forms 1 and 4. The requested amendments are discussed below.

### A. Amendment of §§ 479.63 and 479.85

As discussed above, the photograph, fingerprint card, and chief law enforcement officer (CLEO) certificate requirements of §§ 479.63 and 479.85 do not apply if the applicant or transferee is a partnership, company, association, trust, or corporation. As such, persons who possess, directly or indirectly, the power or authority to receive, possess, ship, transport, deliver, transfer or otherwise dispose of a firearm for, or on behalf of the entity are not subject to these requirements, and ATF does not conduct a background check of those individuals.

The NFATCA expressed concern that persons who are prohibited by law from possessing or receiving firearms may acquire NFA firearms through the establishment of a legal entity such as a corporation, trust, or partnership. It contends that the number of applications to acquire NFA firearms via a corporation, partnership, trust, or other legal entity has increased significantly over the years. ATF has researched the issue and has determined that the number of Forms 1, 4, and 5 involving legal entities that are not Federal firearms licensees increased from approximately 840 in 2000 to 12,600 in 2009 and to 40,700 in 2012. There accordingly has been an increase in the number of individuals who have

access to NFA firearms but who have not undergone a background check. The petitioner expressed concern that an NFA firearm could be acquired by a prohibited person and used in a violent crime. Therefore, for applications for a corporation, trust, partnership, or other legal entity to make or receive an NFA firearm, the petitioner has requested amendments to §§ 479.63 and 479.85 to require photographs and fingerprint cards for persons who are responsible for directing the management and policies of the entity, so that a background check of the individual may be conducted.

The Department of Justice agrees with the concerns underlying this proposal, and believes that such persons should not be excluded from background checks and other requirements of the regulations that seek to ensure that prohibited persons do not gain access to NFA firearms. ATF recently encountered a situation where an application for a transfer of a silencer was denied because the transferee was determined to be prohibited from possessing an NFA firearm. The transferor subsequently applied to transfer the same silencer to a trust whose name contained the same last name as the prior transferee. ATF reviewed the trust documents and found that the prohibited person was a settlor of the trust and, thus, would have access to the firearm. ATF denied the transfer. However, if the trust name had been different from that of the prior transferee, or if the transferor sought to transfer a different firearm, ATF employees may not have realized that the prior transferee was a settlor of the trust and so may have approved the transfer.

### B. Certification of Citizenship

When filing an ATF Form 1, 4, or 5, the applicant also must submit ATF Form 5330.20, *Certification of Compliance with 18 U.S.C. 922(g)(5)(B)*. Under section 922(g)(5)(B) of the Gun Control Act, 18 U.S.C. 922(g)(5)(B), it generally is unlawful for any alien admitted under a nonimmigrant visa to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. Section 922(y)(2) provides for certain exceptions. 18 U.S.C. 922(y)(2). If an alien who was admitted under a nonimmigrant visa falls within one of the specified exceptions, or has obtained a waiver from the Attorney General under 18 U.S.C. 922(y)(3),

appropriate documentation must be provided on Form 5330.20.

The petitioner requests that the information required on Form 5330.20 be incorporated into the requirements of 27 CFR 479.63 and 479.85 and the corresponding forms. According to the petitioner, "[e]limination of the ATF Form 5330.20 by adding a citizenship statement to the transfer [and making] forms would reduce human effort for both the public and ATF while reducing funds expenditures for printing, copying, and handling the form."

The Department supports the elimination of unnecessary forms and is committed to reducing the paperwork burden for individuals and businesses. Accordingly, the Department proposes amending 27 CFR 479.62 and 479.84 and the corresponding forms to incorporate information currently required in Form 5330.20.

### C. Revision of Instructions on Forms 1, 4, and 5

The NFATCA requests that the instructions on applications to make or transfer a firearm be revised so that they are consistent with those on ATF Form 7 (5310.12), *Application for Federal Firearms License*. The petitioner appears to be referring to the instruction on Form 7 regarding the submission of photographs and fingerprint cards for responsible persons, namely, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the legal entity, insofar as they pertain to firearms. The Department agrees that proposed changes to regulations will require modifications to corresponding Forms 1, 4, and 5, including changes to the instructions on the forms.

### D. Law Enforcement Certificate

With respect to an application to make a firearm, 27 CFR 479.63 provides that if the applicant is an individual, a certificate of the local chief of police, county sheriff, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may be acceptable to the Director, shall be completed on each copy of the Form 1. The certificate must state, *inter alia*, that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of state or local law or that the maker will use the firearm for other than lawful purposes. The law enforcement certificate requirement also applies with respect to an application to transfer a firearm if the

transferee is an individual. 27 CFR 479.85.

The petitioner requests that the law enforcement certificate requirement be eliminated and that ATF "adopt a CLEO [chief law enforcement officer] process that will include a full NICS [National Instant Criminal Background Check System] check for principal officers of a trust or corporation receiving such firearms for the trust or corporation." The petitioner articulates several reasons in support of its request. For example, it states that the lack of cooperation on the part of many CLEOs in recent years has forced larger numbers of individuals to acquire NFA firearms via a trust or corporate entity, so as to avoid the need for a law enforcement certificate. The petitioner also asserts that ATF no longer accepts the CLEO certificate as prima facie verification of compliance with state and local law, and that the certificate therefore does not alleviate the burden on ATF to verify that receipt or possession of a NFA firearm would not place the applicant or transferee in violation of state or local law.

Although ATF agrees in principle with some of petitioner's assertions (for example, with the fact that ATF independently verifies whether receipt or possession of a NFA firearm would place the applicant or transferee in violation of state or local law), ATF does not propose to eliminate the CLEO certificate requirement at this time. Rather, ATF proposes extending the CLEO certificate requirement to responsible persons of a legal entity. ATF also proposes amending the language of the certificate to omit the requirement that the certifying official state that he has no information that the applicant or transferee will use the firearm for other than lawful purposes.

Sections 5812 and 5822 of the NFA, 26 U.S.C. 5812 and 5822, provide that applications shall be denied if the transfer, making, receipt, or possession of the firearm would place the applicant or transferee in violation of law. When the law enforcement certificate requirement was implemented in 1934, local law enforcement officials were generally better situated than federal officials to determine whether the transfer, making, receipt, or possession of the firearm would place the applicant or transferee in violation of state or local law. There were not at that time any readily accessible national automated databases, such as the National Crime Information Center (NCIC), that could facilitate instantaneous comprehensive nationwide criminal background checks. Although federal officials would consult available criminal history and

criminal identification records, the assessment of whether an applicant or transferee would use the firearm for other than lawful purposes often was based on information in the possession of local police. The CLEO certificate requirement thus was intended in part to ensure that an individual's authority to make, receive, or possess an NFA firearm was consistent with state and local law, and that the background of the individual was assessed by those in the best position to evaluate it.

In light of the NCIC's establishment in 1967 and additional technological developments, ATF now has direct access to a number of criminal history databases, a fact that puts it in a stronger position than before to assess the criminal background of applicants and transferees. ATF no longer relies exclusively on CLEO certificates to assess whether the making, receipt, or possession of a firearm by an applicant or transferee would violate state or local law or whether a particular applicant or transferee has a record that would warrant denying the application. ATF conducts its own background checks of individuals applying to make and receive NFA firearms. In addition to transmitting fingerprints to the FBI for a criminal history check, ATF routinely queries the following databases and indexes:

- National Crime Information Center
- TECS (formerly named the Treasury Enforcement Communication System)
- National Law Enforcement Telecommunications System
- Interstate Identification Index
- National Instant Criminal Background Check System

Although access to these databases provides ATF with a fuller picture of any individual than was possible in 1934, the available information is not comprehensive in all cases. For a variety of reasons, it is still the case that local law enforcement may have access to more complete records. For example, according to a 2006 publication by the Department of Justice, not all state criminal history records meet the standard for inclusion in the Interstate Identification Index database (the national criminal history record depository maintained by the FBI), and only 50 percent of arrest records in the database have final dispositions.<sup>2</sup> To ensure that background checks for NFA firearms are as complete as possible, ATF proposes to retain the CLEO certificate requirement for individuals,

<sup>2</sup> U.S. Department of Justice, The Attorney General's Report on Criminal History Background Checks, at 17 (June 2006), available at [http://www.justice.gov/olplag\\_bgchecks\\_report.pdf](http://www.justice.gov/olplag_bgchecks_report.pdf).

and to expand the requirement to responsible persons of a legal entity.

With respect to the law enforcement officer's statement in the CLEO certificate that he or she has no information indicating that the transferee will use the firearm described on the Form 4 for other than lawful purposes, the petitioner states that "[s]ome CLEOs express a concern of perceived liability; that signing an NFA transfer application will link them to any inappropriate use of the firearm." ATF agrees with the petitioner that state and local law enforcement officials may be concerned with the language of the current law enforcement certificate, a concern that also applies to Forms 1 and 5. ATF has received numerous statements from chiefs of police, sheriffs, and other CLEOs expressing discomfort with the portion of the certificate that requires them to state that they have no information to suggest that the individual will use the firearm for other than lawful purposes. ATF is aware that officials in a number of jurisdictions refuse to sign the certificate because of concern about potential liability for an individual's intentional or accidental misuse. Such refusals have resulted in litigation by some applicants against ATF. See *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002); *Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996). While courts have upheld the CLEO certificate requirement, ATF proposes to amend the language of the regulations and the corresponding forms to address this concern. Sections 479.63 and 479.85 will no longer require the certificate to contain a statement regarding information about the use of the firearm for other than lawful purposes. ATF requests comments on the specific language proposed, and whether this change will address the concerns raised by some CLEOs.

### III. Proposed Rule

#### A. Amendment of § 479.11

The Department proposes amending § 479.11 to add a definition for the term "responsible person." The term would include specific definitions in the case of a trust, partnership, association, company (including a Limited Liability Company (LLC)), or corporation. Depending on the context, the term includes any individual, including any grantor, trustee, beneficiary, partner, member, officer, director, board member, owner, shareholder, or manager, who possesses, directly or indirectly, the power or authority under any trust instrument, contract, agreement, article, certificate, bylaw, or

instrument, or under state law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the entity.

To ensure that responsible persons, as so defined, are subject to penalties under 26 U.S.C. 5871 for committing prohibited acts under the NFA (as defined in 26 U.S.C. 5861) to the same extent as are the legal entities with which they are associated, the Department also proposes amending the definition of "person" in 27 CFR 479.11 to clarify that a "person" is a partnership, company, association, trust, or corporation, including each responsible person associated with such an entity; an estate; or an individual.

Although the definition of "person" in section 479.11 includes the word "estate," ATF traditionally has treated estates differently from business entities, and does not propose defining the term "responsible person" to include estates. Estates are temporary legal entities created to dispose of property previously possessed by a decedent. The term during which an estate exists typically is defined by state law in the State in which the decedent resided. Conversely, partnerships, trusts, associations, companies, and corporations are formed for a specific purpose and remain in existence until action is taken to dissolve them.

Historically, ATF has treated the transfer of an NFA-registered firearm held by an estate differently from other transfers under the NFA. ATF allows the registered firearm to be held by the executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate (executor) without such possession being treated as a transfer under the NFA. Because the executor holds the property temporarily, is representing the decedent, and is bound by the limits of probate, ATF does not register the firearm to the executor and allows the transfer from the estate of the decedent directly to the beneficiaries, with the executor signing as the transferor. The disposition of the firearm to the beneficiaries of the estate is a "transfer by operation of law," because it is an involuntary transfer dictated by the terms of a will or by intestacy laws in the State where the decedent resided. The transfer to the beneficiaries of the estate is treated like any other transfer of registered firearms, except that ATF allows such transfers to be made on a tax-exempt basis when an ATF Form 5 is submitted and approved in accordance with 27 CFR 479.90. The transfer of the firearm to persons outside the estate requires the executor to file an

ATF Form 4 and to pay any transfer tax in accordance with § 479.84.

#### *B. Amendment of §§ 479.62 and 479.63*

With respect to an application to make a firearm, the Department proposes several amendments to §§ 479.62 (Application to make) and 479.63 (Identification of applicant).

The proposed § 479.62:

1. Provides that if the applicant is a partnership, company, association, trust, or corporation, all information on the Form 1 application must be furnished for each responsible person of the applicant;

2. Specifies that if the applicant is a partnership, company, association, trust, or corporation, each responsible person must comply with the identification requirements prescribed in § 479.63(b); and

3. Requires the applicant (including, if other than an individual, any responsible person), if an alien admitted under a nonimmigrant visa, to provide applicable documentation demonstrating that he or she falls within an exception to 18 U.S.C. 922(g)(5)(B) or has obtained a waiver of that provision.

The proposed § 479.63, where the applicant is an individual, maintains the CLEO certificate but omits the requirement for a statement about the use of a firearm for other than lawful purposes. The certificate must state that the official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the official has no information indicating that possession of the firearm by the maker would be in violation of state or local law.

The CLEO's certification that he or she "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant," is an existing requirement. ATF intends to modify Form 1 to include certification to that effect by the CLEO for individuals (which has always been a requirement but was not reflected on the current form). As discussed below, ATF will include the same certification on Form 5320.23 for responsible persons of a legal entity.

The proposed § 479.63, where the applicant is a partnership, company, association, trust, or corporation:

1. Provides that the applicant must be identified on the Form 1 application by the name and exact location of the place of business, including the name of the county in which the business is located or, in the case of a trust, the address where the firearm is located. In the case of two or more locations, the address shown must be the principal place of

business (or principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is located;

2. Requires the applicant to attach to the application:

- Documentation evidencing the existence and validity of the entity, which includes, without limitation, complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures; however, if the entity had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, the entity may provide a certification that the information has not changed since the prior approval and must identify the application for which the documentation had been submitted by form number, serial number, and date approved;

- A completed ATF Form 5320.23 for each responsible person. Form 5320.23 would require certain identifying information for each responsible person, including each responsible person's full name, position, social security number (optional), home address, date and place of birth, and country of citizenship;

- In accordance with the instructions provided on Form 5320.23, a photograph of each responsible person 2 × 2 inches in size, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which must have been taken within 1 year prior to the date of the application;

- Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and

- In accordance with the instructions provided on Form 5320.23, a certificate for each responsible person completed by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director. The certificate for each responsible person must be completed by the CLEO who has jurisdiction in the area in which the responsible person resides. The certificate must state that the official is satisfied that the fingerprints and photograph accompanying the application are those of the responsible person and that the certifying official has no information

indicating that possession of the firearm by the responsible person would be in violation of state or local law.

ATF seeks public comments regarding whether it is feasible to ask CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person. For example, some responsible persons may bring their fingerprint cards to the CLEO office already stamped, and some legal entities may have the paperwork, fingerprint cards, and photographs for each of their responsible persons couriered to the CLEO office. In such instances, ATF seeks comments on whether CLEOs will have enough information to certify that they are satisfied that the photographs and fingerprints match those of the responsible persons, or whether changes are needed to this proposal.

#### C. Amendment of §§ 479.84 and 479.85

With respect to an application to transfer a firearm, the Department proposes several amendments to §§ 479.84 (Application to transfer) and 479.85 (Identification of transferee).

The proposed § 479.84:

1. Provides that the Form 4 application, in duplicate, must be filed by the transferor. If the transferee is a partnership, company, association, trust, or corporation, all information on the Form 4 application must be furnished for each responsible person of the transferee; and

2. Provides that the type of firearm being transferred must be noted on the Form 4. If the firearm is other than one classified as "any other weapon," the applicant must submit a remittance in the amount of \$200 with the application in accordance with the instructions on the form. If the firearm is classified as "any other weapon," the applicant must submit a remittance in the amount of \$5.

The proposed § 479.85, where the transferee is an individual, maintains the certificate but omits the requirement for a statement about the use of a firearm for other than lawful purposes. The certificate must state that the official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that receipt or possession of the firearm by the transferee would be in violation of state or local law.

The CLEO's certification that he or she "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant," is an existing requirement. ATF intends to modify Forms 4 and 5 to include certification to that effect by the CLEO

for individuals (which has always been a requirement but was not reflected on the current forms). As discussed below, ATF will include the same certification on Form 5320.23 for responsible persons of a legal entity.

The proposed § 479.85, where the transferee is a partnership, company, association, trust, or corporation:

1. Provides that the transferee must be identified on the Form 4 application by the name and exact location of the place of business, including the name of the county in which the business is located or, in the case of a trust, the address where the firearm is to be located. In the case of two or more locations, the address shown must be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is to be located;

2. Requires the transferee to attach to the application:

- Documentation evidencing the existence and validity of the entity, which includes, without limitation, complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures; however, if the entity has had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, including the responsible person information, the entity may provide a certification that the information has not changed since the prior approval and must identify the application for which the documentation had been submitted by form number, serial number, and date approved;

- A completed ATF Form 5320.23 for each responsible person. Form 5320.23 would require certain identifying information, including the responsible person's full name, position, social security number (optional), home address, date and place of birth, and country of citizenship;

- In accordance with the instructions provided on Form 5320.23, a photograph of each responsible person 2 x 2 inches in size, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which must have been taken within 1 year prior to the date of the application;

- Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification

and should be taken by someone properly equipped to take them; and

- In accordance with the instructions provided on Form 5320.23, a certificate for each responsible person completed by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director. The certificate for each responsible person must be completed by the CLEO who has jurisdiction in the area in which the responsible person resides. The certificate must state that the official is satisfied that the fingerprints and photograph accompanying the application are those of the responsible person and that the certifying official has no information indicating that receipt or possession of the firearm by the responsible person would be in violation of state or local law.

ATF seeks public comments regarding whether it is feasible to ask CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person. For example, some responsible persons may bring their fingerprint cards to the CLEO office already stamped, and some legal entities may have the paperwork, fingerprint cards, and photographs for each of their responsible persons couriered to the CLEO office. In such instances, ATF seeks comments on whether CLEOs will have enough information to certify that they are satisfied that the photographs and fingerprints match those of the responsible persons, or whether changes are needed to this proposal.

#### D. Amendment of § 479.90

Section 5853(a) of the NFA, 26 U.S.C. 5853(a), provides that a firearm may be transferred to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations, without the payment of the transfer tax. Regulations implementing section 5853(a) are set forth in 27 CFR 479.90. That section provides, in pertinent part, that the transfer tax exemption may be obtained by the transferor of the firearm by filing with the Director an application on ATF Form 5 (5320.5), *Application for Tax Exempt Transfer and Registration of Firearm*, in duplicate. The application must provide certain information, including the name and address of the transferor and the transferee. In the case of a transfer of a firearm by a governmental entity to a transferee who is a natural person not qualified as a

manufacturer, importer, or dealer under part 479, the transferee must be further identified in the manner prescribed in § 479.85.

The Department proposes amending § 479.90(b) to remove the word "natural." Removing the word "natural" leaves the term "person," which would be defined in § 479.11 to include a partnership, company, association, trust, or corporation (including each responsible person of such entity), an estate, or an individual. This change would mean that in the case of a transfer of a firearm by a governmental entity to a transferee that is a partnership, company, association, trust, or corporation, and that is not qualified as a manufacturer, importer, or dealer under part 479, each responsible person of the transferee would be subject to the requirements prescribed in § 479.85.

#### E. Addition of § 479.90a, Estates

The Department proposes adding a new section to part 479 to address the possession and transfer of firearms registered to a decedent. The new section would specify that the executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate (collectively "executor") may lawfully possess the decedent's NFA firearm during the term of probate without such possession being treated as a transfer from the decedent. The new section also would clarify that the executor may transfer firearms held by the estate on a tax-free basis when the transfer is to a beneficiary of the estate; when the transfer is to persons outside the estate, the executor must pay the appropriate transfer tax.

#### F. Transfer of Unserviceable Firearm

Section 479.91 provides that an unserviceable firearm, defined in § 479.11 as a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition, may be transferred as a curio or ornament without payment of the transfer tax. This section also provides that the procedures set forth in § 479.90 must be followed for the transfer of an unserviceable firearm, with the exception that a statement must be entered on the application that the transferor is entitled to the exemption because the firearm is unserviceable and is being transferred as a curio or ornament. This section will remain unchanged. It references the procedures in § 479.90, which itself references § 479.85, which would be amended by the proposals herein.

#### G. Miscellaneous

ATF recognizes that the composition of the responsible persons associated with a trust, partnership, association, company, or corporation may change, and is considering a requirement that new responsible persons submit Form 5320.23 within 30 days of the change. ATF seeks comments on this option and solicits recommendations for other approaches.

#### IV. Statutory and Executive Order Review

##### A. Executive Order 12866 and 13563—Regulatory Review

This proposed rule has been drafted in accordance with section 1(b) of Executive Order 12866 ("Regulatory Planning and Review") and with section 1(b) of Executive Order 13563 ("Improving Regulation and Regulatory Review"). The Department of Justice has determined that this proposed rule is a significant regulatory action under section 3(f) of Executive Order 12866, and accordingly this proposed rule has been reviewed by the Office of Management and Budget (OMB).

The proposed rule complies with the public participation requirements of Executive Order 13563. As this rulemaking is in response to a petition for rulemaking, ATF seeks the views of those who are likely to be affected by the proposed rule (including those who are likely to benefit and those who are potentially subject to the proposed rule) prior to issuing the final rule.

This proposed rule will not have an annual effect on the economy of \$100 million or more; nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Accordingly, this proposed rule is not an economically significant rulemaking as defined by Executive Order 12866. The estimated costs and benefits of the proposed rule are discussed below.

##### 1. Summary of Costs and Benefits

This proposed rule would require certain legal entities (trusts, partnerships, companies, associations, and corporations) applying to make or receive an NFA firearm to submit information for each of its responsible persons to ATF in order for ATF to ensure such persons are not prohibited from possessing NFA firearms. ATF estimates a total cost of \$14.9 million annually for: (1) Legal entities to gather, procure, and submit such information to ATF; (2) ATF to process the information and conduct a background check on

responsible persons; and (3) local and state agencies possibly to review the information provided on Form 5320.23 which is submitted as part of a Form 1, 4, or 5 application, conduct their own background checks, and determine whether to complete the certificate. These proposed provisions will have public safety benefits in that they will enable ATF to ensure that the responsible persons within legal entities that request to make or receive NFA firearms are not prohibited from possessing such firearms under federal, state, or local law.

##### 2. Costs and Benefits of Ensuring Responsible Persons Within Legal Entities are Not Prohibited From Possessing NFA Firearms

ATF estimated the cost of the proposed provisions to ensure responsible persons within legal entities are not prohibited from possessing NFA firearms by: (1) Estimating the time and other resources that would be expended by legal entities to complete paperwork, obtain photographs and fingerprints, receive CLEO certificates, and send this information to ATF; (2) estimating the time and other resources that would be expended by ATF to process and review the materials provided by the legal entities and to conduct background checks of responsible persons; and (3) estimating costs for state and local agencies in the event they review the information provided, conduct their own background checks; and determine whether to complete the CLEO certificate.

ATF estimated the cost of the time for legal entities to complete these tasks using employee compensation data for September 2012 as determined by the U.S. Department of Labor, Bureau of Labor Statistics (BLS). See [http://www.bls.gov/news.release/archives/ecec\\_12112012.pdf](http://www.bls.gov/news.release/archives/ecec_12112012.pdf). The BLS determined the hourly compensation (which includes wages, salaries, and benefits) for civilian workers to be \$30.80. In addition, ATF estimates that each legal entity has an average of two responsible persons, an estimate that is based on ATF's review of 39 recent randomly selected paper (hardcopy) applications for corporations, LLCs, and trusts. ATF welcomes comments from the industry and other members of the public regarding the accuracy of its assumptions and estimates.

In calendar year (CY) 2012, ATF received 84,435 applications that were either ATF Forms 1, 4, or 5. Of these, 40,700 applications were for unlicensed legal entities (e.g., corporations, companies, and trusts) to make or receive an NFA firearm; 29,448 were for

individuals to make or receive an NFA firearm; and 14,287 were for government agencies or qualified

Federal firearms licensees (Gov/FFLs) to make or receive an NFA firearm. The numbers of applications, by Form and

submitting individual or entity, are set forth below.

TABLE A—NUMBERS OF APPLICATIONS

CY 2012	Legal entity	Individual	Gov/FFL	Total
Form 1 .....	5328	3758	576	9662
Form 4 .....	35237	25102	4746	65085
Form 5 .....	135	588	8965	9688
Total .....	40700	29448	14287	84435

Under the proposed rule, a legal entity would be required to complete the following steps in addition to completing the applicable Form 1, 4, or 5 before it is permitted to make or receive an NFA firearm:

1. Complete and submit proposed Form 5320.23 for each responsible person;
2. Submit fingerprints, photographs, and CLEO certificate for each responsible person; and
3. Submit a copy of the documentation that establishes the legal existence of the legal entity.

In addition, under the proposed rule, information required on the existing ATF Form 5330.20 would be incorporated into the ATF Forms 1, 4, and 5.

#### Cost to Legal Entities

##### Cost of Completion of a Responsible Person Form

The proposed rule would require legal entities to complete and submit to ATF a new form (Form 5320.23), photographs, fingerprint cards, and a CLEO certificate for each responsible person before the legal entity is permitted to make or receive an NFA firearm. The information required on Form 5320.23 would include the responsible person's name, position, home address, social security number (optional), date and place of birth, and country of citizenship. The identifying information for each responsible person is necessary in order for ATF, and possibly state and local law enforcement, to conduct a background check on each individual to ensure the individual is not prohibited from possessing an NFA firearm under federal, state, or local law.

ATF estimates the time for each responsible person to complete Form 5320.23 to be 10 minutes. Based on an estimate of 2 responsible persons per legal entity and 40,700 entities, the estimated annual cost of proposed Form 5320.23 is \$417,854 (10 minutes at \$30.80 per hour  $\times$  40,700  $\times$  2).

#### Cost of Photographs

ATF estimates that:

- The cost of the photographs is \$8.00 (cost based on the average of the costs determined for seven large retailers); and

- The time needed to procure photographs is 50 minutes. Currently, only individuals must obtain and submit photographs to ATF. Based on an estimate of 29,448 individuals, the current estimated cost is \$991,416. (Cost of Photographs = \$8.00  $\times$  29,448 = \$235,584; Cost to Procure Photographs = 50 minutes at \$30.80 per hour  $\times$  29,448 = \$755,832).

Under the proposed rule, costs for individuals would remain the same, but legal entities would incur new costs. Each responsible person of a legal entity would be required to obtain and submit photographs. Based on an estimate of 2 responsible persons per entity and 40,700 entities, the estimated cost for legal entities to obtain and submit photographs is \$2,740,467. (Cost of Photographs = \$8.00  $\times$  40,700  $\times$  2 = \$651,200; Cost to Procure Photographs = 50 minutes at \$30.80 per hour  $\times$  40,700  $\times$  2 = \$2,089,267).

#### Cost of Fingerprints

ATF has reviewed various fingerprinting services. At the present time, ATF is only able to accept fingerprints on hard copy fingerprint cards. Thus, the cost estimates are based on the submission of two fingerprint hard copy cards for each responsible person.

- The estimated cost of the fingerprints is \$24.00 (cost based on the average of the costs determined for seven fingerprint services); and
- The estimated time needed to procure the fingerprints is 60 minutes.

Currently, only individuals must obtain and submit fingerprints. Based on an estimate of 29,448 individuals, the current estimated cost is \$1,613,750. (Cost of Fingerprints = \$24.00  $\times$  29,448 = \$706,752; Cost to Procure Fingerprints = 60 minutes at \$30.80 per hour  $\times$  29,448 = \$906,998). Under the proposed

rule, costs for individuals would remain the same, but legal entities would incur new costs. Each responsible person of a legal entity would be required to obtain and submit fingerprints to ATF. Based on an estimate of 2 responsible persons per entity and 40,700 entities, the estimated cost for legal entities to obtain and submit fingerprints is \$4,460,720. (Cost of Fingerprints = \$24.00  $\times$  40,700  $\times$  2 = \$1,953,600; Cost to Procure Fingerprints = 60 minutes at \$30.80 per hour  $\times$  40,700  $\times$  2 = \$2,507,120).

#### Costs for a Legal Entity To Obtain CLEO Certificate

ATF estimates that the time needed for a responsible person to procure the CLEO certificate is 100 minutes (70 minutes travel time and 30 minutes review time with the CLEO). Based on an estimate of 2 responsible persons per legal entity and 40,700 entities, the estimated cost for legal entities to obtain CLEO certificate is \$4,178,533 (100 minutes at \$30.80 per hour  $\times$  40,700  $\times$  2).

#### Cost of Documents To Establish Existence of Legal Entity

A legal entity that is applying to make or receive an NFA firearm must provide to ATF documentation evidencing the existence and validity of the entity—e.g., copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures. Currently, legal entities may submit this documentation with their application package, although they are not required to do so. Therefore, ATF will treat the costs for documentation as new costs. ATF accepts, and will continue to accept, photocopies of the documents without notarization. ATF based the cost estimate by determining the average number of pages in the corporate or trust documents for 50 recent randomly selected paper (hardcopy) submissions, which was 15 pages.

ATF estimates that:

- The cost of the copied documentation is \$1.50 (\$.10 per page at 15 pages); and

- The time needed to copy attachments is 5 minutes.

Assuming 40,700 entities would provide ATF this documentation each year, the estimated annual cost to submit the documentation is \$165,513. (Cost of documentation = \$1.50 × 40,700 = \$61,050; Cost to copy attachments = 5 minutes at \$30.80 per hours × 40,700 = \$104,463). This cost is not dependent on the number of responsible persons associated with a legal entity. ATF notes

that the estimated cost is likely to be lower if the entity already has filed the documents with ATF as part of a recent making or transfer application and the information previously provided has not changed. Under these circumstances, the entity can certify to ATF that the documentation is on file and is unchanged.

Cost of Completing and Mailing Form 1, 4, or 5

Currently, both individuals and legal entities must complete and mail Form 1, 4, or 5. This proposed rule should not

change the costs associated with this process. Even if there are multiple responsible persons associated with a legal entity, the legal entity still would be completing and mailing one Form 1, 4, or 5.

The estimated costs to legal entities that are discussed above are summarized in Tables B(1) and B(2). The total estimated new cost of the proposals for legal entities to provide to ATF identification information for each of its responsible persons is \$11,963,087 annually.

TABLE B(1)—COST ESTIMATES OF THE TIME TO COMPLY WITH THE PROPOSED RULE'S REQUIREMENTS

Process	Estimated time (minutes)	Number of entities	2 Responsible persons
Completion of F 5320.23	10	40,700	\$417,854
Procure Photographs	50	40,700	2,089,267
Procure Fingerprints	60	40,700	2,507,120
Obtain Certificate	100	40,700	4,178,533
Copy Attachments	5	40,700	104,463
<b>Total</b>			<b>9,297,237</b>

TABLE B(2)—COST ESTIMATES OF PROCURING PHOTOGRAPHS, FINGERPRINTS, AND DOCUMENTATION

Process-related item	Estimated cost	Number of entities	2 Responsible persons
Photographs	\$8.00	40,700	\$651,200
Fingerprints	24.00	40,700	1,953,600
Documentation of Legal Entity	1.50	40,700	61,050
<b>Total</b>			<b>2,665,850</b>

Cost to ATF

ATF incurs costs to process forms, fingerprint cards, photographs, and to conduct and review background checks. Currently, ATF incurs these costs for the 29,448 applications for individuals to make or receive NFA firearms. Under the proposed rule, ATF would incur these costs for applications for legal entities to make or receive NFA firearms. ATF estimates that:

- ATF's cost for FBI to process a set of fingerprints is \$14.50. (The cost is based on FBI's current fee, which is set by statute on a cost recovery basis.)
  - The estimated cost for an examiner at ATF's NFA Branch to conduct and review the results of a background check is \$7.70 (15 minutes at \$30.80 per hour); and
  - The estimated cost to print the new 5320.23 forms is \$.01 per form.
- Based on an estimate of 2 responsible persons per legal entity and 40,700

entities, the estimated cost for ATF to process forms, fingerprint cards, photographs, and to conduct and review background checks for applications for legal entities to make or receive firearms is \$1,807,894 annually. (Cost for processing fingerprints = \$14.50 × 40,700 × 2 = \$1,180,300; Cost for background checks = \$7.70 × 40,700 × 2 = \$626,780; Cost to print forms = \$.01 × 40,700 × 2 = \$814).

TABLE C—COSTS TO ATF UNDER PROPOSED RULE

Process	Estimated cost or time	Number of entities	2 Responsible persons
ATF's costs for Processing Fingerprints	\$14.50	40,700	\$1,180,300
Time Needed to Conduct and Review Background Check by ATF.	15 minutes	40,700	626,780
Cost of 5320.23 form	.01	40,700	814
<b>Total</b>			<b>1,807,894</b>



**Cost to State and Local Agencies**

The proposed requirement for each responsible person of a legal entity to obtain a CLEO certificate may increase the cost to state and local agencies as

they may decide to review the information provided, conduct their own background checks, and determine whether to complete the certificate. Based on an estimate of 2 responsible persons per legal entity and 40,700

entities, the estimated cost for state and local agencies to determine whether to sign the CLEO certificate is \$1,253,560 (30 minutes of review time at \$30.80 per hour × 40,700 × 2).

**TABLE D—COSTS TO STATE AND LOCAL AGENCIES UNDER PROPOSED RULE**

Process	Estimated time	Number of entities	2 Responsible persons
Agency Costs to Review/Sign Certificate .....	30 minutes .....	40,700	\$1,263,560
Total .....			1,263,560

**Benefits of Background Checks for Responsible Persons**

Existing regulations do not require the identification of responsible persons of a legal entity. Therefore, ATF lacks the necessary information to perform a background check on a person who meets this proposed rule's definition of "responsible person" to determine if that person is prohibited from possessing an NFA firearm. This proposed rule, if finalized, would provide important public safety and security benefits by enabling ATF to identify and perform background checks on such persons.

For example, there may be a number of responsible persons associated with a corporation, LLC, or trust. As noted above, based on a recent review of paper (hardcopy) applications for corporations, LLCs, and trusts, ATF estimates that there are 2 responsible persons associated with such legal entities. One or more of these persons could be a prohibited person, e.g., a convicted felon. Currently, when an NFA transfer application is approved, a corporate officer or trustee arranges for the receipt of the firearm. If the seller is a Federal firearms licensee, the officer or trustee must complete ATF Form 4473 (5300.9), *Firearms Transaction Record*. On the Form 4473, the officer or trustee must answer questions which determine if the officer or trustee is a prohibited person. If one of the officers or trustees is prohibited, then one of the other officers or trustees may pick up the firearm and complete the Form 4473. If the seller is not a licensee, then no form is completed. Once the firearm is picked up by the officer or trustee, then it becomes corporate or trust property and can be possessed by any of the officers or trustees. In Texas, ATF became aware of a situation in which the member of an LLC was an illegal alien, living in the United States under an assumed name, and had a felony warrant outstanding. At that time, the LLC had 19 firearms registered to it and

ATF lacked the necessary information to conduct any background checks to determine whether the member was a prohibited person. In Tennessee, as a result of information provided by a Federal firearms licensee, ATF became aware of applications submitted to transfer two NFA firearms to a trust in which one of the trustees was a convicted felon. If there had been no referral, ATF would not have known of the need to conduct any background checks for the trust members to determine if any were prohibited persons. As a result, under current regulations, prohibited persons can circumvent the statutory prohibitions and receive and possess firearms. This proposed rule will make the requirements for background checks the same for certain legal entities as they are now for individuals.

**3. Consolidation of Forms**

The incorporation of the information required on ATF Form 5330.20 into the existing Forms 1, 4, and 5 will reduce the burden upon the applicant or transferee by eliminating an additional form to be completed and filed. The current estimated time to complete the form is 3 minutes. Because the information requested on the forms is the same, any savings result from the applicant not having to attach a separate form. ATF estimates the elimination of the form will reduce the industry costs by \$108,028 (70,148 transactions for both individuals and legal entities × 3 minutes per form saved × \$30.80 per hour) and ATF's printing costs by \$701 (70,148 forms × .01 cents per form) for a total reduction in costs of \$108,729.

**4. Number of Legal Entities**

ATF cannot estimate with reasonable precision what effect this proposed rule will have on resources used for creating and maintaining these entities. ATF seeks information from the public to measure this effect, including how many fewer legal entities there may be

(if any), and how much it costs on average to create and maintain such entities.

**B. Executive Order 13132**

This proposed rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

While there would be an increase in the paperwork filed with ATF and an increase in the resources ATF devotes to processing that paperwork, as well as a potential increase in the resources state and local agencies may devote to processing CLEO certificates for responsible persons of a legal entity, any impact on state and local resources would be voluntary and expected to be minimal, and must be balanced against the benefits of ATF being able to identify and conduct background checks on such persons. Therefore, in accordance with section 6 of Executive Order 13132 ("Federalism"), the Attorney General has determined that this proposed regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**C. Executive Order 12988**

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 ("Civil Justice Reform").

**D. Regulatory Flexibility Act**

The Regulatory Flexibility Act requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. 5 U.S.C. 601. The Attorney

General has reviewed this proposed rule and, by approving it, certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule will primarily affect legal entities that are seeking to make or acquire NFA firearms and are not making or acquiring them as a qualified Federal firearms licensee. ATF believes that the increased cost of implementing the proposed regulations will not be significant on the entities. The estimated annual cost of implementing the proposed regulations is \$11,963,087 for identification costs for legal entities. Accordingly, the estimated cost increase per entity is \$293.93 (Cost of increase ÷ 40,700 entities).

#### *E. Small Business Regulatory Enforcement Fairness Act of 1996*

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### *F. Unfunded Mandates Reform Act of 1995*

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *G. Paperwork Reduction Act*

Under the Paperwork Reduction Act, a federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. This proposed rule would revise several existing information collections and create a new information collection. The existing information collections that would be revised are in 27 CFR 479.62, 479.63, 479.84, 479.85, 479.90, 479.90a, and 479.91, which are associated with ATF Forms 1, 4, and 5. Forms 1, 4, and 5 have been approved by the OMB under control numbers 1140-0011, 1140-0014, and 1140-0015,

respectively. The new information collection that would be created is associated with ATF Form 5320.23. Form 5320.23 would require certain identifying information for each responsible person within a legal entity requesting to make or receive an NFA firearm, including their full name, position, social security number (optional), home address, date and place of birth, and country of citizenship. Form 5320.23 also would require a proper photograph of each responsible person; two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person; and a law enforcement certificate.

ATF is submitting a request to revise currently approved OMB control numbers 1140-0011, 1140-0014, and 1140-0015, and to obtain a new OMB control number for ATF Form 5320.23 in accordance with 5 CFR 1320.11. ATF requests public comments on all aspects of these proposed collections, including to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
  - enhance the quality, utility, and clarity of the information to be collected; and
  - minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The estimated total annual burden hours and related information (number of respondents, frequency of responses, costs, etc.) for the proposed revisions to Forms 1, 4, and 5, as well as the new Form 5320.23, appear below.

For a recent submission of an information collection request to the OMB regarding other changes to these forms, ATF performed an analysis of the time it takes to fulfill the requirements of each form. ATF found that the time varies among individuals, legal entities, and Gov/FFLs. For example, ATF estimates that it takes four hours for an individual to complete Form 1 due to the requirements to provide fingerprints, photographs and a law enforcement certificate. ATF estimates it takes less time for a Gov/FFL to

complete Form 1 because the application does not require the submission of these items. The estimated submission times for individuals, legal entities, and Gov/FFLs are:

- 230 minutes for submission by an individual (50 minutes to procure photographs; 60 minutes to procure fingerprints; 100 minutes to obtain certificate; and 20 minutes to complete and mail the form);
- 465 minutes for a submission by a legal entity (for two responsible persons) (20 minutes to complete Form 5320.23; 100 minutes to procure photographs; 120 minutes to procure fingerprints; 200 minutes to obtain CLEO certificate; 5 minutes to procure the attachments; and 20 minutes to complete and mail the form); and
- 20 minutes (to complete and mail the form) for a submission by a Gov/FFL.

With respect to ATF Form 1:

*Estimated total annual reporting and/or recordkeeping burden:* 55,890 hours (current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0011: 4,284 hours). Note: 576 Gov/FFL responders will take 20 minutes (192 hours); 5,328 legal entity responders will take 465 minutes (41,292 hours); and 3,758 individual responders will take 230 minutes (14,406 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper:* 5.78 hours (current estimated average burden hours per respondent or recordkeeper from OMB Information Collection Number 1140-0011: 4 hours).

*Estimated number of respondents and/or recordkeepers:* 9,662 (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0011: 1,071).

*Estimated annual frequency of responses:* 1 (current estimated annual frequency of responses from OMB Information Collection Number 1140-0011: 1).

*Estimated total costs:* \$487,757.60.  
 \$461,248 (fingerprints and photographs (\$32 × 3,758 (individuals) = \$120,256; \$32 × 10,656 (2 responsible persons) = \$340,992))  
 \$7,992 (copies of legal entity documents (\$1.50 × 5,328))

\$18,517.60 (mailing (\$2 each for 9,086 respondents and \$.60 for 576 respondents) (current estimated total costs from OMB Information Collection Number 1140-0011: \$471).

With respect to ATF Form 4:  
*Estimated total annual reporting and/or recordkeeping burden:* 370,893 hours

(current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0014: 44,260 hours). Note: 4,746 Gov/FFL respondents will take 20 minutes (1,582 hours), 35,237 legal entity respondents will take 465 minutes (273,087 hours), and 25,102 individual respondents will take 230 minutes (96,224 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper:* 5.69 hours (current estimated average burden hours per respondent and/or recordkeeper from OMB Information Collection Number 1140-0014: 4 hours).

*Estimated number of respondents and/or recordkeepers:* 65,085 (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0014: 11,065).

*Estimated annual frequency of responses:* 1 (current estimated annual frequency of responses from OMB Information Collection Number 1140-0014: 1).

*Estimated total costs:* \$3,234,813. \$3,058,432 (fingerprints and photographs (\$32 × 25,102 (individuals) = \$803,264; \$32 × 70,474 (2 responsible persons) = \$2,255,168))

\$52,855.50 (copies of legal entity documents (\$1.50 × 35,237))  
\$123,525.60 (mailing (\$2 each for 60,339 respondents and \$.60 for 4,746 respondents) (current estimated total costs from OMB Information Collection Number 1140-0014: \$4,536).

With respect to ATF Form 5:

*Estimated total annual reporting and/or recordkeeping burden:* 6,288 hours (current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0015: 379,896 hours).<sup>3</sup> Note: 8,965 Gov/FFL respondents will take 20 minutes (2,988 hours); 135 legal entity respondents will take 465 minutes (1,046 hours); and 588 individual respondents will take 230 minutes (2,254 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper:* .65 hours (current estimated average burden hours per respondent and/or recordkeeper from OMB Information Collection Number 1140-0015: 4 hours).

*Estimated number of respondents and/or recordkeepers:* 9,688 (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0015: 7,888).

*Estimated annual frequency of responses:* 1 (current estimated annual frequency of responses from OMB Information Collection Number 1140-0015: 12).

*Estimated total costs:* \$34,483.50. \$27,456 (fingerprints and photographs (\$32 × 588 (individuals) = \$18,816; \$32 × 270 (2 responsible persons) = \$8,640))

\$202.50 (copies of legal entity documents (\$1.50 × 135))

\$6,825 (mailing (\$2 each for 723 respondents and \$.60 for 8,965 respondents)) (current estimated total costs from OMB Information Collection Number 1140-0015: \$20,894).

With respect to ATF Form 5320.23:  
*Estimated total annual reporting and/or recordkeeping burden:* 13,566.67 hours (based on 2 responsible persons).

*Estimated average burden hours per respondent and/or recordkeeper:* .33 hours.

*Estimated number of respondents and/or recordkeepers:* 40,700.

*Estimated annual frequency of responses:* 1.

*Estimated total costs:* 0. (All the estimated costs are associated with the submission package for Forms 1, 4, and 5.)

The current estimated costs provided above for Forms 1, 4, and 5 are being revised. Due to an administrative oversight, the initial costs provided to OMB only reflected the costs associated with mailing the completed forms to ATF. They did not include the costs associated with certain information that must be included as part of the application, e.g., fingerprint cards. ATF has provided OMB with the adjusted cost estimates for these forms.

## Public Participation

### A. Comments Sought

ATF is requesting comments on the proposed rule from all interested persons. ATF is also specifically requesting comments on the clarity of this proposed rule and how it may be made easier to understand, as well as comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits.

All comments must reference the docket number (ATF 41P), be legible, and include the commenter's name and complete mailing address. ATF will treat all comments as originals and will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

### B. Confidentiality

Comments, whether submitted electronically or on paper, will be made available for public viewing at ATF, and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number (ATF 41P). Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comments that contains material that is confidential under law (e.g., trade secrets, processes). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked "confidential" at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

### C. Submitting Comments

Comments may be submitted in any of three ways:

- *Mail:* Send written comments to the address listed in the ADDRESSES section of this document. Written comments must appear in minimum 12 point font size (.17 inches), include your mailing address, be signed, and may be of any length.

- *Facsimile:* You may submit comments by facsimile transmission to (202) 648-9741. Faxed comments must:
  - (1) Be legible and appear in minimum 12 point font size (.17 inches);

<sup>3</sup> The large drop in burden hours from 379,896 to 6,288 is attributable to a change in methodology. We no longer count each item on a Form 5 as a separate response. The current burden hours using the new methodology is 4,380 hours ((7,388 government agencies or legal entities × 20 minutes and + 60) plus (500 individual respondents × 230 minutes and + 60)).

- (2) Be on 8½" x 11" paper;  
 (3) Contain a legible, written signature; and  
 (4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

• *Federal eRulemaking Portal*: To submit comments to ATF via the Federal eRulemaking portal, visit <http://www.regulations.gov> and follow the instructions for submitting comments.

#### D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

#### Disclosure

Copies of this proposed rule and the comments received will be available for public inspection through the Federal eGovernment portal, <http://www.regulations.gov>, or by appointment during normal business hours at the ATF Reading Room, Room 1E-062, 99 New York Avenue NE., Washington, DC 20226; telephone: (202) 648-8740.

#### Drafting Information

The author of this document is Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

#### List of Subjects in 27 CFR Part 479

Administrative practice and procedure, Arms and munitions, Authority delegations, Customs duties and inspection, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, and Transportation.

#### Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 479 is proposed to be amended as follows:

#### PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

- 1. The authority citation for 27 CFR part 479 is revised to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7805.

- 2. Amend § 479.11, by revising the definition for "Person" and adding a

definition for the term "Responsible person" to read as follows:

#### § 479.11 Meaning of terms.

\* \* \* \* \*

*Person*. A partnership, company, association, trust, corporation, including each responsible person associated with such an entity; an estate; or an individual.

\* \* \* \* \*

*Responsible person*. (1) In the case of a trust, any individual, including any grantor, trustee, or beneficiary, who possesses, directly or indirectly, the power or authority under any trust instrument or other document, or under state law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust;

(2) In the case of a partnership, any individual, including any partner or manager, who possesses, directly or indirectly, the power or authority under any contract, agreement, article, certificate, bylaw, or instrument, or under state law, to direct the management and policies of the partnership to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the partnership;

(3) In the case of an association, any individual, including any member, officer, director, board member, owner, or manager, who possesses, directly or indirectly, the power or authority under any contract, agreement, article, certificate, bylaw, or instrument, or under state law, to direct the management and policies of the association to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the association;

(4) In the case of a company (including a Limited Liability Company (LLC)), any individual, including any member, officer, director, board member, owner, shareholder, or manager, who possesses, directly or indirectly, the power or authority under any contract, agreement, article, certificate, bylaw, or instrument, or under state law, to direct the management and policies of the company to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the company; and

(5) In the case of a corporation, any individual, including any officer, director, board member, owner, shareholder, or manager, who possesses, directly or indirectly, the power or authority under any contract, agreement, article, certificate, bylaw, or instrument, or under state law, to direct

the management and policies of the corporation to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the corporation.

\* \* \* \* \*

- 3. Revise § 479.62 to read as follows:

#### § 479.62 Application to make.

(a) *General*. No person shall make a firearm unless the person has filed with the Director a completed application on ATF Form 1 (5320.1), Application to Make and Register a Firearm, in duplicate, executed under the penalties of perjury, to make and register the firearm and has received the approval of the Director to make the firearm, which approval shall effectuate registration of the firearm to the applicant. If the applicant is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, all information on the Form 1 application shall be furnished for each responsible person of the applicant.

(b) *Preparation of ATF Form 1*. All of the information called for on Form 1 shall be provided, including:

(1) The type of application, i.e., tax paid or tax exempt. If the making of the firearm is taxable, the applicant shall submit a remittance in the amount of \$200 with the application in accordance with the instructions on the form;

(2) The identity of the applicant. If an individual, the applicant shall provide his or her name, address, and date and place of birth, and also comply with the identification requirements prescribed in § 479.63(a). If other than an individual, the applicant shall provide its name, address, and employer identification number, as well as the name and address of each responsible person. Each responsible person of the applicant also shall comply with the identification requirements prescribed in § 479.63(b);

(3) A description of the firearm to be made by type, caliber, gauge or size, model, length of barrel, serial number, other marks of identification, and the name and address of the original manufacturer (if the applicant is not the original manufacturer);

(4) The applicant's Federal firearms license number (if any);

(5) The applicant's special (occupational) tax stamp (if applicable); and

(6) If the applicant (including, if other than an individual, any responsible person) is an alien admitted under a nonimmigrant visa, applicable documentation demonstrating that the

nonimmigrant alien falls within an exception to 18 U.S.C. 922(g)(5)(B) under 18 U.S.C. 922(y)(2) or has obtained a waiver of that provision under 18 U.S.C. 922(y)(3).

(c) *Approval of Form 1.* If the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (see § 479.67). The approved application will then be returned to the applicant.

■ 4. Revise § 479.63 to read as follows:

**§ 479.63 - Identification of applicant.**

(a) If the applicant is an individual, the applicant shall:

(1) Securely attach to each copy of the Form 1, in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application;

(2) Attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and

(3) Have a certificate completed on each copy of the Form 1 by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, for the jurisdiction in which the individual resides. The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of state or local law.

(b) If the applicant is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, the applicant shall:

(1) Be identified on the Form 1 by the name and exact location of the place of business, including the name and number of the building and street, and the name of the county in which the business is located or, in the case of a trust, the address where the firearm is located. In the case of two or more locations, the address shown shall be the principal place of business (or

principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is located;

(2) Except as provided in paragraph (c) of this section, attach to the application—

(i) Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures;

(ii) A completed ATF Form 5320.23 for each responsible person. Form 5320.23 requires certain identifying information, including each responsible person's full name, position, social security number (optional), home address, date and place of birth, and country of citizenship;

(iii) In the space provided on Form 5320.23, a photograph of each responsible person 2 x 2 inches in size, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application;

(iv) Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and

(v) In the space provided on Form 5320.23, a certificate completed by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, for the jurisdiction in which the responsible person resides. The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the form are those of the responsible person and that the certifying official has no information indicating that possession of the firearm by the responsible person would be in violation of state or local law.

(c) If the applicant entity has had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, the entity may provide a certification that the information has not been changed since the prior approval and shall identify the application for which the documentation had been

submitted by form number, serial number, and date approved.

■ 5. Revise § 479.84 to read as follows:

**§ 479.84 Application to transfer.**

(a) *General.* Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless an application, Form 4 (5320.4), Application for Tax Paid Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury, to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application shall be filed by the transferor. If the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, all information on the Form 4 application shall be furnished for each responsible person of the transferee.

(b) *Preparation of ATF Form 4.* All of the information called for on Form 4 shall be provided, including:

(1) The type of firearm being transferred. If the firearm is other than one classified as "any other weapon," the applicant shall submit a remittance in the amount of \$200 with the application in accordance with the instructions on the form. If the firearm is classified as "any other weapon," the applicant shall submit a remittance in the amount of \$5;

(2) The identity of the transferor by name and address and, if the transferor is other than a natural person, the title or legal status of the person executing the application in relation to the transferor;

(3) The transferor's Federal firearms license number (if any);

(4) The transferor's special (occupational) tax stamp (if any);

(5) The identity of the transferee by name and address and, if the transferee is a person not qualified as a manufacturer, importer, or dealer under this part, the transferee shall be further identified in the manner prescribed in § 479.85;

(6) The transferee's Federal firearms license number (if any);

(7) The transferee's special (occupational) tax stamp (if any); and

(8) A description of the firearm to be transferred by name and address of the manufacturer or importer (if known); caliber, gauge, or size; model; serial number; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length of the weapon and the length of the barrel; and any other

identifying marks on the firearm. In the event the firearm does not bear a serial number, the applicant shall obtain a serial number from ATF and shall stamp (impress) or otherwise conspicuously place such serial number on the firearm in a manner not susceptible of being readily obliterated, altered, or removed.

(9) If the applicant (including, if other than an individual, any responsible person) is an alien admitted under a nonimmigrant visa, applicable documentation demonstrating that the nonimmigrant alien falls within an exception to 18 U.S.C. 922(g)(5)(B) under 18 U.S.C. 922(y)(2) or has obtained a waiver of that provision under 18 U.S.C. 922(y)(3).

(c) *Approval of Form 4.* If the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (see § 479.87). The approved application will then be returned to the transferor.

■ 6. Revise § 479.85 to read as follows:

**§ 479.85 Identification of transferee.**

(a) If the transferee is an individual, such person shall:

(1) Securely attach to each copy of the Form 4, in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application;

(2) Attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and

(3) Have a certificate completed on each copy of the Form 4 by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, for the jurisdiction in which the individual resides. The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that receipt or possession of the firearm by the transferee would be in violation of state or local law.

(b) If the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a

partnership, company, association, trust, or corporation, such person shall:

(1) Be identified on the Form 4 by the name and exact location of the place of business, including the name and number of the building and street, and the name of the county in which the business is located or, in the case of a trust, the address where the firearm is located. In the case of two or more locations, the address shown shall be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is located;

(2) Except as provided in paragraph (c) of this section, attach to the application—

(i) Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures;

(ii) A completed ATF Form 5320.23 for each responsible person. Form 5320.23 requires certain identifying information, including the responsible person's full name, position, social security number (optional), home address, date and place of birth, and country of citizenship;

(iii) In the space provided on Form 5320.23, a photograph of each responsible person 2 x 2 inches in size, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application;

(iv) Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and

(v) In the space provided on Form 5320.23, a certificate completed by the local chief of police, sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, for the jurisdiction in which the responsible person resides. The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the form are those of the responsible person and that the certifying official has no information indicating that receipt or possession of the firearm by the

transferee would be in violation of state or local law.

(c) If the applicant entity has had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, the entity may provide a certification that the information has not been changed since the prior approval and shall identify the application for which the documentation had been submitted by form number, serial number, and date approved.

■ 7. Revise § 479.90 to read as follows:

**§ 479.90 Estates.**

(a) The executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate (collectively "executor") may possess a firearm registered to a decedent during the term of probate without such possession being treated as a "transfer" as defined in § 479.11. No later than the close of probate, the executor must submit an application to transfer the firearm to beneficiaries or other transferees in accordance with this section. If the transfer is to a beneficiary, the executor shall file an ATF Form 5 (5320.5), Application for Tax Exempt Transfer and Registration of Firearm, to register a firearm to any beneficiary of an estate in accordance with § 479.90. The executor will identify the estate as the transferor, and will sign the form on behalf of the decedent, showing his or her title and the date of filing. The executor must also provide the documentation prescribed in paragraph (c) of this section.

(b) If there are no beneficiaries of the estate or the beneficiaries do not wish to possess the registered firearm, the executor will dispose of the property outside the estate (i.e., to a non-beneficiary). The executor shall file an ATF Form 4 (5320.4), Application for Tax Paid Transfer and Registration of Firearm, in accordance with § 479.84. The executor, administrator, personal representative, or other authorized person must also provide documentation prescribed in paragraph (c) of this section.

(c) The executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate shall submit with the transfer application documentation of his or her appointment as executor, administrator, personal representative, or as an authorized person, a copy of the decedent's death certificate, a copy of the will (if any), any other evidence of his or her authority to dispose of property, and any other document

relating to, or affecting the disposition of firearms from the estate.

Dated: August 29, 2013.

Eric H. Holder, Jr.,  
Attorney General.

[FR Doc. 2013-21661 Filed 9-6-13; 8:45 am]

BILLING CODE 4410-FY-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 52

[EPA-R06-OAR-2010-0333; FRL-9900-83-Region 6]

#### Approval and Promulgation of Implementation; Texas; Houston: Reasonable Further Progress Plan, Contingency Measures, and Transportation Conformity Budgets for the 1997 8-Hour Severe Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** The EPA is proposing to approve revisions to the Texas State Implementation Plan to the emissions inventory (EI), the reasonable further progress (RFP) plan and contingency measures, the vehicle miles traveled (VMT) offset analysis, and transportation conformity motor vehicle emissions budgets associated with the reasonable further progress portion of these revisions. The EPA is proposing to approve these revisions because they satisfy the EI, the RFP, the VMT offset, and transportation conformity requirements for areas classified as severe nonattainment for the 1997 8-hour ozone national ambient air quality standard and demonstrate further progress in reducing ozone precursors.

**DATES:** Comments must be received on or before October 9, 2013.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-OAR-2010-0333, by one of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *U.S. EPA Region 6 "Contact Us" Web site:* <http://epa.gov/region6/r6comment.htm>. Please click on "6PD" (Multimedia) and select "Air" before submitting comments.
- *Email:* Mr. Guy Donaldson at [donaldson.guy@epa.gov](mailto:donaldson.guy@epa.gov). Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), at fax number 214-665-7263.

- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8:00 a.m. and 4:00 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R06-OAR-2010-0333. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through [www.regulations.gov](http://www.regulations.gov) or email, information that you consider to be CBI or otherwise protected. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sandra Rennie, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7367; fax number (214) 665-7263; email address [rennie.sandra@epa.gov](mailto:rennie.sandra@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us," and "our" means EPA.

#### Table of Contents

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  - C. Projected Inventories and Determination of RFP
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  - E. Contingency Measures
  - F. Vehicle Miles Traveled Offset Analysis
  - G. Transportation Conformity Budgets
- IV. Proposed Action
- V. Statutory and Executive Order Reviews

#### I. What action is EPA proposing?

The EPA is proposing to approve a revision to the Texas State Implementation Plan (SIP) for the Houston-Galveston-Brazoria (HGB) ozone nonattainment area submitted by the Texas Commission on Environmental Quality on April 1, 2010,

# **Exhibit**

**8**



# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Thomas H. Odom  
Ian Friedman



Bechtelsville	1-610-845-3803
Allentown	1-610-770-1151
Bethlehem	1-610-814-0838
Camp Hill	1-717-731-0100
Lancaster	1-717-393-7002
Lebanon	1-717-274-9250
North Wales	1-215-412-0800
Pottstown	1-610-326-4200
Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

October 30, 2013

Ms. Melanie Ann Pustay  
Attention U.S Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue N.W.  
Washington, DC 20530-0001

RE: **FREEDOM OF INFORMATION ACT APPEAL**  
**Appeal of Nos 13-1479, 13-1486, 13-1532 & Unknown**

Dear Director Pustay,

On October 22, 2013, I filed an administrative appeal from the constructive denial of several requests under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), including the FOIA request that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") assigned reference number 13-1479. Today I received what, on its face, purports to be a statement granting my request. I am attaching that letter and its lone enclosure as comparison of it to the documents I requested shows that, in fact, ATF failed to provide documents in the requested categories.

As you can see, the only document ATF enclosed with the "response" was a copy of the Notice of Proposed Rulemaking that I had referenced in my initial letter as indicating the existence of the categories of documents rather than the underlying documents themselves. As such, the attached letter in no way moots the previously-filed administrative appeal. I continue to await your determination with respect to the categories of documents requested.

I would like to further point out that although ATF's "response" said it was granting my request, it did not include a *Vaughn* index. It would seem that either ATF has acknowledged that

## FIREARMS INDUSTRY CONSULTING GROUP

there are no underlying documents in any of the categories I requested or ATF has waived any objection to the production of such documents as exist.

I respectfully request your prompt consideration of these appeals. As explained in my previous letter, the requested documents relate to matters of *current* public concern so that time is of the essence.

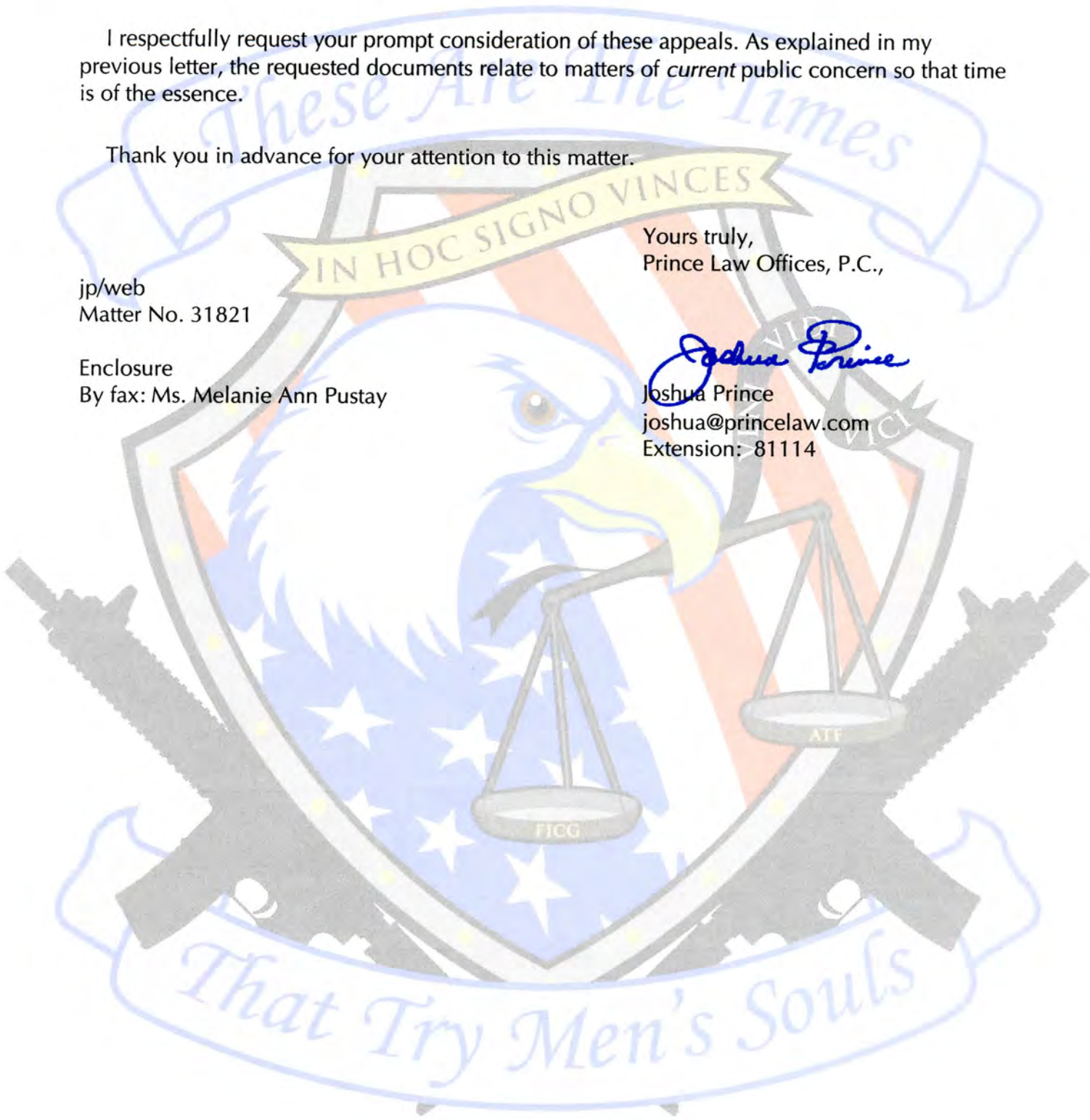
Thank you in advance for your attention to this matter.

jp/web  
Matter No. 31821

Enclosure  
By fax: Ms. Melanie Ann Pustay

Yours truly,  
Prince Law Offices, P.C.,

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114



# **Exhibit**

**9**



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

**November 1, 2013**

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
Prince Law Offices, P.C.  
646 Lenape Road  
Bechtelsville, PA 19505  
[joshua@princelaw.com](mailto:joshua@princelaw.com)

Re: Appeal Nos. AP-2014-00005  
Through AP-2014-00008  
Request Nos. 13-1479, 13-1486 &  
13-1532  
ADW:MTC

**VIA: E-mail**

Dear Mr. Prince:

You attempted to appeal from the failure of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to respond to your requests for access to records. Your appeals have been assigned numbers **AP-2014-00005 through AP-2014-00008**.

Regarding your Appeal No. AP-2014-00005, ATF responded to your Request No. 13-1479 by letter dated October 28, 2013 (copy enclosed). Because ATF responded to your request, your appeal from ATF's failure to respond to your request is moot.

Regarding your Appeal Nos. AP-2014-00006 and AP-2014-00007, Department of Justice regulations provide for an administrative appeal to the Office of Information Policy only after there has been an adverse determination by a component. See 28 C.F.R. § 16.9(a) (2013). As no adverse determination has yet been made by ATF regarding Request Nos. 13-1486 and 13-1532, there is no action for this Office to consider on appeal.

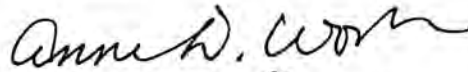
As you may know, the Freedom of Information Act authorizes requesters to file a lawsuit when an agency takes longer than the statutory time period to respond. See 5 U.S.C. § 552(a)(6)(C)(i). However, I can assure you that this Office has contacted ATF and has been advised that your requests are currently being processed. If you are dissatisfied with ATF's final response, you may appeal again to this Office.

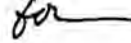
This Office has forwarded a copy of your letter to ATF. I suggest that you contact ATF's Requester Service Center at 202-648-8740 for further updates regarding the status of your requests.

Finally, regarding your Appeal No. AP-2014-00008, ATF has no record of having received a fourth FOIA request from you. Nor did you identify any other component of the Department of Justice from whose action you might be appealing. Accordingly, there is no action for this Office to consider on this appeal.

Because there is no action for this Office to consider on any of your appeals, and I am closing your appeal files in this Office. Furthermore, I note that you requested expedited treatment of your appeals. Because I am closing your underlying appeals, your request for expedited treatment of these appeals is moot.

Sincerely,



Sean R. O'Neill   
Chief  
Administrative Appeals Staff

Enclosure



**U.S. Department of Justice**

**Bureau of Alcohol, Tobacco,  
Firearms and Explosives**

---

OCT 28 2013

[www.atf.gov](http://www.atf.gov)

REFER TO: 13-1479

Mr. Joshua Prince, Esq.  
Firearms Industry Consulting Group  
646 Lenape Road  
Bechtelsville, Pennsylvania 19505

Dear Mr. Prince:

This is our final response to your Freedom of Information Act (FOIA) request for access to information maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Your request is granted.

If we can be of further assistance, please do not hesitate to write again or call 202-648-8740.

Sincerely,

Stephanie M. Boucher  
Chief, Disclosure Division

Enclosure

---

# **Exhibit**

**10**



**U.S. Department of Justice**

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

November 13, 2013

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
648 Lenape Road  
Bechtelsville, PA 19505-9135

Re: Request No. 13-1479

Dear Mr. Prince:

This is to advise you that your administrative appeal from the action of the Bureau of Alcohol, Tobacco, Firearms and Explosives was received by this Office on November 5, 2013.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2014-00416**. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number above. If you have submitted your appeal through this Office's online electronic appeal portal, you may also obtain an update on the status of your appeal by logging into your portal account.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones".

Priscilla Jones  
Supervisory Administrative Specialist



# **Exhibit**

**11**

# Summary of 2013 Feinstein Assault Weapons Legislation

## **Bans the sale, transfer, importation, or manufacturing of:**

- 120 specifically-named firearms
- Certain other semiautomatic rifles, handguns, shotguns that can accept a **detachable magazine** and have **one military characteristic**
- Semiautomatic rifles and handguns with a **fixed magazine** that can accept **more than 10 rounds**

## **Strengthens the 1994 *Assault Weapons Ban* and various state bans by:**

- Moving from a 2-characteristic test to a **1-characteristic** test
- Eliminating the easy-to-remove bayonet mounts and flash suppressors from the characteristics test
- Banning firearms with “**thumbhole stocks**” and “**bullet buttons**” to address attempts to “work around” prior bans

**Bans large-capacity ammunition feeding devices** capable of accepting more than 10 rounds.

## **Protects legitimate hunters and the rights of existing gun owners by:**

- **Grandfathering** weapons legally possessed on the date of enactment
- **Exempting** over 900 specifically-named weapons used for hunting or sporting purposes and
- **Exempting** antique, manually-operated, and permanently disabled weapons

Requires that grandfathered weapons be **registered** under the **National Firearms Act**, to include:

- **Background check** of owner and any transferee;
- **Type and serial number** of the firearm;
- **Positive identification**, including photograph and fingerprint;
- Certification from **local law enforcement** of identity and that possession would not violate State or local law; and
- Dedicated funding for ATF to **implement registration**

# **Exhibit**

**12**

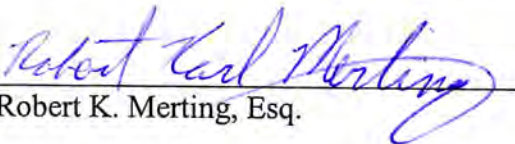
**VERIFIED STATEMENT OF ROBERT K. MERTING**

My name is Robert K. Merting. I am an attorney who represents numerous individuals on firearms matters. As such, I had been monitoring any efforts by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") with respect to any rulemaking initiatives related to the National Firearms Act ("NFA").

On August 29, 2013, the White House announced from the briefing room two gun control initiatives, one of which involved imposing additional burdens for persons seeking to make or acquire firearms regulated under the NFA. That afternoon, I telephoned Brenda Friend, the attorney at ATF listed as the contact person with respect to the proposed rulemaking. Ms. Friends advised me that the proposed rule would be published soon for a 90 day comment period and that a pre-publication draft would be published on ATF's Website in advance of formal publication in the *Federal Register*. Ms. Friend specifically confirmed that the rule would not be retroactive and those transactions already approved would remain valid. Ms. Friend further confirmed that pending applications would be processed under the currently existing regulations but declined to specify what particular event would determine whether an application was pending on the effective date of any new regulation: mailing, receipt by ATF, or cashing the tax check.

On September 9, 2013, ATF published its Notice of Proposed Rulemaking ("NPR") in the matter I had discussed with Ms. Friend at volume 78 of the *Federal Register* at pages 55014 through 55029. Neither the preamble nor the proposed regulatory text specifically indicated how any new rule would be implemented.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 2013.

  
Robert K. Merting, Esq.

The ATF has announced several times in the past few years that a potential rule change would be considered but had failed to take action. Prior to earlier this month the Senate had not approved a permanent ATF leader in seven years. With the help of our Senator Lindsey Graham, B. Todd Jones was sworn into office as the permanent chief of the ATF. With a new leader securely in place the ATF has decided to take action. (If you don't like this, please contact Senator Graham and let him know!)

Now, what the media has announced as a "rule change" is actually just the beginning of a long process. (For a better understanding of the process itself I direct you to an article on Joshua Prince's blog by a former Administrative Process

professor. <http://blog.princelaw.com/2013/08/29/white-house-announcement-of-regulatory-gun-control-initiatives/>)

This afternoon I spoke with Brenda Friend, the attorney at the ATF responsible for answering questions on this initiative. According to Ms. Friend, the proposed rule should be published soon for a 90 day comment period and will appear on the ATF website before an official publication by the Government Printing Office. Once the 90 day comment period is up the ATF will have to consider ALL comments and respond. A flood of comments could drastically slow this down. **Ms. Friend specifically confirmed that the rule would not be retroactive and those transactions already approved will stand.**

In short, the rule will not change for some time, and we all will have a chance to comment. This includes letting your representatives know your thoughts and asking them to contact the ATF on your behalf. (Let's not forget who apportions funds for the ATF!)

I will be monitoring the situation and posting updates as the ATF releases the proposed rule. I will also provide links to where you can comment. For now all we can do is wait and contact our representatives. The current regulations still stand, and **if you have been waiting to purchase NFA firearms now is the time.** Past transfers should not be affected by this rule change and those with firearms owned by a trust will be grandfathered in. If you wish to proceed, please contact me to move forward as soon as possible.

This entry was posted in [General NFA](#), [Trust Benefits](#) and tagged [ATF](#), [Gun Trust](#), [NFA](#), [NFA Firearms](#), [nfa trusts](#), [Trust](#). Bookmark the [permalink](#).

- July 2013
- May 2013
- April 2013
- March 2013
- February 2013
- January 2013
- December 2012
- November 2012
- October 2012
- September 2012

#### Categories

- General NFA
- Trust Benefits
- Uncategorized

## **Robert K. Merting**

September 2, 2013 at 6:20 pm (Edit)



Josh, During my conversation with Brenda she did acknowledge that pending applications would be processed, but she could not say what date would be pending. (i.e. deposit in the mail, receipt at ATF, or cashing of the tax check.) She suggested that “normally” final rules are announced 30 days ahead of time. Perhaps this is another procedural issue to argue.

## **joshuaplo**

September 2, 2013 at 6:23 pm (Edit)



**Thanks for the follow up!**

# **Exhibit**

**13**



# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Tom Odom



Bechtelsville	1-610-845-3803
Allentown	1-610-770-1151
Bethlehem	1-610-814-0838
Camp Hill	1-717-731-0100
Lancaster	1-717-393-7002
Lebanon	1-717-274-9250
North Wales	1-215-412-0800
Pottstown	1-610-326-4200
Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

September 02, 2013

Ms. Brenda Raffath Friend  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Ms. Friend,

I am writing in connection with the above-referenced draft proposed rule posted on the Department of Justice Website last week that identifies you as the contact person.

I am seeking confirmation and clarification of communications that you had with Attorney Robert Merting on August 29, 2013. Attorney Merting posted on his site that "This afternoon I spoke with Brenda Friend, the attorney at the ATF responsible for answering questions on this initiative...**Ms. Friend specifically confirmed that the rule would not be retroactive and those transactions already approved will stand.**" See, <http://rkmerting.com/closing-the-loop-hole-2/> (emphasis in original). Attorney Merting further informed me that during his conversation with you, you did acknowledge that pending applications would be processed, but you could not say what date would be pending. (i.e. deposit in the mail, receipt at ATF, or cashing of the tax check.)

In relation to this communication that you had with Attorney Merting, I am respectfully

## FIREARMS INDUSTRY CONSULTING GROUP

requesting confirmation and/or clarification, in writing, of the following:

1. Is it the ATF's position with respect to legal entities that have previously received authorization to make or receive NFA firearms that the new rule, if adopted, would not require submission of information regarding the legal entity or its responsible persons unless and until the legal entity filed a new application to make or transfer a NFA firearm?
2. Is it the ATF's position that any making or transfer applications submitted prior to the effective date of the regulation for any entities, which would be encompassed by the proposal, but which are still pending at the time of the effective date of the regulation, will not require submission of any additional information regarding the legal entity or its responsible persons? For purposes of this question, I acknowledge that ATF already requires a copy of the Trust or Corporate documents with the application; however, the regulation seeks to include a greater portion of those documents, as well as additional information for each Responsible Person. Therefore, this question is only in relation to the effect of the new rule on making and transfer applications, which are currently pending at the time of the effective date.

Based upon the statements given by the ATF at the 12th Annual NSSF/FAIR Import Export Conference in Washington D.C. on August 6 - 7, 2013, and the statements by Attorney Merting, I believe your response to both will be in the affirmative.

As these issues are of great importance, I am respectfully requesting that these issues additionally be addressed in the draft proposal before publication in the *Federal Register*.

If you could kindly send you written response to me at Joshua Prince, Esq., 646 Lenape Rd, Bechtelsville, PA 19505, or via email at Joshua@Prinzelaw.com, I would greatly appreciate it.

Thanking you for your time and assistance in this request, I am

Yours truly,  
Prince Law Offices, P.C.,

jp/web  
Matter No. 31821  
By fax: Ms. Brenda Raffath Friend

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114

# **Exhibit**

**14**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Tom Odom



Bechtelsville	1-610-845-3803
Allentown	1-610-770-1151
Bethlehem	1-610-814-0838
Camp Hill	1-717-731-0100
Lancaster	1-717-393-7002
Lebanon	1-717-274-9250
North Wales	1-215-412-0800
Pottstown	1-610-326-4200
Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

September 10, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

**RE: ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

With the publication of the Notice of Proposed Rulemaking ("NPR") in ATF 41P yesterday, the electronic portal at [www.regulations.gov](http://www.regulations.gov) was opened. I was struck by the fact that the only item placed in the docket at the same time as the NPR was a final rule entitled Importation of Defense Articles and Defense Services: U.S. Munitions Import List, codified in 27 C.F.R. Part 447. As the NPR addresses 27 C.F.R. Part 449, it is not immediately apparent what relationship the final rule has to the newly-proposed rule. The NPR in ATF 41P contains no reference either to Part 447 or the U.S. Munitions Import List.

If the final rule was added to this docket by mistake, I respectfully request that it be removed as it would seem very likely to confuse interested persons who care to comment on ATF 41P. Such confusion would seem to be compounded by the fact that the "Primary Documents" page for ATF 41P contains the text "Comment Period Closed" which could lead some interested persons to believe that it was too late to submit comments with respect to ATF 41P.

**FIREARMS INDUSTRY CONSULTING GROUP**

Thank you for your attention to this matter.

jp/web

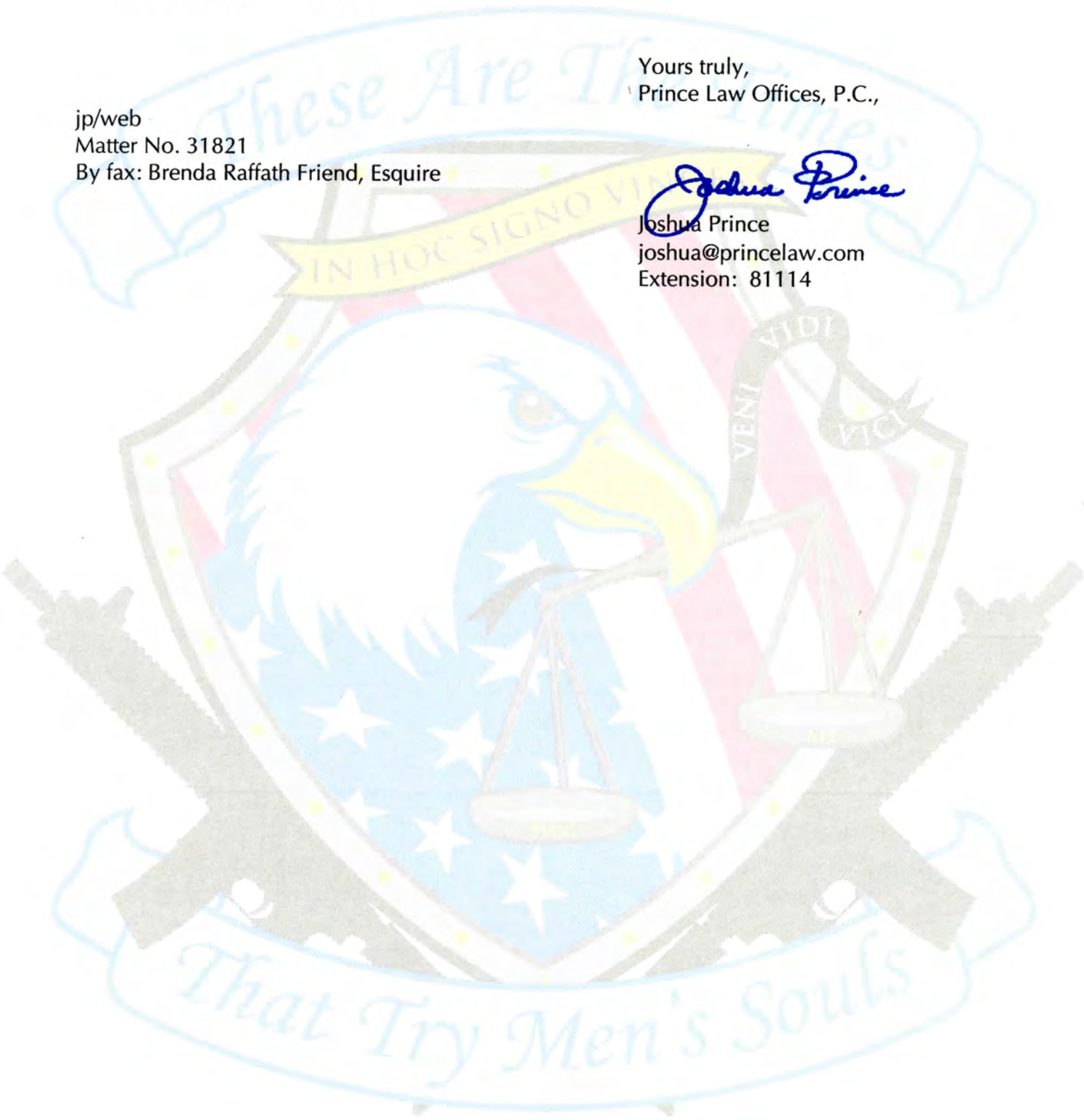
Matter No. 31821

By fax: Brenda Raffath Friend, Esquire

Yours truly,  
Prince Law Offices, P.C.,



Joshua Prince  
joshua@princelaw.com  
Extension: 81114



# **Exhibit**

**15**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
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Tom Odom



Bechtelsville 1-610-845-3803  
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North Wales 1-215-412-0800  
Pottstown 1-610-326-4200  
Pottsville 1-570-621-8828  
Reading 1-610-375-8425  
Toll Free 1-888-313-0416  
Fax 1-610-845-3903

September 29, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

With the publication of the Notice of Proposed Rulemaking ("NPR") in ATF 41P on September 9, 2013, the public comment period opened. Nonetheless, more than two weeks later, a page on the ATF Website entitled "ATF Submissions for Public Comments" contains references to two matters, neither of which is 41P. That page may be found here:

<http://www.atf.gov/content/contact-us/FOIA/ATF-submissions-public-comment>

I realize that this page is not designed to be the electronic portal for the submission of public comments in 41P. Because some concerned individuals may be confused by the page which makes no reference to other matters in which ATF is soliciting public comments, I respectfully request that a link for 41P be placed on that page redirecting users to the appropriate page at [www.regulations.gov](http://www.regulations.gov).

Thank you for your attention to this matter.

jp/web  
Matter No. 31821  
By fax: Brenda Raffath Friend, Esquire

Yours truly,  
Prince Law Offices, P.C.,

  
Joshua Prince  
joshua@princelaw.com  
Extension: 81114



United States Department of Justice  
**ATF**  
Bureau of Alcohol, Tobacco, Firearms and Explosives

**FIREARMS EXPLOSIVES ARSON ALCOHOL & TOBACCO LIBRARY ABOUT CAREERS CONTACT US**

**Contact Us**

Home » Contact Us » FOIA » ATF Submissions Public Comment

**Bureau of Alcohol, Tobacco, Firearms and Explosives**  
Disclosure Division  
Stephanie Boucher, Division Chief  
99 New York Avenue, NE,  
Room 1E 400  
Washington, DC, 20226  
Voice (202) 648-8740  
Fax (202) 648-8619  
foiamail@atf.gov

**Privacy Impact Assessments**  
Select One

**Other Contact Information**  
Service Centers

## ATF Submissions for Public Comment

Comments regarding the 60-day emergency notice of information collection relating to Federal Register Notice Vol. 75, No. 242/Friday, December 17, 2010, page 79021.

Select One  
**Mayors Against Illegal Guns Coalition**  
Select One

Set date and time automatically: Apple Americas/U.S. (time.apple.com)

9/27/2013

8:05:34 PM

Calendar: Sep 2013  
Su Mo Tu We Th Fr Sa  
1 2 3 4 5 6 7  
8 9 10 11 12 13 14  
15 16 17 18 19 20 21  
22 23 24 25 26 27 28  
29 30

Time Zone: Clock



## ATF Submissions for Public Comment

**Comments regarding the 60-day emergency notice of information collection relating to Federal Register Notice Vol. 75, No. 242/Friday, December 17, 2010, page 79021.**

Select One

**Mayors Against Illegal Guns Coalition**

Select One

# **Exhibit**

**16**



Thomas Odom &lt; thodom2@gmail.com &gt;

---

**Request for access to ATF's Reading Room**

---

Peter.J.Chisholm@usdoj.gov < Peter.J.Chisholm@usdoj.gov >  
To: thodom2@gmail.com

Fri, Nov 8, 2013 at 2:01 PM

Mr. Odom:

The ATF Reading Room will be unavailable on Tuesday, November 12<sup>th</sup>. The earliest date the Reading Room is accessible will be Friday, November 15<sup>th</sup>.

If you wish to use the Reading Room on Friday, please let me know. You will also need to fill out the attached ATF Form 8620.42 to gain access to the building. You can fill out the form and return it via email to me, I will forward it to our Security Office. If possible, please return the form at least 24 hours prior to your visit.

Sincerely,

Pete Chisholm

Team Leader - Disclosure Division

Office of Public and Governmental Affairs


Bureau of Alcohol, Tobacco, Firearms and Explosives

[\(202\) 648-7382](tel:(202)648-7382)

---

**\*\*\*\*\* NOTICE: This e-mail message and any attached files are intended solely for the use of the addressee(s) named above in connection with official business. This communication may contain Sensitive But Unclassified information that may be statutorily or otherwise prohibited from being released without appropriate approval. Any review, use, or dissemination of this e-mail message and any attached file(s) in any form outside of the Bureau of Alcohol, Tobacco, Firearms & Explosives or the Department of Justice without express authorization is strictly prohibited.**

---

 **ATF Form 8620.42.pdf**  
35K

## Police Check Inquiry

**Instructions:** ATF Form 8620.42 must be completed by non-ATF personnel and ATF sponsors (*COTRs or Points of Contact*) when requesting non-ATF personnel be granted escorted access to ATF facilities, non-sensitive information, and/or construction sites. Items 1-15 of this form must be completed by all non-ATF personnel requiring escorted access to ATF facilities, ATF non-sensitive information, and/or an ATF construction site for the purpose of performing low risk, non-sensitive duties. Once completed, non-ATF personnel must sign and date the form and forward it to the ATF sponsor. ATF sponsors will complete items 16-25 and forward this form to the Physical Security Programs Branch or appropriate Field Division personnel for processing.

1. Non-ATF Personnel's Assignment Status (*check one*): Contractor  Vendor  Other

**To be Completed by Non-ATF Personnel**

2. Last Name	3. First Name	4. Middle Name	5. Suffix	6. Social Security Number
--------------	---------------	----------------	-----------	---------------------------

7. Date of Birth	8. Place of Birth ( <i>State/Country</i> )	9. Citizenship	10. Sex
------------------	--	----------------	---------

11. Other Names Used ( <i>Maiden, Nickname, etc.</i> )	12. If foreign born, provide the type and number for one of the following: alien registration, naturalization certificate, U.S. passport, or employment authorization card.		
	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%; border: none;">Type</td> <td style="width: 40%; border: none;">Number</td> </tr> </table>	Type	Number
Type	Number		

13. Home Address (*provide residential history for past 5 years-use additional sheet(s) if necessary*)

From:	To:	Address	City	State

14. Employment History (*provide employment information for past 5 years-use additional sheets(s) if necessary*)

From:	To:	Employer Name	Address	City	State

15a. Ethnicity Origin

Hispanic or Latino Yes  No  A person of Mexican, Puerto Rican, Cuban, South or Central American, or other Spanish culture or origin, regardless of race.

15b. Race (*mark one or more of the following categories*)

American Indian or Alaska Native <input type="checkbox"/>	A person having origin in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliations or community attachment.
Asian <input type="checkbox"/>	A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent, including for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
Black or African American <input type="checkbox"/>	A person having origins in any of the black, Haitian, or Negro racial groups of Africa.
Native Hawaiian or Other Pacific Island <input type="checkbox"/>	A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
White <input type="checkbox"/>	A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

I, \_\_\_\_\_, give my consent and permission for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to conduct a police check inquiry for the purpose of granting me escorted access to ATF facilities and/or access to ATF non-sensitive information, or access to an ATF construction site. I understand that a felony conviction will automatically disqualify me. I understand that additional forms may be required by ATF for a more in-depth background investigation. I attest that the information provided is true.

Signature	Date
-----------	------

**To be Completed by ATF Sponsor (COTR/ POC)**

16. Subject's Assigned ATF Office	17. Subject's Job Title	18. Assignment Duration Dates Beginning _____ Ending _____
19. Subject's Duties will Require the Following Escorted Access Facilities <input type="checkbox"/> ATF Non-Sensitive Information <input type="checkbox"/> Construction Site <input type="checkbox"/>		
20. ATF Sponsor Name	21. ATF Sponsor Address	22. Phone Number
23. Sponsor Signature		24. Date
25. Description of Duties and Other Remarks		

**To be Completed by the Physical Security Programs Branch/Field Division**

26. NCIC Conducted: ____/____/____ (Date)  QH N/R <input type="checkbox"/> R <input type="checkbox"/> QW N/R <input type="checkbox"/> R <input type="checkbox"/> QPO N/R <input type="checkbox"/> R <input type="checkbox"/>	27. TECS Conducted: ____/____/____ (Date)  SQ N/R <input type="checkbox"/> R <input type="checkbox"/>	28. NLETS Conducted: ____/____/____ (Date) States (identify below): ____ IQ N/R <input type="checkbox"/> R <input type="checkbox"/> ____ IQ N/R <input type="checkbox"/> R <input type="checkbox"/> ____ DQ N/R <input type="checkbox"/> R <input type="checkbox"/> ____ DQ N/R <input type="checkbox"/> R <input type="checkbox"/>	
Access Granted <input type="checkbox"/> Access Denied <input type="checkbox"/>	Signature of Authorized ATF Official	Title	Date

**Instructions**

ATF Form 8620.42 must be initiated by the COTR or ATF Point of Contact (POC) prior to granting escorted access to ATF facilities. Examples of positions that could be escorted are janitorial or short-term construction contractors who may be performing electrical or plumbing duties. The Physical Security Programs Branch or Field Division is responsible for conducting the required records and inquiry checks.

Items 1-15. Non-ATF personnel are responsible for completion of items 1 through 15. No item may be left unanswered.

Items 16-25. To be completed by ATF Sponsor (COTR or ATF POC).

Items 26-28. To be completed by the Physical Security Programs Branch or Field Division.

**Paperwork Reduction Act Notice**

This request is in accordance with the Paperwork Reduction Act of 1995. The information collected is used by ATF to screen prospective contractors for escorted access to ATF facilities, non-sensitive information, and /or construction sites. The appropriate ATF office (Physical Security Programs Branch or Field Division) will maintain a copy of this form with the results of the indices checks for the duration of the contract employment or for a minimum of 1 year, whichever is longer.

The estimated average burden associated with this collection of information is 5 minutes per respondent, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be addressed to the Report Management Officer, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**Privacy Act Statement**

You are requested to furnish information regarding your race under the authority of 42 USC § 2000e - 16, which requires that Federal employment practices be free from discrimination and provide equal employment opportunities for all. Solicitation of this information is in accordance with Department of Commerce Directive 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting."

You are further requested to furnish your social security number (SSN) under authority of E.O. 9397, published 11/22/1943. That Order requires agencies to use the SSN for the sake of economy and orderly administration in the maintenance of records. Furnishing your race and SSN is voluntary; however, your failure to provide the requested information may negatively impact ATF's ability to positively identify you in the Federal criminal justice records system.

Solicitation of this information is authorized as part of our investigative authorities devolving from E.O. 10450 and E.O. 12968. This information will be used by ATF to begin preliminary screening/investigation for security purposes.

# **Exhibit**

**17**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Tom Odom



Bechtelsville	1-610-845-3803
Allentown	1-610-770-1151
Bethlehem	1-610-814-0838
Camp Hill	1-717-731-0100
Lancaster	1-717-393-7002
Lebanon	1-717-274-9250
North Wales	1-215-412-0800
Pottstown	1-610-326-4200
Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

October 11, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

I am writing to respectfully request that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") extend the period for filing public comments previously announced in connection with the rulemaking initiated with the publication of the Notice of Proposed Rulemaking ("NPR") in ATF 41P on September 9, 2013.

While ATF has been understaffed during the government shutdown, comments submitted by mail and facsimile have not been reviewed and posted on-line or made available in the reading room, comments submitted directly through [www.regulations.gov](http://www.regulations.gov) have not been posted, inquiries to ATF have gone unanswered, and requests under the Freedom of Information Act for pertinent documents have remained unprocessed. To restore normal order to the rulemaking process, I request that ATF extend the comment period by at least one day for each day ATF has been closed. I further ask that if you grant this request you promptly publish a notice of that fact in the Federal Register so that all interested persons will be aware.



## FIREARMS INDUSTRY CONSULTING GROUP

Furthermore, I am respectfully requesting that after your review of this letter, it be placed into the docket for ATF 41P.

Thank you for your attention to this matter.

Yours truly,  
Prince Law Offices, P.C.,

jp/web

Matter No. 31821

By fax: Brenda Raffath Friend, Esquire



Joshua Prince

Joshua Prince  
joshua@princelaw.com  
Extension: 81114

# **Exhibit**

**18**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Thomas H. Odom  
Allen Thompson  
Ian Friedman  
Stanley Kuter



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Allentown 1-610-770-1151  
Bethlehem 1-610-814-0838  
Camp Hill 1-717-731-0100  
Lancaster 1-717-393-7002  
Lebanon 1-717-274-9250  
North Wales 1-215-412-0800  
Pottstown 1-610-326-4200  
Pottsville 1-570-621-8828  
Reading 1-610-375-8425  
Toll Free 1-888-313-0416  
Fax 1-610-845-3903

November 07, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

I am writing to respectfully request that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") extend the period for filing public comments previously announced in connection with the rulemaking initiated with the publication of the Notice of Proposed Rulemaking ("NPR") in ATF 41P on September 9, 2013.

As you likely know, [www.regulations.gov](http://www.regulations.gov) was unavailable for several days earlier this week. No new comments could be posted and interested persons seeking information about the docket could not gain access.

By letter dated October 11, 2013, I previously requested that you extend the deadline for the submission of comments in light of the fact that for sixteen days comments submitted by mail and facsimile were not reviewed and posted on-line or made available in the reading room, comments submitted directly through [www.regulations.gov](http://www.regulations.gov) were not posted, inquiries to ATF went unanswered, and requests under the Freedom of Information Act for pertinent documents

## FIREARMS INDUSTRY CONSULTING GROUP

remained unprocessed. Since returning to normal staffing levels, ATF failed to post any of the backlog of comments on October 23, 28, 29, 30, 31, November 5 and 6.

To date, ATF has not acted on the October 11 request. The continuing failure to timely process comments received and the unavailability of the electronic portal earlier this week exacerbates the problem.

I request that ATF extend the comment period by at least one day for each day that either ATF has been closed or [www.regulations.gov](http://www.regulations.gov) has been inaccessible. Some such action is necessary to restore normal order to the rulemaking process. I further ask that if you grant this request you promptly publish a notice of that fact in the Federal Register so that all interested persons will be aware.

**Please place this letter in the docket for ATF 41P after reading.**

Thank you for your attention to this matter.

jp/web  
Matter No. 31821

Enclosure  
By fax: Brenda Raffath Friend, Esquire

Yours truly,  
Prince Law Offices, P.C.,



Joshua Prince  
[joshua@princelaw.com](mailto:joshua@princelaw.com)  
Extension: 81114



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Please check the site periodically for availability. We appreciate your patience and apologize for any inconvenience.

Regulations.gov was not available between 10pm Monday, November 4, 2013, and 4:30pm Wednesday, November 6, 2013. For questions about how the system outage may have affected a document's comment submission process, please contact the agency point of contact listed in the Federal Register directly.



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41p

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# **Exhibit**

**19**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Thomas H. Odom  
Allen R. Thompson  
Ian Friedman  
Stanley Kutler



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Lebanon 1-717-274-9250  
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Pottsville 1-570-621-8828  
Reading 1-610-375-8425  
Toll Free 1-888-313-0416  
Fax 1-610-845-3903

November 18, 2013

Brenda Raffath Friend, Esquire  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Office of Regulatory Affairs, Enforcement Programs and Services  
Mailstop 6N-602  
99 New York Avenue, NE,  
Washington, DC 20226

RE: **ATF Proposal to Further Restrict Access to  
Firearms Under the National Firearms Act,  
Docket Number ATF 41P  
RIN 1140-AA43**

Dear Attorney Friend,

**Please place this letter in the docket for ATF 41P after reading.**

I am writing to respectfully request that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") extend the period for filing public comments previously announced in connection with the rulemaking initiated with the publication of the Notice of Proposed Rulemaking ("NPR") in ATF 41P on September 9, 2013.

As you likely know, [www.regulations.gov](http://www.regulations.gov) was unavailable for several days last week. I am attaching proof of that fact as Exhibit A. This period of unavailability is in addition to the period identified in my November 7, 2013 letter. During both such periods, no new comments could be posted and interested persons seeking information about the docket could not gain access.

By letter dated October 11, 2013, I previously requested that you extend the deadline for the submission of comments in light of the fact that for sixteen days comments submitted by mail

## FIREARMS INDUSTRY CONSULTING GROUP

and facsimile were not reviewed and posted on-line or made available in the reading room, comments submitted directly through [www.regulations.gov](http://www.regulations.gov) were not posted, inquiries to ATF went unanswered, and requests under the Freedom of Information Act for pertinent documents remained unprocessed. To date, ATF has not acted on the October 11th request or even placed the letter in the docket as requested in the letter. Our inquiry as to why the October 11th letter had not been placed in the docket, while ATF did post a November 1st letter from another interested person addressing precisely the same issue, that ATF did not even receive until November 4th, failed to generate any explanation. See Exhibit B.

Despite providing advance notice, my colleague was also advised that ATF's reading room was unavailable to him for inspection of the docket on November 12, 13, and 14. I am attaching ATF's statement of that unavailability as Exhibit C. No reason has been provided for this apparent violation of ATF's obligation under the Freedom of Information Act.

With no access to the docket for sixteen days in October and another three days last week together with the failure of the [www.regulations.gov](http://www.regulations.gov) site for two different periods in November, I again renew my request that ATF extend the deadline for the filing of public comments so as to provide the full ninety days originally announced. Counting days when the public cannot access information regarding the rulemaking effectively turns the notice period into a sham.

As I pointed out previously, there is also the problem that even when the docket may be accessed, there are substantial delays in placing materials in the docket. Our October 3, 2013, letter identified specific communications with reference to this rulemaking that had not been placed in the docket. Six weeks later, ATF has not placed any of those items in the docket.

Since returning to normal staffing levels, ATF failed to post any of the backlog of comments on October 23rd, 28th, 29th, 30th, 31st, November 5th, 6th, 7th, 8th, and 13th. Moreover, the order in which ATF is posting comments to the docket has delayed the publication of substantial issues of interest to other persons preparing comments. The comment of David M. Goldman (1899) was posted only on the afternoon of November 14th, despite having been received by ATF on October 21st. The overwhelming majority of comments received on October 21st were posted on November 1st (1620-1670, 1690-1700) if not earlier. Meanwhile another submission received in hardcopy on November 4th (1895) was posted before the Goldman comment. An inquiry into the different treatment of these submissions failed to generate a meaningful response. See Exhibit B.

The continuing failure to timely process comments received, to do so without respect to the author, and the unavailability of the reading room and the electronic portal exacerbates the problems flowing from the sixteen day closure in October.

I again request that ATF extend the comment period by at least one day for each day that either ATF's reading room has been closed or [www.regulations.gov](http://www.regulations.gov) has been inaccessible. Some such action is necessary to restore normal order to the rulemaking process. I further ask that if you grant this request you promptly publish a notice of that fact in the Federal Register so that all

**FIREARMS INDUSTRY CONSULTING GROUP**

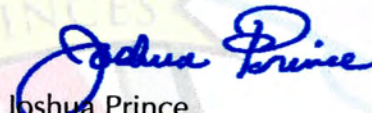
interested persons will be aware.

Thank you for your attention to this matter.

jp/web  
Matter No. 31821

Enclosure  
By fax: Brenda Raffath Friend, Esquire

Yours truly,  
Prince Law Offices, P.C.,



Joshua Prince  
joshua@princelaw.com  
Extension: 81114

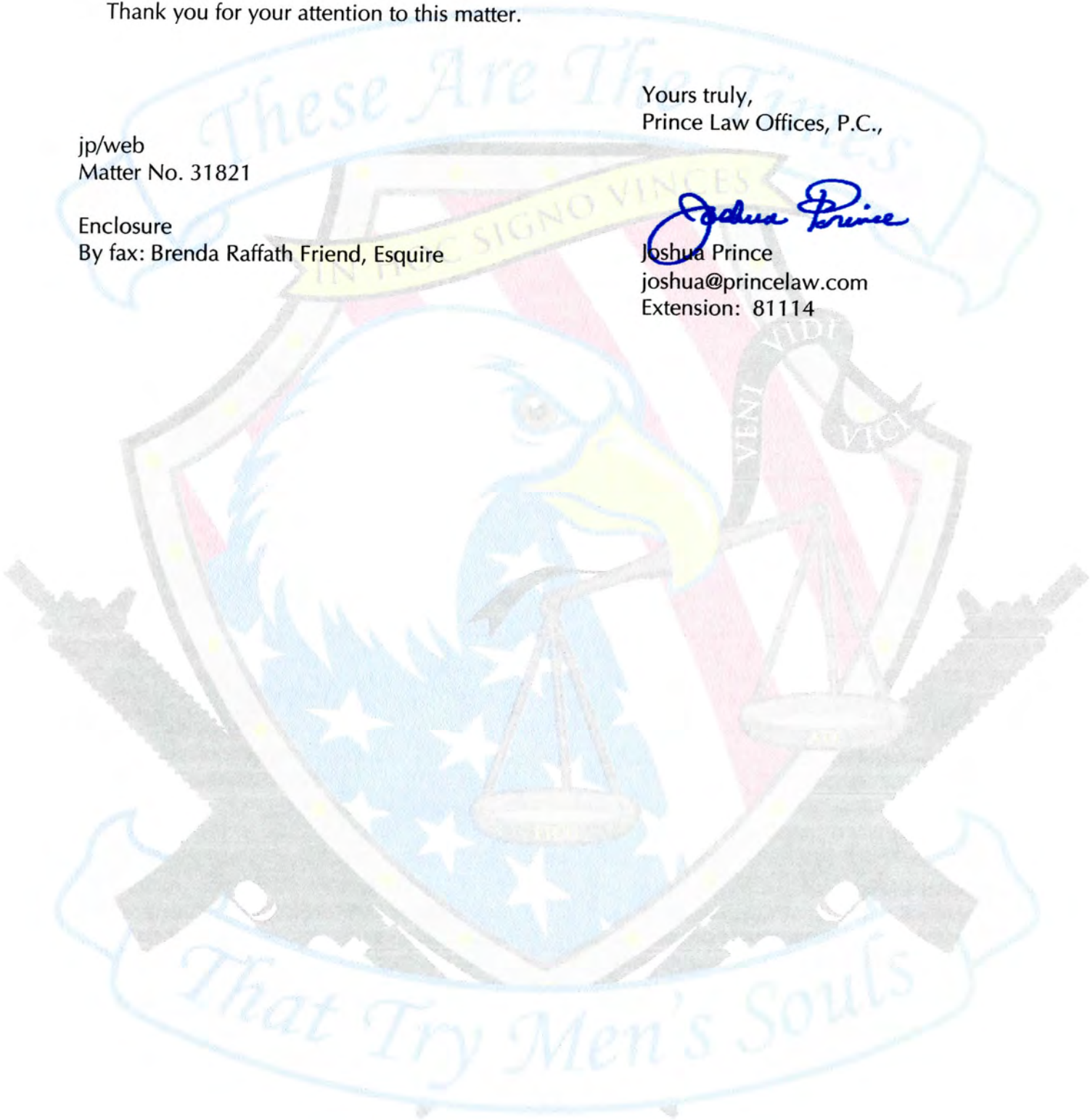


Exhibit A





Thomas Odom &lt;thodom2@gmail.com&gt;

---

**Website Down ISSUE=25412 PROJ=29**

---

**regulations.gov\_helpdesk** <regulations.gov\_helpdesk@bah.com>

Fri, Nov 15, 2013 at 7:25 AM

To: Thomas Odom &lt;thodom2@gmail.com&gt;

Mr Odom,

We received this release from the eRulemaking Program Office to send out to users of Regulations.gov:

Regulations.gov was unavailable to public users starting shortly before midnight Monday, November 4th, 2013. Technical experts discovered a failure in the storage system and restored Regulations.gov in the backup recovery (cloud) environment at 4:30 pm Wednesday, November 6th.

Both sites became unavailable again at 7 pm Sunday November 10th, due to an issue with one of the database components in the temporary cloud environment.

The eRulemaking system was restored back to the primary (physical) hosting location by early afternoon on Tuesday November 12th.

Regulations.gov Help Desk

---

**From:** Thomas Odom <thodom2@gmail.com>**Date:** Thursday, November 14, 2013 at 7:31 PM**To:** Pat Madden <regulations.gov\_helpdesk@bah.com>**Subject:** [External] Re: Website Down ISSUE=25412 PROJ=29

[Quoted text hidden]

Exhibit B



Thomas Odom <thodom2@gmail.com>

---

## Material Missing from Rulemaking Docket ATF 41P

---

Thomas Odom <thodom2@gmail.com>  
To: brenda.r.friend@usdoj.gov

Thu, Nov 14, 2013 at 3:16 PM

Dear Ms. Friend,

I see from the most recent comments posted to [www.regulations.gov](http://www.regulations.gov) that material received by ATF as recently as November 1 has been processed. I am wondering why the comment I submitted on behalf of David M. Goldman – which the U.S. Postal Service shows was delivered to ATF on October 21 – has not yet been posted.

I also note that a letter from NFATCA dated November 1 requesting an enlargement of time has been posted to the docket despite the absence of an explicit request that you do so. Conversely, FICG's letter from weeks earlier has not been posted despite an explicit request in the letter that you do so.

My October 3 letter identified several items that were not placed in the docket and that list continues to grow.

Can you please shed some light on the different treatment of these matters?

Thomas H. Odom  
[thodom2@gmail.com](mailto:thodom2@gmail.com)





Thomas Odom < thodom2@gmail.com >

**Material Missing from Rulemaking Docket ATF 41P**

**Brenda.R.Friend@usdoj.gov** < Brenda.R.Friend@usdoj.gov >  
To: thodom2@gmail.com

Thu, Nov 14, 2013 at 3:54 PM

Mr. Odom,

We have an administrative process in place for reviewing and posting comments. Thank you for your concern.

Brenda Friend

---

**From:** Thomas Odom [mailto:thodom2@gmail.com]  
**Sent:** Thursday, November 14, 2013 3:16 PM  
**To:** Friend, Brenda R.  
**Subject:** Material Missing from Rulemaking Docket ATF 41P

Dear Ms. Friend,

[Quoted text hidden]  
[Quoted text hidden]  
[Quoted text hidden]

Thomas H. Odom

[thodom2@gmail.com](mailto:thodom2@gmail.com)  


---

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## Exhibit C



Thomas Odom < thodom2@gmail.com >

---

## Request for access to ATF's Reading Room

---

Peter.J.Chisholm@usdoj.gov < Peter.J.Chisholm@usdoj.gov >  
To: thodom2@gmail.com

Fri, Nov 8, 2013 at 2:01 PM

Mr. Odom:

The ATF Reading Room will be unavailable on Tuesday, November 12<sup>th</sup>. The earliest date the Reading Room is accessible will be Friday, November 15<sup>th</sup>.

If you wish to use the Reading Room on Friday, please let me know. You will also need to fill out the attached ATF Form 8620.42 to gain access to the building. You can fill out the form and return it via email to me, I will forward it to our Security Office. If possible, please return the form at least 24 hours prior to your visit.

Sincerely,

Pete Chisholm

Team Leader - Disclosure Division

Office of Public and Governmental Affairs


Bureau of Alcohol, Tobacco, Firearms and Explosives

(202) 648-7382

---

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---

 ATF Form 8620.42.pdf  
35K

# **Exhibit**

**20**

1899

## PUBLIC SUBMISSION

<b>As of:</b> November 14, 2013
<b>Received:</b> October 21, 2013
<b>Status:</b> Posted
<b>Posted:</b> November 14, 2013
<b>Tracking No.:</b> ljsx-88qm-pp9i
<b>Comments Due:</b> December 09, 2013
<b>Submission Type:</b> Paper

**Docket:** ATF-2013-0001

Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm

**Comment On:** ATF-2013-0001-0001

Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm

**Document:** ATF-2013-0001-1899

Comment on FR Doc # 2013-21661

---

### Submitter Information

**Name:** Thomas Odom

**Address:**

646 Lenape Road

Bechtelsville, PA, 19505

**Organization:** David M. Goldman

---

### General Comment

See Attached

---

### Attachments

Goldman, David Comment

Goldman, David Exhibits



# Product Tracking System



Home Search Reports Manual Entry Rates/Commitments PTS / EDW USPS Corporate Accounts

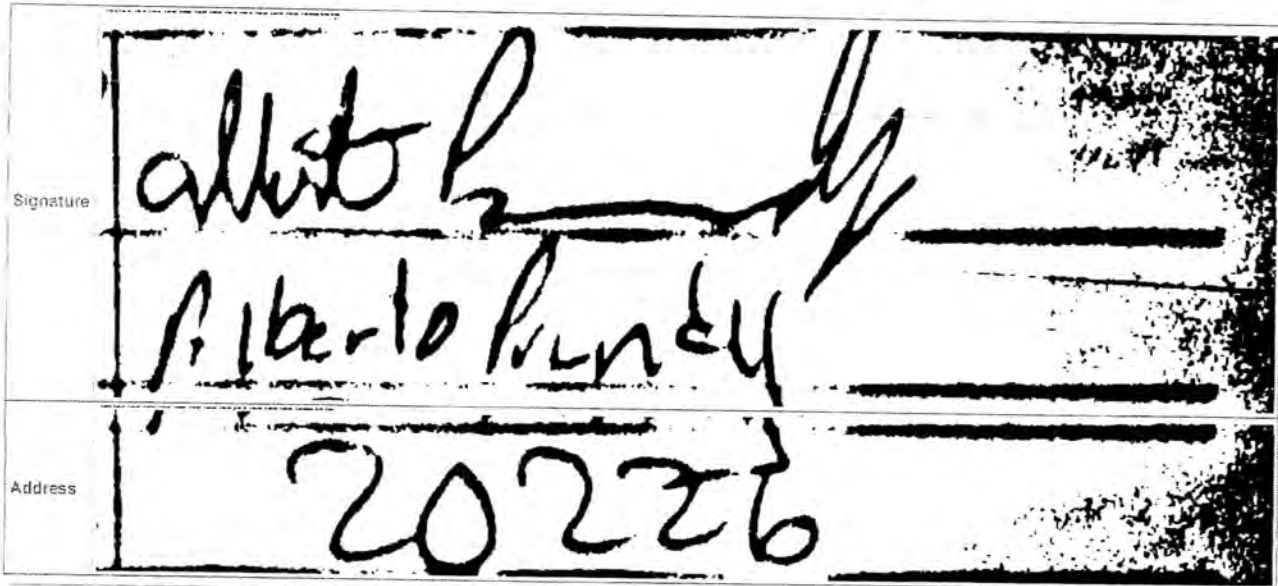
October 25, 2017

## Track & Confirm Intranet Delivery Signature and Address

Tracking Number: 7013 1710 0000 6461 0887

This item was delivered on 10/21/2013 at 04:30:00

[< Return to Tracking Number View](#)



Enter up to 10 items separated by commas.

Select Search Type: Quick Search

Submit

Product Tracking System, All Rights Reserved  
Version: 1.5.0.16

# Product Tracking System

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[Rates/  
Commitments](#)
[PTS](#)

## Track & Confirm Intranet Tracking Number Result

Result for Domestic Tracking Number 7013 1710 0000 6461 0887

Destination and Origin		
<b>Destination</b>		
ZIP Code	City	State
20226	WASHINGTON	DC
<b>Origin</b>		
ZIP Code	City	State
170139998	CARLISLE	PA
Tracking Number Classification		
<b>Class/Service</b>		
<b>Class/Service:</b> Priority Mail Certified Mail <b>Class of Mail Code/Description:</b> PM / Priority Mail 2-Day™		
<b>Service Delivery Information</b>		
<b>Service Performance Date:</b> Scheduled Delivery Date: 10/19/2013 <b>Delivery Option Indicator:</b> 1 - Normal Delivery <b>Zone:</b> 02 <b>PO Box:</b> N <b>Other Information</b> <a href="#">Service Calculation Information</a>		
<b>Payment</b>		
<b>Payment Type:</b> Other Postage <b>Payment Account Number:</b> 000000000000 <b>Postage:</b> \$5.80 <b>Weight:</b> 1 lb(s) 13 oz(s) <b>Rate Indicator:</b> Single-Piece Rate		
<b>Other Information</b>		
<b>Firm Label ID:</b> 5103 OSGS E673 1467 1778		

**Extra Services****Extra Services Details**

Description	Amount
Certified Mail	\$3.10
Return Receipt	\$2.55
No insurance included	\$0.00

**Events**

Event	Event Date	Event Time	Location	Input Method	Scanner ID	Carrier Route	Other Inform
DELIVERED	10/21/2013	04:30	WASHINGTON, DC 20226	Firm Book	030SGSD786	Scanned by route 00000000	<div style="border: 1px solid black; padding: 5px; width: fit-content;">View De an</div> <div style="border: 1px solid black; padding: 5px; width: fit-content;">Facility Finance Firm Name: ATF</div> <div style="border: 1px solid black; padding: 5px; width: fit-content;">Request I</div>
AVAILABLE FOR PICKUP	10/20/2013	12:06	WASHINGTON, DC 20226	Firm Book	030SGSE642	Scanned by route 25000005	
ARRIVAL AT UNIT	10/20/2013	11:49	WASHINGTON, DC 20018	Firm Book	030SGSE673	Scanned by route 25000022	
DISPATCHED FROM SORT FACILITY	10/19/2013	11:30	WASHINGTON, DC 20018	System Generated			Dispatch Label ID <a href="#">1910 3346</a>
ENROUTE/PROCESSED	10/19/2013	08:42	WASHINGTON, DC 20018	Scanned	030SGSE673	Scanned by route 25000022	
DISPATCHED FROM SORT FACILITY	10/19/2013	05:59	WASHINGTON, DC 20066	System Generated			Dispatch Label ID <a href="#">1905 0234</a>
ENROUTE/PROCESSED	10/18/2013	16:39	WASHINGTON, DC 20066	Scanned	PSS-001-8010		
DISPATCHED FROM SORT FACILITY	10/18/2013	03:46	HARRISBURG, PA 17107	System Generated			Dispatch Label ID <a href="#">1804 3254</a>
ENROUTE/PROCESSED	10/17/2013	18:51	HARRISBURG, PA 17107	Scanned	APPS-052-		
DISPATCHED TO SORT FACILITY	10/17/2013	14:04	CARLISLE, PA 17013	System Generated			Closeout Label ID <a href="#">1713 0826</a>
ACCEPT OR PICKUP	10/17/2013	11:34	CARLISLE, PA 17013	Scanned	POS		Facility Finance

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■

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PS Form 3800, August 2006

See Reverse for Instructions

# **Exhibit**

**21**



Thomas Odom < thodom2@gmail.com >

---

## Visit to ATF Reading Room on Friday, November 14, 2013

---

Thomas Odom < thodom2@gmail.com >  
To: Peter.J.Chisholm@usdoj.gov

Thu, Nov 14, 2013 at 3:27 PM

Peter,

I wanted to alert you that the most recent posting of comments to [www.regulations.gov](http://www.regulations.gov) shows that material received as recently as November 1 has been processed. As a result, I trust that the materials that will be available to me tomorrow will include all submissions received by ATF before that date, including specifically the comment of David M. Goldman that the U.S. Postal Service shows was delivered to ATF on October 21. Can you please make sure that item is included in the materials? Thank you.

Tom Odom

[Quoted text hidden]

# **Exhibit**

**22**



## Your comment was submitted successfully!

The Alcohol Tobacco Firearms and Explosives Bureau (ATF) Proposed Rule: [Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm](#)

For related information, [Open Docket Folder](#)

**3**

### Your Receipt

Your Comment Tracking Number:  
**1jx-88t8-g7wg**

*Your comment will be viewable on Regulations.gov after the agency has reviewed it, which may be an indefinite amount of time. Use your tracking number to find out the status of your comment.*

Your comment:

**Comment:**

Please see attached letter of November 18, 2013 and attached exhibits that were already provided to Attorney Brenda Friend today.

**Uploaded File(s)** (Optional)

- ATF 41P Letter.pdf: **success**

This information will appear on  
Regulations.gov:

**First Name:**

Joshua

**Last Name:**

Prince

**Organization****Name:**

Firearms Industry  
Consulting Group

This information will **not** appear on  
Regulations.gov:



<b>Mailing Address:</b>	<b>ZIP/Postal Code:</b>
646 Lenape Rd	19505
<b>City:</b>	<b>Email Address:</b>
Bechtelsville	joshua@princelaw.com
<b>Country:</b>	<b>Phone Number:</b>
United States	610-845-3804
<b>State or Province:</b>	<b>Fax Number:</b>
PA	610-845-3903

**C Comment on FR Doc # 2013-21661**

This is a Comment on the Alcohol Tobacco Firearms and Explosives Bureau (ATF) Proposed Rule: Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm  
For related information, Open Docket Folder

**Comment**  
See Attached

**More Document Details**

Docket ID: ATF-2013-0001  
Document Type: Public Submission  
Received Date: Nov 18, 2013  
Comment Start Date: Sep 9, 2013  
Comment Due Date: Dec 9, 2013

**Comment Now!**

Due Dec 9 2013, at 11:59 PM ET

ID: ATF-2013-0001-2404  
Tracking Number: 1jx-88vs-nahm  
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**Document Information**

Date Posted: Nov 22, 2013  
RIN: 1140-AA43  
[Show More Details](#)

**Submitter Information**

Submitter Name: Joshua Price

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Regulations.gov Help Desk  
<regulations.gov\_helpdesk@bah.com>

November 25, 2013 9:22 AM

To: <joshua@princelaw.com>

Reply-To: regulations.gov\_helpdesk@bah.com

Comment Not Appearing as Submitted nor is Attachment Available ISSUE=25525  
PROJ=29

---

When replying, type your text above this line.

---

**Notification of Request Change**

The following changes have been made to this Request: *Changed Status to Closed from Open, Changed Request data or Contact data, Appended a Additional Comments.*

**Workspace:** New Regulations.gov July 2009  
**Request:** Comment Not Appearing as Submitted nor is Attachment Available  
**Request Number:** 25525

**Priority:** Low           **Status:** Closed  
**Date:** 11/25/2013   **Time:** 10:21:49  
**Creation Date:** 11/23/2013   **Creation Time:** 11:52:34  
**Created By:** RegsUser

[Click here to view Request in Browser](#)

**Additional Comments:**

*Entered on 11/25/2013 at 10:21:49 AST (GMT-0400) by John S: Joshua,*

Each agency manages their own dockets and documents on Regulations.gov.

We see that your comment, referenced by comment tracking number 1jx-88t8-g7wg has been received but not yet posted by the agency.

We see that comments ATF-2013-0001-2404 and -1899 are listed as "Paper" for Submission Type by the agency which leads us to believe these comments were received by fax or mail, and perhaps ATF made an error when manually uploading them onto Regulations.gov.

For further questions and or assistance, please contact the ATF employee listed in this Federal Register:

Brenda R. Friend  
202-648-8408

If you need additional assistance in searching for documents or submitting a comment,

please reply to this e-mail or call the Regulations.gov Help Desk at 1-877-378-5457, Monday through Friday, from 9:00 AM until 5:00 PM, EST.

Thank you,  
Regulations.gov Help Desk

*Entered on 11/23/2013 at 11:52:34 AST (GMT-0400) by RegsUser:*

I submitted a Comment regarding ATF 41P on November 18, 2013. The comment tracking number is 1jx--88t8--g7wg. The text of the Comment was "Please see attached letter of November 18, 2013 and attached exhibits that were already provided to Attorney Brenda Friend today." The attached document, entitled ATF 41P Letter.pdf, was successfully uploaded and I have a screenshot reflecting such. I also filed it on behalf of the Firearms Industry Consulting Group, as it is listed as the Organization in my original submission.

I see that a revised version of my Comment was posted on November 22, 2013, Comment ID ATF-2013-0001-2404. The revised version of my Comment now only reflects "See Attached". Further, my letter of November 18, 2013 and attached exhibits are no where to be found. Lastly, the organization name is not listed.

In looking at Comment ID ATF-2013-0001-1899, PDF copies of the comment and exhibits are provided as links to download. Further, the Submitter Information reflects that Thomas Odom submitted it on behalf of the Organization David M. Goldman.

Therefore, I am writing to inquire as to the following: 1. why was the text of my Comment changed to "See Attached," who changed the text and why?; 2. why is a PDF copy of my letter and attached exhibits not available?; and 3. why is the organization name of Firearms Industry Consulting Group not listed?

As these omissions can cause great confusion and result in individuals and ATF not reviewing my Comment, I am respectfully requesting an explanation as to these issues. If necessary, I can provide screenshots of these issues, reflecting everything described herein.

Thank you for your prompt attention and assistance in this matter

**Current Assignees:**

**Request Information:**

**Question or Comment:** Question

**Contact Information:**

**Last Name:** Prince **First Name:** Joshua

**Email address:** [joshua@princelaw.com](mailto:joshua@princelaw.com)

# **Exhibit**

**23**

Joshua Prince <joshua@princelaw.com>

October 15, 2013 2:19 PM



To: John Brown and 2 more...

Re: John Brown's Comment?

---

John,

I apologize for the delay in my response. I've been in trial and keep being pulled in 15 different directions.

I am somewhat confused by your response. Although your email response ends in an incomplete sentence, I interpret it to mean that you aren't going to divulge the information regarding the instances to which you alluded to on the public record by filing your comment. If you lack personal knowledge of the circumstances and are simply referencing information ATF provided you without details, please let me know. But, if you have details, for the Industry to respond to ATF-41P and any unintentional (as well as intentional) suggestions raised in your comment, it is necessary to investigate the background, as ATF has not including anything in ATF-41P that even remotely suggests that prohibited individuals have gained actual possession of registered NFA firearms. For such an allegation to be presented on the public record without factual background, denies all interested parties the opportunity to address the issue as contemplated by the APA.

While I understand your possible inclination to assist the ATF in relation to ATF 41P, in the hopes of being able to resolve other issues amicably in the future, the failure to provide information supporting or further explaining your comment hurts the entire Industry. Also, as evidenced by the current quagmire of ATF 41P, the ATF was more than willing to throw NFATCA and the Firearms Industry under the bus, even after the NFATCA filed its petition; thereby, providing ATF the vehicle to move forward with ATF-41P.

Accordingly, I respectfully request that you reconsider your decision not to disclose the information regarding these alleged instances of prohibited persons coming into actual possession of registered NFA firearms. This information is either public or it isn't. By filing the comment, you treated the instances as public and ensured they were placed on the record. Now that you have already treated the instances as public, sufficient details must be disclosed to provide the Industry with an opportunity to be heard in relation to them.

I look forward to your response

Joshua

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
a division of Prince Law Offices, P.C.  
646 Lenape Rd  
Bechtelsville, PA 19505  
610-845-3803 ext 81114  
610-845-3903 (fax)  
[Joshua@PrinceLaw.com](mailto:Joshua@PrinceLaw.com)

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On Oct 2, 2013, at 12:12 PM, John Brown  
<[john.battlefield.brown@gmail.com](mailto:john.battlefield.brown@gmail.com)> wrote:

Josh,  
With all due respect we have been working inside ATF for over ten years and know things we should never know. What you are asking for is for me to divulge information that I would  
John Brown  
[john.battlefield.brown@gmail.com](mailto:john.battlefield.brown@gmail.com)

On Oct 2, 2013, at 8:33 AM, Joshua Prince wrote:

I am saying that ATF has not offered any evidence of an actual prohibited person (let alone a felon) actually procuring an NFA firearm. John's comment clearly states, as I stated in my original email, that multiple felons have procured (not merely attempted to procure) NFA firearms through a trust. Since ATF does not mention these instances in ATF 41P, in order to draft an effective comment in response to those instances, we need to know the background. As I mentioned yesterday, if a Court directed that the firearms be placed into a trust because the individual lost his/her possessory interest that is hardly a legitimate instance. This is why we need the facts to be able to investigate these instances and whether they are legitimate.

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
a division of Prince Law Offices, P.C.  
646 Lenape Rd  
Bechtelsville, PA 19505  
610-845-3803 ext 81114  
610-845-3903 (fax)  
[Joshua@PrinceLaw.com](mailto:Joshua@PrinceLaw.com)

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On Oct 2, 2013, at 7:28 AM, Jeff Folloder <[jeff.folloder@nfatca.org](mailto:jeff.folloder@nfatca.org)>



wrote:

Joshua,

I will not presume to speak for John, however, I will offer my comments. As I have pointed out on numerous occasions, and yesterday, it is clear to me that the situation of prohibited persons being able to and actually obtaining weapons via legal entities does exist. It is reasonable to assume that even now there are prohibited persons in possession via legal entities and due to the volume of legal entities involved, it is also reasonable to assume that trusts are involved.

I believe that yesterday we obtained a minimal consensus at Chris Cox's guidance to stipulate that prohibited persons in possession was an issue of concern for ATF and that offering the primary person designation and background check for that person would be a reasonable accommodation. Reasonable even though ATF and DOJ have clearly demonstrated that prosecuting prohibited persons is not a priority. With no significant record of ATF prosecutions of these cases it would be nearly impossible to quantify what ATF knew but declined to prosecute for whatever reason. Are you suggesting that we abandon this approach?

I am not trying to be combative or argumentative. I guess I am trying to figure out if there are still strategy decisions that are undecided.

Sent from my iPad

On Oct 1, 2013, at 8:51 PM, Joshua Prince <[joshua@princelaw.com](mailto:joshua@princelaw.com)> wrote:

Jeff,

I returned to the office today for an associate to bring to my attention a recent comment that was submitted regarding ATF 41P, where it alleged that the commentor knew "that convicted felons procured NFA items through a trust." The name of the commentor is John Brown and the first sentence is almost a verbatim recitation of what John stated today during the summit.

<http://www.regulations.gov/#!documentDetail;D=ATF-2013-0001-0437>.

This is extremely troubling and disconcerting, as this statement, which will later be used against us, declares that prohibited persons have actually obtained access to NFA firearms, which is absent from ATF

41P. Specifically,

1. The use of "convicted felons" reflects that John has knowledge of multiple occasions;
2. The use of "procured" reflects that John has knowledge that not only did multiple prohibited persons apply but also have gained access to NFA firearms; and
3. These instances only involved a trust.

I find this extremely disconcerting, when, as I mentioned above, ATF does not even state in ATF 41P that it has knowledge that ANY prohibited person EVER procured an NFA firearm. If ATF had actual instances of prohibited persons gaining access to NFA firearms, I guarantee you that such would be reflected in ATF 41P, as it bolsters their argument that regulation is necessary. Rather, what ATF 41P reflects is that there were several alleged instances, for which insufficient information is provided, where an alleged prohibited person was involved, in some capacity, with the legal entity applying for transfer of an NFA firearm.

If the above-listed comment was by John, I would like to know 1. how many exact occasions he has knowledge of where a convicted felon actually procured an NFA firearm using a fictitious legal entity, 2. the type of NFA Firearms, and 3. the breakdown between fictitious entities (trusts, LLCs, corps or other legal entities). We will need any details he has so that we can investigate what happened in those situations to deal effectively with those examples in our comments. If John meant to say something like "assuming as ATF represents" instead of "knowing," I would hope that he would submit clarification promptly, before the assertion gets repeated in other comments.

I look forward to your response

Joshua

Joshua Prince, Esq.  
Firearms Industry Consulting Group  
a division of Prince Law Offices, P.C.  
646 Lenape Rd  
Bechtelsville, PA 19505

610-845-3803 ext 81114  
610-845-3903 (fax)  
[Joshua@PrinceLaw.com](mailto:Joshua@PrinceLaw.com)

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# **Exhibit**

**24**

# FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince  
Karl P. Voigt IV  
Joshua Prince  
Thomas R. Beveridge  
Eric E. Winter  
Alexander Elliker  
Phillip Alan Simon  
Thomas H. Odom  
Allen Thompson  
Ian Friedman  
Stanley Kuter



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Bethlehem 1-610-814-0838  
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Lebanon 1-717-274-9250  
North Wales 1-215-412-0800  
Pottstown 1-610-326-4200  
Pottsville 1-570-621-8828  
Reading 1-610-375-8425  
Toll Free 1-888-313-0416  
Fax 1-610-845-3903

October 31, 2013

National Firearms Act Trade And Collectors Association,  
20603 Big Wells Drive  
Katy, TX 77449-6269

RE: Recent Comments Regarding Prohibited Persons in Possession of Registered NFA  
Firearms

Dear NFATCA Board,

I am writing in relation to President John Brown's recent Comment, posted on September 20, 2013, that he filed with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regarding ATF-41P, RIN 1140-AA43, and the recently published version of NFATCA's *The Partisan*, both of which reference multiple instances of prohibited persons coming into actual possession of registered NFA firearms through the use of fictitious entities, including trusts and LLCs, but fail to disclose any information regarding these alleged instances.

On September 20, 2013, the ATF posted a Comment by an individual with the name of John Brown. That Comment declares, among other things, "Knowing that convicted felons have procured NFA items through a trust means there must be changes made at some point in this process." On October 1, 2013, when I first saw the Comment, I emailed President John Brown and Jeff Folloder to inquire of whether the Comment was filed by President Brown or someone else, either intending to appear to be him or with his same name. I further inquired if President Brown submitted the Comment, if he would kindly provide me with "1. how many exact occasions he has knowledge of where a convicted felon actually procured an NFA firearm using a fictitious legal entity, 2. the type of NFA Firearms, and 3. the breakdown between fictitious entities (trusts, LLCs, corps or other legal entities)," because we will need any details he has so that the Firearms Industry can investigate what occurred in those situations to deal effectively with those examples in their Comments.

## FIREARMS INDUSTRY CONSULTING GROUP

On October 2, 2013, President Brown responded, "With all due respect we have been working inside ATF for over ten years and know things we should never know. What you are asking for is for me to divulge information that I would [sic]." That was the totality of his response, with the exception of his signature line. On October 15, 2013, I responded to President Brown explaining that I was somewhat confused by his response, as he was contending that the information relating to these instances was confidential; yet, he posted this information publicly in his Comment. I reiterated that it was necessary for the Industry to be provided the background information of these alleged instances, so that Comments filed by Industry leaders could fully investigate and respond to those occurrences. In closing, I respectfully requested that he reconsider his decision not to disclose the information involving these alleged instances. As of the date of this correspondence, I have not received any response.

Today, I saw that Volume 5, Issue 4 of the NFACTA's *The Partisan* was published electronically. In the article *Who's Driving the Bus*, it states, "Make no mistake, ATF is engaged with dozens of cases where prohibited persons acquired weapons through trusts and corporations without background checks." The several convicted felons actual possession of registered NFA firearms, as stated in President Brown's Comment, has now become "dozens," without any citation or reference to any actual pending or closed matters or investigations.

As nothing within ATF-41P even remotely suggests that prohibited persons have come into possession of registered NFA firearms through the use of fictitious entities, for the Industry to have opportunity to properly respond to these alleged instances, it is necessary for the NFATCA to disclose as much information as possible of these occurrences. In the absence of providing this information, the Industry will be denied its opportunity to be heard.

Therefore, I am respectfully requesting that you take appropriate action and fully disclose all information known, as previously requested from President Brown, so to provide the Industry with an opportunity to investigate and comment on these occurrences.

As you can see from the Comment that we prepared for David M. Goldman, there are strong bases to broadly oppose ATF's proposed rule. NFATCA seems to prefer a narrower approach and it is entitled to take that position. We remain concerned, however, that in advancing a narrower basis for opposition, certain statements by NFATCA seem to affirmatively undermine the broader opposition. We welcome the opportunity to confer with counsel preparing NFATCA's Comment so that we can ensure that even if we take different approaches, we do not weaken our respective positions and harm the Industry.

Thanking you for your time and consideration in this request, I am

FIREARMS INDUSTRY CONSULTING GROUP

jp/web

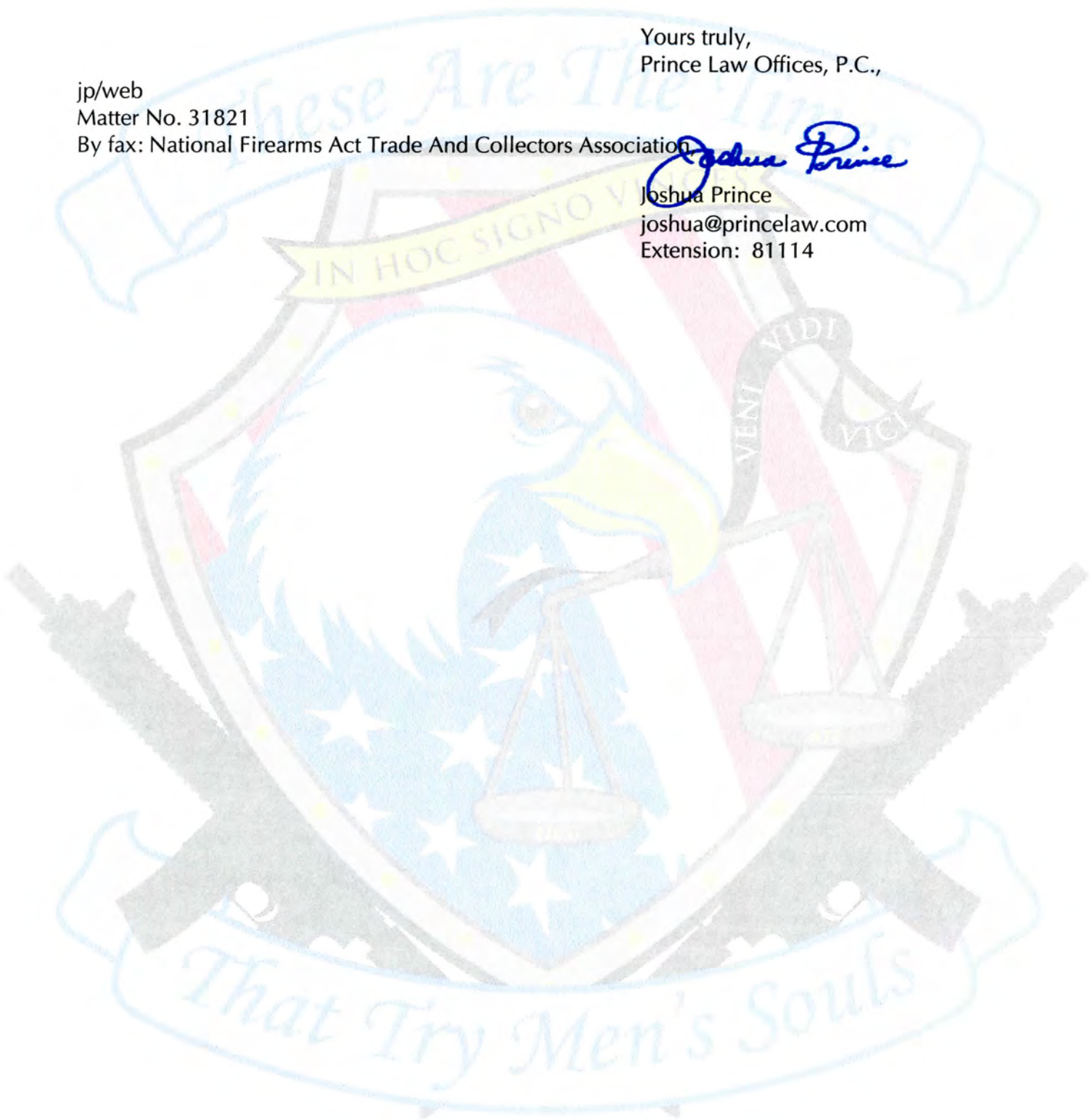
Matter No. 31821

By fax: National Firearms Act Trade And Collectors Association

Yours truly,  
Prince Law Offices, P.C.,



Joshua Prince  
joshua@princelaw.com  
Extension: 81114



# **Exhibit**

**25**



# **Exhibit**

**A**

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA

3

4 United States of America, )  
5 )  
6 Plaintiff, )  
7 vs. )  
8 ) CR-10-01047-PHX-ROS (DKD)  
9 Randolph Benjamin Rodman and Idan )  
10 C. Greenberg, )  
11 )  
12 Defendants. )  
13 ) November 28, 2012  
14 ) 8:45 a.m.  
15 )

---

16 BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 Jury Trial - Day 2  
19 (Pages 161 through 362)

20  
21 Official Court Reporter:  
22 Elaine Cropper, RDR, CRR, CCP  
23 Sandra Day O'Connor U.S. Courthouse, Suite 312  
24 401 West Washington Street, Spc. 35  
25 Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

CR-10-01047-PHX-ROS (DKD), November 28, 2012

I N D E XTESTIMONY

WITNESS	Direct	Cross	Redirect	Recross
RICHARD VASQUEZ	167	211 246	256 278	276
ERNEST LINTNER	282	315 324	350	

E X H I B I T S

Number		Ident	Rec'd
1-41			211
19	A6042075 model 1919 machine gun-PICTURE ONLY	194	194
24	820101152 MP40 pieces	167	
25	820101389 Thompson machine gun	171	
26	820101541 model 1919 machine gun	171	
27	820101546 model 1919 side-plate	172	
28	820101557 model 1919 side-plate	172	
29	820101575 MAG58/M240	173	
30	820101589 MAG58/M240 machine gun	173	
31	820101592 model 1919 machine gun	174	
32	BA-V036 M2 heavy machine gun	174	
33	C351 AK-47 machine gun	176	
34	SAP453187 Maxim receiver/side-plates	180	
35	SAP453187 Maxim receiver/side-plates	180	
36	MG42 without serial number or manufacturer markings	182	

United States District Court

## RICHARD VASQUEZ - Direct

1 A. Because I know how to read this information, you know, it 10:29:20  
2 indicates caliber 9 millimeter M45 AC and the P is missing.  
3 Someone also put next to Military Armament Corporation .30,  
4 trying to indicate that it was also -- I would think that they  
5 were trying to indicate it was also a .30 caliber. 10:29:42

6 MR. TATE: I'm going to object to the speculation.

7 THE COURT: Sustained.

8 MR. VANN: That's fine.

9 BY MR. VANN:

10 Q. Now, we had earlier discussed your conversation with 10:30:00  
11 Mr. Brown regarding the 1919 that you examined of his. Do you  
12 know Mr. Brown?

13 A. Yes, I do.

14 Q. How do you know Mr. Brown?

15 A. The first time I met Mr. Brown, he's the president of an 10:30:13  
16 organization called NFA TCA and the first time I met Mr. Brown,  
17 a meeting had been set up with his group through my  
18 headquarters to come in to Martinsburg, West Virginia, to try  
19 to resolve some issues that the industry and manufacturers had  
20 with ATF. 10:30:35

21 Q. Okay. And subsequent to that meeting, did you have other  
22 interaction with Mr. Brown?

23 A. Yes. Throughout the years we met at different trade  
24 shows. He's interacted with ATF a lot. Our headquarters  
25 interacted with our directors and then we developed a personal 10:30:53

RICHARD VASQUEZ - Direct

- 1 relationship. 10:30:56
- 2 Q. All right. And he's a friend of yours?
- 3 A. Yes, he is.
- 4 Q. Now, you allowed him to leave the ATF facility with that  
5 1919 that you suspected was a counterfeit; correct? 10:31:03
- 6 A. Correct.
- 7 Q. Do you have the ability to seize the firearm? I think  
8 I've asked you this before.
- 9 A. I do not.
- 10 Q. Was it your decision or are you empowered to make a  
11 decision to act on that firearm? 10:31:13
- 12 A. No, I was not.
- 13 Q. Okay. You don't have the power to do that?
- 14 A. No, I do not.
- 15 Q. Were you asked about that? 10:31:22
- 16 A. Was I asked by?
- 17 Q. Were you asked by somebody at ATF to seize it or asked to  
18 give your input on whether or not you should seize it?
- 19 A. As we were doing this evaluation, as it progressed, I was  
20 contacting my headquarters. 10:31:38
- 21 Q. So who was making the decision on what to do with the  
22 firearm?
- 23 A. My deputy assistant director.
- 24 Q. Were you making that decision?
- 25 A. No, I was not. 10:31:45

United States District Court

## RICHARD VASQUEZ - Cross

- 1 Q. A minute. You took one look at it, saw the piece of metal 10:36:54  
2 with the identifying numbers of the MAC on it and realized that  
3 you had an unlawful machine gun?
- 4 A. Correct.
- 5 Q. And did you make that determination known to the other 10:37:10  
6 people?
- 7 A. Yes, I did.
- 8 Q. Did you make it known to anybody else --
- 9 A. Yes, I did.
- 10 Q. -- at the time? 10:37:19
- 11 A. Once I left the library, I contacted my headquarters and  
12 let them know this.
- 13 Q. And who did you contact in your headquarters?
- 14 A. Once again, DAD, Audrey Stucko.
- 15 Q. And at this point, you're still in possession of the 10:37:34  
16 machine gun?
- 17 A. Correct.
- 18 Q. This is a full -- fully assembled M1919; correct?
- 19 A. Correct.
- 20 Q. And at some point you hand to it Mr. Brown? 10:37:52
- 21 A. Correct.
- 22 Q. And you know that he's going to bring it back to Virginia;  
23 correct?
- 24 A. He was directed to take it back to Virginia.
- 25 Q. And the machine gun at this time you also know is 10:38:04

## RICHARD VASQUEZ - Cross

1 contraband?

10:38:07

2 A. That is correct.

3 Q. It cannot be possessed by anyone for any purpose other  
4 than law enforcement people?

5 A. Well, currently the firearm is still -- he still has  
6 legitimate paperwork showing a firearm with all of this  
7 information was transferred to him, so it was still his  
8 firearm.

10:38:15

9 Q. Well, it is contraband or it isn't contraband?

10 A. It is contraband.

10:38:33

11 Q. Okay. And you hand the contraband machine gun to a  
12 private citizen?

13 A. That is correct.

14 Q. Okay. And contraband is in the same category as cocaine,  
15 counterfeit money, all of that stuff. A citizen cannot possess  
16 it under any circumstances?

10:38:48

17 MR. VANN: Objection, Your Honor. Calling for a  
18 legal conclusion.

19 THE COURT: Overruled.

20 BY MR. SANDERS:

10:38:59

21 Q. You can answer.

22 A. Say that again.

23 Q. A contraband item cannot be possessed by a citizen for any  
24 reason at any time; correct?

25 A. I would say that's correct.

10:39:11

## RICHARD VASQUEZ - Cross

- 1 Q. And you handed to it Mr. Brown and he's a citizen. He's 10:39:13  
2 not a law enforcement --
- 3 A. That is correct.
- 4 Q. Okay. And did you report that to anyone?
- 5 A. Yes, I did. 10:39:24
- 6 Q. Who did you report that to?
- 7 A. Audrey Stucko.
- 8 Q. Audrey Stucko?
- 9 A. Yes, sir.
- 10 Q. If you could wait until I finish the question. Relax and 10:39:30  
11 wait until I finish the question.
- 12 At any time after that, did you prepare a report of  
13 what you did?
- 14 A. No, I did not.
- 15 Q. You reported this on the telephone to Ms. Stucko? 10:39:55
- 16 A. That is correct.
- 17 Q. At any time after that examination, were you ever  
18 interviewed by anybody concerning your involvement in that  
19 examination?
- 20 A. No, I was not. 10:40:05
- 21 Q. No one from ATF ever interviewed you?
- 22 A. No.
- 23 Q. During that examination, did you write any report?
- 24 A. I did not.
- 25 Q. No report at all? 10:40:17



## RICHARD VASQUEZ - Cross

- 1 A. None. 10:40:18
- 2 Q. Did you take any pictures?
- 3 A. I did not.
- 4 Q. At any time after were you asked to write a report?
- 5 A. No. 10:40:30
- 6 Q. So ATF, as an institution, has no report whatsoever of  
7 your examination of a firearm in which you determined it was  
8 contraband?
- 9 A. That is correct.
- 10 Q. Now, you also said that you told Mr. Brown to take it back 10:40:49  
11 to his place of business and somebody would contact him;  
12 correct?
- 13 A. Correct.
- 14 Q. And did you refer to the office of the special agents, the  
15 office of law enforcement? 10:41:11
- 16 A. Yes, sir, we did.
- 17 Q. Did you?
- 18 A. I say "we" because I don't remember exactly who made the  
19 phone call to the field office. But it was discussed that the  
20 Washington field office would take abandonment of the firearm. 10:41:24
- 21 Q. So -- but your answer is that you don't know whether you  
22 did?
- 23 A. Someone in our chain of command -- could have been me --  
24 made a phone call to the special agents in the Washington field  
25 office. 10:41:41

## RICHARD VASQUEZ - Cross

- 1 Q. You don't know if you did? 10:41:41
- 2 A. That's correct.
- 3 Q. Okay. Now, you do know that it was abandoned to ATF. Do  
4 you know the date?
- 5 A. Not the exact date without looking at the report. But it 10:41:56  
6 was probably a month and a half later.
- 7 Q. Okay. And in that month and a half he's in possession of  
8 a contraband machine gun?
- 9 A. Correct.
- 10 Q. And you did have contact during this period, during this 10:42:08  
11 month and a half, with others concerning the abandonment, did  
12 you not, e-mails, telephone calls?
- 13 A. Absolutely.
- 14 Q. And there was a discussion about whether Mr. Brown would  
15 be allowed to abandon the entire machine gun -- the entire 10:42:27  
16 contraband machine gun or if it were possible for him to  
17 abandon only the receiver; is that correct?
- 18 A. That is correct.
- 19 Q. And your answer or your opinion to the people who were  
20 asking was that he would be able to abandon only the receiver; 10:42:48  
21 correct?
- 22 A. Since it was an abandonment, the component parts are not  
23 regulated. And we didn't see it was a problem. I didn't see  
24 it was a problem that he be allowed to complete -- to keep the  
25 component parts. 10:43:07

## RICHARD VASQUEZ - Cross

1 Q. My question was, did you recommend to others in ATF to 10:43:09  
2 accept the abandonment of merely the side-plate instead of the  
3 entire machine gun?

4 A. I think that's what I said. I said I did not see an  
5 issue -- you could say that it was a recommendation but I saw 10:43:24  
6 no issue with the component parts other than to regulate an  
7 item being kept.

8 Q. Well, you finding no issue and recommending something are  
9 two different questions.

10 Did you recommend that Brown be permitted to abandon 10:43:41  
11 merely the side-plate?

12 A. I cannot remember my exact language, whether I said I  
13 recommend that he that be allowed to keep the component parts.

14 Q. And did you also offer to have someone from Firearms Tech  
15 Branch there present during the abandonment to help disassemble 10:44:03  
16 the machine gun?

17 A. I sure did.

18 Q. Okay. And you said that the abandonment took place a  
19 month and a half later or approximately?

20 A. Approximately. 10:44:21

21 Q. And to put a period on that, do you know that he abandoned  
22 only the receiver?

23 A. He abandoned the complete receiver housing and the barrel  
24 extension.

25 Q. And that was taken by an ATF special agent but a member of 10:44:38

## RICHARD VASQUEZ - Cross

1 your staff, one of the firearms enforcement officers, was 10:44:44  
2 present to help him disassemble it and assist in any way he  
3 could at the actual abandonment?

4 A. Yes, that is correct.

5 Q. And that took place at Brown's place of business. He is 10:44:55  
6 a -- or do you know? He's an FFL and he's a special  
7 occupational taxpayer?

8 A. Correct.

9 Q. And you knew that then?

10 A. Yes, I did. 10:45:12

11 Q. And the abandoned part, the receiver and the barrel  
12 shroud, was taken by the special agent and it was put into an  
13 evidence vault in Falls Church, Virginia; correct?

14 A. Correct.

15 Q. And today when you were showing all of the machine guns, 10:45:33  
16 we didn't see what was abandoned and seized as evidence, did  
17 we?

18 A. That is correct.

19 Q. And do you know why?

20 A. Special Agent Quartetti destroyed it. 10:45:48

21 Q. Okay.

22 Now, before destroying it, Quartetti had it delivered  
23 to the Firearms Tech Branch again and this time it goes as  
24 evidence should go. It's taken to your shop, it's entered by  
25 an evidence custodian, it's recorded that it was entered and 10:46:12

## RICHARD VASQUEZ - Cross

1 it's assigned to a -- one of the people that work for you for 10:46:17  
2 examination?

3 And now this time they are examining only the  
4 receiver because that is all they have?

5 A. That is correct. 10:46:29

6 Q. All right. And it's assigned to Mr. Mason?

7 A. Correct.

8 Q. And we just heard testimony about his report. You  
9 testified to it. That is Exhibit 295. Do you have that there  
10 with you? 10:46:44

11 A. I do. I do.

12 Q. Okay. And just to go through it quickly, it's a four-page  
13 report of what it is and it's along with Mr. Mason's findings  
14 and conclusions about the results of his testing; correct?

15 A. Correct. 10:47:35

16 Q. Okay. Now, is there any part of this report -- and you  
17 reviewed this report and you signed it?

18 A. That is correct.

19 Q. Okay. And that's normal procedure for any item that comes  
20 into Firearms Tech Branch for examination; correct? 10:47:51

21 A. Correct.

22 Q. It's brought in. It's handled as evidence, an examination  
23 is done, a report is written and then it's returned to whomever  
24 sent it in. That's what happened with this piece of evidence?

25 A. Correct. 10:48:10

## RICHARD VASQUEZ - Cross

1 Q. Now, this report is dated -- was brought in to your branch 10:48:14  
2 in June of 2007. So just to recount the dates, you did your  
3 examination of the full machine gun on October 31, 2006. Is  
4 that about right?

5 A. Correct. 10:48:44

6 Q. The machine gun then was abandoned on November -- in  
7 November of 2006; correct?

8 A. To Quartetti.

9 Q. To Quartetti?

10 A. Correct. 10:49:04

11 Q. It was placed in an evidence vault in Falls Church and now  
12 it's taken out of the evidence vault and it reaches FTB on June  
13 15, 2007; okay?

14 A. Okay.

15 Q. The report is written and executed on -- there's a date 10:49:18  
16 there of August 13, 2007?

17 A. Correct.

18 Q. Okay. Now, you said that it was destroyed, the item  
19 itself?

20 A. Yes. 10:49:38

21 Q. Do you know when it was destroyed?

22 A. No.

23 Q. On this report, as we go through the four pages, is there  
24 anything at all that resembles what you testified to at the  
25 beginning about it being an unlawful gun? Would you point out 10:50:06

## RICHARD VASQUEZ - Cross

1 the language to the jury? 10:50:13

2 A. I don't understand what you're saying.

3 Q. The report itself, the text of the report, the content of  
4 the report, is there anything there -- there's nothing in the  
5 findings and conclusions that indicates that this machine gun 10:50:27  
6 that was examined by Kenneth Mason is illegal; is that correct?

7 It says it's a firearm and it says it's a machine gun.

8 A. That is correct. These are technical evaluations. These  
9 aren't -- these reports are not criminal evaluations.

10 If we get in a piece of wood, we write it up and say 10:50:51  
11 it's a piece of wood and we classify it under the Gun Control  
12 Act or National Firearms Act, so we write up the item that we  
13 receive in. Is it regulated as a firearm? Is it regulated as  
14 a machine gun?

15 We don't make an investigative role out of this 10:51:09  
16 report.

17 Q. You do apply the federal laws and regulations to the item  
18 that you are examining, do you not?

19 A. Yes.

20 Q. Did Mr. Mason do that? 10:51:30

21 A. Yes, he did.

22 Q. Did he make any findings and conclusions that this machine  
23 gun is illegal?

24 A. No, he did not. Because, once again, we're making --  
25 using the Gun Control Act and the National Firearms Act. The 10:51:44

## RICHARD VASQUEZ - Cross

1 statutes that we talked about, we are not special agents. We 10:51:47  
2 are not investigators. We are technical personnel and we write  
3 up the object that we have for what it is classified under the  
4 Gun Control Act or National Firearms Act.

5 Q. Then what in the world was it sent to Firearms Tech Branch 10:52:05  
6 for? It was sent to determine whether it's legal; correct?

7 A. No. It was sent for a classification.

8 Q. Well, a classification as legal, not legal, contraband,  
9 not contraband is the very essence of this examination;  
10 correct? 10:52:29

11 A. Once again, when we get an item in, we don't -- we're not  
12 an investigating branch. We're a technical branch and we  
13 evaluate the firearm and we write up the firearm in this  
14 generic technical manner.

15 Q. Did you finish your answer? 10:52:54

16 A. Yes.

17 Q. So it's not your role to determine whether something was  
18 unlawfully made?

19 A. If someone were to ask my opinion, if this firearm was the  
20 firearm that was presented on a form and I would say no. This 10:53:12  
21 is not the firearm that is presented on the form.

22 So the assumption is that it's a contraband firearm.  
23 But when I write up a report or any of my personnel write up a  
24 report, they write up the report for what it is, turn it over  
25 to the special agent and the special agent starts an 10:53:35



## RICHARD VASQUEZ - Cross

1 investigation.

10:53:37

2 Q. So if you had an opinion, this thing had not changed --  
3 that had changed from contraband to something else in the  
4 interim between when you first examined it and when you  
5 examined it in 2007?

10:54:01

6 A. You're going to have to explain that a little better.

7 Q. Well, I may have misinterpreted what you said. Let me be  
8 clear.

9 You said that if you had an opinion, you would  
10 determine that it's contraband; right?

10:54:18

11 A. I said if a form was presented to me and a firearm were  
12 presented and a form said this was a MAC 10 or this was a 1919  
13 and then I made a comparison to those, then my opinion would be  
14 that these aren't the same firearms; that one of these is  
15 counterfeit and it's not truly representative of what is being  
16 transferred. That is not what we put in these technical  
17 evaluations.

10:54:39

18 Q. You signed this report?

19 A. That is correct.

20 Q. You approved this report?

10:54:52

21 A. Yes, I did.

22 Q. You knew the background on the gun and you didn't put that  
23 in the report, did you?

24 A. That is correct.

25 Q. And you testified about writing this report as if it was

10:55:01

## RICHARD VASQUEZ - Cross

1 the report -- the report of the first examination. This is the 10:55:05  
2 second one and there's no indication that it's contraband.

3 A. You're saying that I testified that this report was a  
4 record of the first examination?

5 Q. I'm sorry. 10:55:19

6 A. You just said that I said that this report is a record of  
7 the first examination.

8 Q. No. When you testified a little earlier when the  
9 government was examining you, you said you put it in your  
10 report. 10:55:34

11 A. I don't think I did.

12 Q. Now, I think you described a little bit about John Brown's  
13 background and your relationship with him. You are a friend?

14 A. That is correct.

15 Q. And that was before he brought the gun in to your place on 10:55:59  
16 October 31, 2006; right?

17 A. Correct.

18 Q. How long before?

19 A. I don't remember the exact time frame.

20 Q. But in any event, you became friendly after you knew that 10:56:14  
21 he was someone that was involved with the National Firearms Act  
22 Trade and Collectors Association, an advocate group for gun  
23 ownership and NFA ownership; correct?

24 A. Say that again?

25 Q. This -- your friendship with him did not precede when he 10:56:36

## RICHARD VASQUEZ - Cross

- 1 was the president of the NFA TCA? 10:56:44
- 2 A. I had never met him before that.
- 3 Q. So when he brought it in, you were involved in another  
4 activity with him, were you not?
- 5 A. And what was that? 10:57:00
- 6 Q. You were acting chief?
- 7 A. Correct.
- 8 Q. And you were the director of a writing project that  
9 involved the government and nongovernmental organization  
10 participation and that was the National Firearms Handbook? 10:57:19
- 11 A. That is incorrect.
- 12 Q. You were not involved in that?
- 13 A. No. You just specified that I was the director and I  
14 would love to have been the director but I am not the director.  
15 So you just specified that I was the director of a project that 10:57:38  
16 involved the National Firearms Act Trade Association and ATF,  
17 and that is incorrect.
- 18 Q. Mr. Vasquez, I'm not testifying. I'm asking questions.
- 19 A. And I gave you the answer.
- 20 Q. You were not involved in the National Firearms Handbook? 10:57:55
- 21 A. I was involved with the writing of a handbook called the  
22 National Firearms Act Handbook.
- 23 Q. Okay. And the purpose of that handbook was to provide a  
24 comprehensive guide to people that are affected by the NFA to  
25 assist them in doing things right; correct? 10:58:19

## RICHARD VASQUEZ - Cross

- 1 A. Say that again? 10:58:27
- 2 Q. The purpose of the NFA handbook, what was it?
- 3 A. To write a guide on the NFA procedures, to give  
4 information not only to the dealers but also to ATF personnel,  
5 inspectors, agents how the National Firearms Act operates, how 10:58:44  
6 to register firearms, identification of firearms. It was a  
7 very comprehensive manual.
- 8 Q. And could you put a date stamp on when that project  
9 started, about when?
- 10 A. I would have to say early 2006, 2005 time frame. 10:59:05
- 11 Q. So that was going on, the writing end of it, at that time.  
12 It was published in 2005. If you look at Exhibit Number 402,  
13 402.
- 14 A. Okay.
- 15 Q. These are excerpts of the handbook, it's not the entire 10:59:53  
16 handbook. It has the cover sheet, the preface and the table of  
17 contents. It's about a 200-page report. It's published -- it  
18 was published by ATF as an official publication in 2007 I  
19 believe and it's currently on the FTB website or the ATF  
20 website? 11:00:21
- 21 A. Correct.
- 22 Q. Correct. And anybody has any questions, they can go to  
23 the NFA handbook?
- 24 A. Correct.
- 25 Q. And that project was going on. Now, John Brown was the 11:00:28

## RICHARD VASQUEZ - Cross

1 president of the NFA TCA and he had staff members coming in and 11:00:34  
2 assisting FTB employees in the writing of this?

3 A. And that is incorrect. Would you like me to explain how  
4 it actually worked?

5 Q. Explain the writing and the nut and bolts how this 11:00:54  
6 occurred.

7 A. There was a gentleman named -- two gentlemen named Ed  
8 Owen, who was the chief of the Firearms Technology Branch when  
9 I was first hired, and a gentleman named Jack Patterson, who  
10 was the chief counsel for ATF. And they both retired about the 11:01:08  
11 same time frame, right around -- about 1999, 2000. They were  
12 hired by an attorney named Mark Barnes, who worked with John  
13 Brown, and they collaborated with our headquarters to work  
14 together to put a comprehensive manual together.

15 So they hired these two personnel with each over 30 11:01:34  
16 years of experience with ATF to write the actual chapters.

17 Now, as part of the initial meeting, I was part of  
18 the meeting; Audrey Stucko, our Deputy Assistant Director; Lou  
19 Radie (phonetic), our Assistant Director; and we sat down and  
20 discussed how this was going to happen and I was charged as a 11:01:56  
21 reviewer of the chapters. I was not a writer. Ed Owen and  
22 Jack Patterson were the writers.

23 So they would do chapters together. They would send  
24 the chapters by e-mail and myself, Gary Schaible, who is  
25 another person with over 30 something years of experience in 11:02:15

## RICHARD VASQUEZ - Cross

1 the National Firearms Act, would review them. It would go back 11:02:19  
2 to our chief counsel's office. Our chief counsel would then  
3 review our reviews, make changes, then it was given back to Ed  
4 Owen and Jack Patterson.

5 So to answer your question, as far as I can recall, I 11:02:34  
6 never discussed any of this with John Brown. He was not in the  
7 review process or the writing process.

8 Q. Okay. During this period that you described what was  
9 going on, did you have any interaction with John Brown about  
10 this project? 11:02:57

11 A. I don't think so. There's -- obviously we communicated  
12 but I don't think so.

13 Q. None at all?

14 A. I would say I don't remember discussing it.

15 Q. Did he come to FTB frequently during this period? 11:03:08

16 A. No.

17 Q. Now, you said you were friendly with John Brown during  
18 this entire period?

19 A. That is correct.

20 Q. And he never came out there to visit and in any way 11:03:30  
21 participate in the NFA handbook?

22 A. Not with the handbook. I think I explained earlier, he  
23 came out with the NFA TCA and some of its members to meet and  
24 become personal with a lot of the offices that were out there  
25 and on of one of the people that he was supporting to try to 11:03:53

## RICHARD VASQUEZ - Cross

- 1 get some clarification. 11:03:57
- 2 Q. Have you ever bought any guns from John Brown?
- 3 A. Yes, I have. Well, no, that is -- I have had him transfer  
4 firearms that I bought from other personnel.
- 5 Q. Okay. About how many over the period of time that you've 11:04:13  
6 known him?
- 7 A. Excuse me?
- 8 Q. About how many?
- 9 A. I think two.
- 10 Q. Any NFA guns? 11:04:23
- 11 A. No. I don't own any NFA firearms.
- 12 Q. Now, he's a source for guns for a lot of ATF employees, if  
13 you know?
- 14 A. I know that other personnel have used him. He's in the  
15 proximity of a lot of personnel. 11:04:35
- 16 Q. And if you know, during this period, was John Brown an  
17 informant for ATF?
- 18 A. John Brown is not an informant for ATF.
- 19 Q. You know.
- 20 A. As far as I am aware, John Brown is not an informant for 11:04:50  
21 ATF. If he's a secret informant, they wouldn't have told me.
- 22 Q. Okay. Did he ever supply you with information in e-mails  
23 about an ongoing litigation involving forfeiture?
- 24 A. Yes, he did.
- 25 Q. He supplied them to you and you supplied them to the 11:05:10

## RICHARD VASQUEZ - Cross

1 attorneys prosecuting the case?

11:05:12

2 MR. VANN: Objection, Your Honor. The relevance?

3 THE COURT: Overruled.

4 THE WITNESS: Say again?

5 BY MR. SANDERS:

11:05:18

6 Q. He supplied e-mails from a party in litigation with ATF  
7 and you supplied -- and you supplied them to the ATF counsel  
8 and prosecutors of that case; isn't that right?

9 A. That is correct. Like I said, John Brown's friendship was  
10 a friendship. Anything to do with ATF business, there was  
11 nothing hidden so any information given to me, I immediately  
12 passed it on.

11:05:40

13 Q. M'hum. And you would not consider that being an  
14 informant?

15 A. Absolutely not.

11:05:52

16 Q. What would you consider it?

17 A. Passing on information that had to do with an -- it wasn't  
18 even an investigation. It was -- I guess a term, litigation.

19 Q. It was a case in progress?

20 A. It was not a case. It was not a criminal case.

11:06:10

21 Q. It was a forfeiture?

22 A. Yes, that's correct.

23 Q. And you passed the information on to the --

24 A. Absolutely.

25 Q. Okay. Now, you also testified very briefly about --

11:06:24



## RICHARD VASQUEZ - Cross

1 A. It doesn't have the exact date but that sounds like about 11:34:06  
2 the approximate time.

3 Q. When you got together, let's talk about John Brown. John  
4 Brown was the president of this particular association;  
5 correct? 11:34:23

6 A. Correct.

7 Q. And you had worked with him before; correct?

8 A. Correct.

9 Q. And you guys had become personal friends; correct?

10 A. Correct. 11:34:32

11 Q. All right. You're an old marine and he was an old marine?

12 A. No. He son was a marine.

13 Q. And your kids got to know his kids?

14 A. My daughter is also a marine. They are both marine  
15 reservists, and that's kind of how our relationship started. 11:34:43

16 Q. Okay. Your kids then got to know his kids; correct?

17 A. Correct.

18 Q. And so then you all became personal friends; correct?

19 A. Correct.

20 Q. All right. So when he brings this 19 -- the pictures we 11:34:56  
21 saw here, government 131 through 135. When he brings that A4  
22 Browning in to you, you know him and he's a friend of yours;  
23 correct?

24 A. That is correct.

25 Q. And when he brings that in, you examine it and you look at 11:35:16

## RICHARD VASQUEZ - Cross

1 A. I guess I don't know what type of answer you want because 11:40:00  
2 that's not a yes-or-no answer.

3 Q. Okay. Let's try it again. That Fickaretta memo --

4 A. Yes.

5 Q. -- where people are asking, FTD is asking, hey, can you 11:40:13  
6 talk to us a little bit about that receiver, lower and upper,  
7 being joined together? That was a fleshing out of whether that  
8 was legal or not. Is that fair to say?

9 A. Yes.

10 Q. And that memo is from 2006; correct? 11:40:31

11 A. Correct.

12 Q. Now, you're aware that John Brown not only had that one  
13 gun that you examined but he had two others, didn't he?

14 A. I did not discover that until after the investigation  
15 started and they started recalling firearms. 11:40:53

16 Q. Excuse me, sir. Maybe I'm not being clear. You found out  
17 that John Brown had two other guns; right, sir?

18 A. Are you -- I have to ask you a question. Are you saying  
19 that today when we evaluated his firearm I found that out?

20 Q. No. Not saying that at all. I'm saying subsequently you 11:41:10  
21 found out that John Brown had two other contraband firearms in  
22 his possession, didn't you?

23 A. At one time they had gone through his possession, correct.

24 Q. And I know you're not in charge of it but Mr. Brown wasn't  
25 charged with any type of criminal offense, was he? 11:41:28

## RICHARD VASQUEZ - Redirect

1 A. No.

11:41:34

2 MR. TATE: That's all I have, Judge.

3 THE COURT: All right.

4 Redirect?

5 **REDIRECT EXAMINATION**

11:41:38

6 BY MR. VANN:

7 Q. Mr. Vasquez, let's start with Mr. Brown and I just want to  
8 clarify some of the things. I think you were asked repeatedly  
9 by defense counsel whether or not you wrote a report.

10 Typically in what situations do you write reports?

11:42:10

11 A. We don't just write reports just to write reports. A  
12 criminal case has to be opened up for us to write a report.

13 Q. When Mr. Brown showed up and was there an active criminal  
14 case about that firearm?

15 A. No, there was not.

11:42:28

16 Q. That you were aware of?

17 A. No.

18 Q. Did an agent bring that firearm in to you and say,  
19 "Pursuant to a criminal case, I need you to do an evaluation on  
20 this and write a report?"

11:42:35

21 A. No.

22 Q. What was your role that day?

23 A. To clarify what, in fact, Mr. Brown had in comparison to  
24 what was registered.

25 Q. And that was it?

11:42:48

## RICHARD VASQUEZ - Redirect

1 A. In the memo, it specifically talks about a lawfully 01:39:36  
2 transferable machine gun that has not had any information  
3 obliterated or removed being attached to a newly manufactured  
4 machine gun. And in this situation, there's an unlawful  
5 machine gun -- an unregistered machine gun that has been newly 01:39:55  
6 made and the identification of a lawful machine gun that has  
7 been destroyed being attached to the newly made machine gun  
8 using the lawfully transferred machine gun's information to  
9 transfer the unregistered machine gun.

10 Q. In both cases, what is the end result of the manufacturing 01:40:14  
11 or putting together of all of these parts? What is the end  
12 result in both this memo and what we have here today?

13 A. The end result is we created new machine guns, post 1986,  
14 with destroyed serial numbers in one situation.

15 Q. Okay. All right. 01:40:37

16 Now, let me take you back very briefly to Mr. Brown.  
17 There was a question about an e-mail that you passed on.  
18 Mr. Brown provided you with that information; is that correct?

19 A. That is correct.

20 Q. And what did you do with it? 01:40:52

21 A. I passed it on first to -- at the time now we had a new  
22 branch chief and I passed it on to chief counsel's office.

23 Q. If anyone else from the public had provided you with this  
24 same information, what would you have done with that  
25 information? 01:41:08

## RICHARD VASQUEZ - Redirect

1 A. That is correct. 01:53:22

2 Q. You, as acting chief, bought personal weapons, your own  
3 personal weapons, from Mr. Brown?

4 A. Incorrect.

5 Q. You didn't buy two firearms from Mr. Brown? 01:53:30

6 A. No, sir. I explained that earlier. He transferred two  
7 firearms that I had bought out of state.

8 Q. Okay. So he did a transfer for you?

9 A. Correct, and I paid a fee.

10 Q. And, finally, after Mr. Brown possessed, ended up 01:53:53  
11 possessing three contraband weapons, he was subsequently not  
12 prosecuted or ended up in a federal courthouse, did he?

13 A. That is correct.

14 MR. TATE: That's all I have, Judge.

15 THE COURT: All right. 01:54:10

16 Anything?

17 MR. VANN: Yes, Your Honor.

18 **REDIRECT EXAMINATION**

19 BY MR. VANN:

20 Q. I'll just take you step by step through the three 01:54:15  
21 questions. You indicated there was more to your answer than he  
22 didn't come forward. Can you describe why you think that  
23 there's more to your answer?

24 A. When he was alerted through conversation with the NFA  
25 branch that there was an issue, he was asking them: Well, what 01:54:35

# **Exhibit**

**B**

CR-10-01047-PHX-ROS (DKD), November 28, 2012

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA

3

4 United States of America, )  
5 )  
6 Plaintiff, )  
7 vs. )  
8 ) CR-10-01047-PHX-ROS (DKD)  
9 Randolph Benjamin Rodman and Idan )  
10 C. Greenberg, )  
11 )  
12 Defendants. )  
13 ) November 28, 2012  
14 ) 8:45 a.m.  
15 )

---

16 BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 Jury Trial - Day 2  
19 (Pages 161 through 362)

20  
21 Official Court Reporter:  
22 Elaine Cropper, RDR, CRR, CCP  
23 Sandra Day O'Connor U.S. Courthouse, Suite 312  
24 401 West Washington Street, Spc. 35  
25 Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

CR-10-01047-PHX-ROS(DKD), November 28, 2012

I N D E XTESTIMONY

WITNESS	Direct	Cross	Redirect	Recross
RICHARD VASQUEZ	167	211 246	256 278	276
ERNEST LINTNER	282	315 324	350	

E X H I B I T S

Number		Ident	Rec'd
1-41			211
19	A6042075 model 1919 machine gun-PICTURE ONLY	194	194
24	820101152 MP40 pieces		167
25	820101389 Thompson machine gun		171
26	820101541 model 1919 machine gun		171
27	820101546 model 1919 side-plate		172
28	820101557 model 1919 side-plate		172
29	820101575 MAG58/M240		173
30	820101589 MAG58/M240 machine gun		173
31	820101592 model 1919 machine gun		174
32	BA-V036 M2 heavy machine gun		174
33	C351 AK-47 machine gun		176
34	SAP453187 Maxim receiver/side-plates		180
35	SAP453187 Maxim receiver/side-plates		180
36	MG42 without serial number or manufacturer markings		182



ERNEST LINTNER - Direct

1 THE WITNESS: First name Ernest. Last name Lintner. 01:57:35  
2 L-I-N-T-N-E-R.

3 THE COURT: Go ahead.

4 MS. LEMKE: Thank you.

5 DIRECT EXAMINATION 01:58:01

6 BY MR. VANN:

7 Q. Mr. Lintner, please tell the jury what you currently do?

8 A. I am an area supervisor in our Harrisburg, Pennsylvania  
9 field office. I'm a first-line supervisor for -- our career  
10 field is industry operations investigator and we conduct 01:58:16  
11 regulatory compliance inspections of firearms and explosives  
12 dealers.

13 Q. Who is that with?

14 A. Bureau of Alcohol, Tobacco, Firearms & Explosives.

15 Q. How long have you been employed by ATF? 01:58:32

16 A. Since August of 2005.

17 Q. Prior to becoming an area supervisor, what did you do?

18 A. I was a specialist in the National Firearms Act branch and  
19 also served as acting branch chief for approximately five  
20 months prior to leaving there for Harrisburg. 01:58:49

21 Q. What does a specialist at the NFA branch do?

22 A. As a specialist, I would respond to correspondence,  
23 letters or phone calls from the industry and public with  
24 regulatory questions. Also assist the examiners on occasion if  
25 they had questions on how to process a form or the legality of 01:59:11

United States District Court

## ERNEST LINTNER - Cross

1 THE COURT: Do we have the date? Do you know? 03:50:58

2 THE WITNESS: I don't remember, Your Honor.

3 THE COURT: Is that the problem, the date?

4 MR. VANN: Yes, Your Honor. It's undated and his  
5 testimony that it was mid-2008 when he came out, that it was 03:51:06

6 being prepared while he was there. If we're talking about

7 transfers that occurred, the latest one --

8 THE COURT: Right. Sustained.

9 MR. VANN: Thank you.

10 MR. SANDERS: Okay. 03:51:20

11 BY MR. SANDERS:

12 Q. Now, the facility where the NFA branch is located is in  
13 Martinsburg, West Virginia, and that's where you were assigned;  
14 correct?

15 A. That's correct. 03:51:37

16 Q. And that is a facility that also houses the Firearms  
17 Technology Branch and other functions of ATF like licensing and  
18 some other things?

19 A. That's correct. It is the location for a National Tracing  
20 Center, Firearms Licensing, Explosives Licensing, Imports 03:51:52

21 Branch, National Firearms Act branch, and what we called Brady  
22 Branch which had to do with prohibited persons who had acquired  
23 firearms through licensees.

24 Q. And while you were there in Martinsburg, did you have  
25 occasion to become aware of John Brown? 03:52:15

## ERNEST LINTNER - Cross

1 A. And.

03:52:19

2 Q. And how would you describe your relationships and  
3 interactions with him during the time you were there?

4 A. They were cordial. I interacted with him in regards to  
5 doing one update on the NFA handbook. The handbook had been  
6 completed prior to my arrival there. One year, though, we did  
7 an update to try to correct some verbiage and text in it, and  
8 myself and two of my co-workers met with Mr. Brown to go over  
9 suggested updates to that manual.

03:52:34

10 Q. And with what frequency did you have occasion to interact  
11 with John Brown?

03:52:57

12 A. I would see Mr. Brown at major industry functions such as  
13 Small Arms Review Show which is held here in Phoenix once a  
14 year. There was also a machine gun shoot and gun show just  
15 outside of Louisville, Kentucky, which is held every six  
16 months. It's in April and October of every year. I will see  
17 him there. And also if there were a manufacturers' or an  
18 importers' conference, if he attended there, I would also see  
19 him there.

03:53:24

20 Q. And at the actual facility, how frequently would you see  
21 him during the time you were there?

03:53:39

22 A. It was not frequently that I saw him at the Martinsburg  
23 facility. The update that I discussed was we did not meet him  
24 there at Martinsburg. I can recall one meeting myself and Gary  
25 Schaible had with John Brown about some suggested regulatory

03:54:14

## ERNEST LINTNER - Cross

1 changes that we wanted to try to make and -- I believe I saw 03:54:19  
2 him more than just that one occasion, but I'm at a loss to tell  
3 you exactly when or under what circumstances.

4 Q. And your work with him on the handbook, the NFA handbook,  
5 was that work done at the facility out there in Martinsburg? 03:54:46

6 A. No. We actually met him at his business office in  
7 Chantilly, Virginia.

8 Q. I see. Okay.

9 Now, you testified about the bona fides of an  
10 approved ATF form. Have you ever had occasion for anybody at 03:55:04  
11 any time to call you and question one that had been approved?

12 A. You mean for someone to call me up and say, "Hey, your  
13 name is stamped at the bottom of this form. Did you really  
14 stamp it"?

15 Q. Something like that, yeah. 03:55:23

16 A. I never had that question posed to me.

17 Q. Because this is the solid gold certificate of ATF that  
18 that machine gun is registered to the person whose name appears  
19 as the transferee; correct?

20 MR. VANN: Objection to the question. Solid gold. 03:55:41

21 THE COURT: Overruled.

22 THE WITNESS: I'm sorry. Could you repeat the  
23 question, sir?

24 THE COURT: You are stylizing it so he needs to  
25 understand that. 03:55:56

# **Exhibit**

**C**

CR-10-01047-PHX-ROS (DKD), November 29, 2012

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA  
3

4 United States of America, )  
5 )  
6 Plaintiff, )  
7 vs. )  
8 ) CR-10-01047-PHX-ROS (DKD)  
9 Randolph Benjamin Rodman and Idan )  
10 C. Greenberg, )  
11 )  
12 Defendants. )  
13 ) November 29, 2012  
14 ) 8:46 a.m.  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )

21 BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
22 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
23

24 Jury Trial - Day 3  
25 (Pages 364 through 587)

Official Court Reporter:  
Elaine Cropper, RDR, CRR, CCP  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 35  
Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

CR-10-01047-PHX-ROS (DKD), November 29, 2012

I N D E XTESTIMONY

WITNESS	Direct	Cross	Redirect	Recross
GARY SCHAIBLE	370	388 414	422	443
DANIEL PINCKNEY	444	455 477	482	
KENDRA TATE	486	493 496	504	
JASON FRUSHOUR	511	519		
RALPH FOX	523	532	538	
SCOTT H. COLE	540	550	552	
JOHN BROWN	554			

E X H I B I T S

Number		Ident	Rec'd
3	86-0012729 model 1919 machine gun	542	
5	86-0013454 model 1919 machine gun	524	
19	A6042075 model 1919 machine gun-PICTURE ONLY	558	
23	820101086 model 1919 machine gun	569	
31	820101592 model 1919 machine gun	569	
42	Blue ribbon certification for 86-0012726	385	
48	Blue ribbon certification for A6041868	405	
49	Blue ribbon certification for A6041869	404	
53	Blue ribbon certification for A6042000	406	
54	Blue ribbon certification for A6042001	408	
55	Blue ribbon certification for A6042026	408	

United States District Court

GARY SCHAIBLE - Direct

PROCEEDINGS

1 (Jury enters.)

2 (Court was called to order by the courtroom deputy.)

3 (Proceedings begin at 8:46.)

4 THE COURT: Please be seated.

08:46:25

5 Good morning. We're ready to go.

6 All right. Counsel, ready?

7 MR. VANN: Yes, Your Honor. Gary Schaible.

8 GARY SCHAIBLE,

9 called as a witness herein by the Government, having been first  
10 duly sworn or affirmed to testify to the truth, was examined  
11 and testified as follows:

08:47:00

12 COURTROOM DEPUTY: State your name for the record,  
13 spell your last name, please.

14 THE WITNESS: My name is Gary Schaible.

08:47:08

15 S-C-H-A-I-B-L-E.

16 COURTROOM DEPUTY: Great. Have a seat right up here.

**DIRECT EXAMINATION**

17 BY MR. VANN:

18 Q. Good morning, Mr. Schaible.

08:47:42

19 A. Good morning.

20 Q. Can you please tell the jury what it is that you do?

21 A. I'm well, I'm assigned to the firearms and explosives

22 division in bureau headquarters of Bureau of Alcohol, Tobacco,

23 Firearms & Explosives and most of my time is spent in the NFA

08:47:58

24 United States District Court



GARY SCHAIBLE - Direct

1 branch, which is part of this division, and I would write  
2 letters, do rule-makings, provide -- well, not technical but  
3 interpretations of the statutory requirements of the National  
4 Firearms Act, occasionally process forms. I'm a custodian of  
5 the record, make sure it's maintained.

08:48:02

08:48:19

6 Q. And how long have you been employed at ATF?

7 A. 40 years.

8 Q. 40 years?

9 A. Yes.

10 Q. And in that 40 years, where was the majority of your time  
11 spent?

08:48:27

12 A. In the National Firearms Act branch.

13 Q. What positions have you held in the National Firearms Act  
14 branch?

15 A. I have been a supervisor coordinator. I have been the  
16 branch chief and a program manager which was retitled to  
17 pre-liaison analyst.

08:48:36

18 Q. All right. Now, before we get into the details of your  
19 job and of some the things related to this case, do you know  
20 either of the defendants sitting here today?

08:48:57

21 A. I know Mr. Rodman.

22 Q. You do know Mr. Rodman?

23 A. Yes.

24 Q. Please explain your relationship with Mr. Rodman to the  
25 jury.

08:49:09

United States District Court

## GARY SCHAIBLE - Cross

1 A. Yes.

09:38:48

2 Q. Oh. Okay. I am mistaken. The memo that -- the letter  
3 that you wrote or the referral that you wrote indicated that  
4 one of the guns was in the possession of a licensed SOT in  
5 Virginia, John Brown?

09:39:04

6 A. That I believe is correct as far as the referral memo we  
7 sent to the field, yes.

8 Q. Correct. And the basis of that referral memo was the  
9 information that you received; right? And that's what I'm  
10 asking about.

09:39:19

11 A. Well, again, it started with what was on the Internet.

12 Q. Yes.

13 A. But we didn't receive any other information.

14 Q. But you wrote a letter with that fact in it when you wrote  
15 the letter to --

09:39:36

16 A. Right. I'm sorry. I interrupted you there. I'm sorry.

17 Q. Pardon?

18 A. I interrupted there. I'm sorry.

19 Q. The memo that you wrote, you personally wrote a memo for  
20 the signature of the Deputy Assistant Director to Phoenix;  
21 correct?

09:39:53

22 A. Correct.

23 Q. And in that letter, you stated that a licensed SOT in  
24 Virginia was in possession of one of the Clark firearms, did  
25 you not?

09:40:14

## GARY SCHAIBLE - Cross

- 1 A. That was part of the information, correct. 09:40:15
- 2 Q. Okay. Well, that's what I asked about.
- 3 A. Okay.
- 4 Q. Now, Virginia is in the jurisdiction of the special agents  
5 in the Falls Church office; correct? 09:40:26
- 6 A. Correct.
- 7 Q. And did you make a referral to that office?
- 8 A. No.
- 9 Q. Do you know if anyone did?
- 10 A. I would have to guess yes but I don't know. 09:40:38
- 11 Q. Well, you do know that you were involved in the  
12 abandonment of one of the firearms in November; correct?
- 13 A. Yes. I'm not sure of the date exactly you're referring  
14 to. You're referring to November 2006.
- 15 Q. Correct. But you have personal recollection of that? 09:40:58
- 16 A. Yes. I was there.
- 17 Q. And you were present when a special agent from the Falls  
18 Church office accepted abandonment of one machine gun,  
19 A6042075; correct?
- 20 A. I don't know the number but I was there for the 09:41:16  
21 abandonment.
- 22 Q. Right. And who else was there, if you recall?
- 23 A. I know the agent was there, Doug Quartetti, someone from  
24 Firearms Tech. I'm not quite sure who.
- 25 Q. The agent, Doug Quartetti, where was he assigned? 09:41:33

## GARY SCHAIBLE - Cross

1 A. Falls Church.

09:41:37

2 Q. All right. And do you have any knowledge of how he became  
3 involved in the investigation?

4 A. No.

5 Q. Now, moving on to another subject, I'm going to go through  
6 a number of the certificates, Mr. Schaible, and I'll move as  
7 fast as I can. There's a lot of them there.

09:41:51

8 Let's take number 60. Do you have that?

9 A. Yes.

10 Q. Just a cursory review. You've seen what that is?

09:42:37

11 A. Yes.

12 Q. And what do you call that in the jargon of ATF, blue  
13 ribbon certificate?

14 A. A blue ribbon certificate, yes.

15 Q. That's a common name.

09:42:49

16 A. Yes.

17 Q. Would you explain to the members of the jury what a blue  
18 ribbon certificate is?

19 A. This is where someone in the NFA branch would do a search  
20 of the registry, the National Firearms Registration Transfer  
21 Record, and report the results where they would, you know, say  
22 that after a diligent search of the record, this is what I  
23 found or didn't find, would sign off on it. It would go, then,  
24 to the branch chief who would sign off on the blue cover sheet  
25 saying that they basically recognize the specialist's signature

09:43:01

09:43:24

## GARY SCHAIBLE - Cross

1 in this case.

09:43:28

2 Q. In a few sentences, that is a certificate that everything  
3 within that packet is what's in the official record, the NFRTR;  
4 right?

5 A. Correct.

09:43:47

6 Q. Okay now, if you'll go to the first few pages, there is  
7 something called a screen shot.

8 A. Right.

9 Q. And would you describe what that is?

10 A. For each firearm in the registry, we maintain basically a  
11 transaction history starting with the first registration and  
12 basically moving up. So whoever it's registered to at the  
13 current time would appear on the top of the list and we do some  
14 color coding in there, that if it's a magenta color, as far as  
15 the database goes, that identifies the current registrant.

09:44:01

09:44:23

16 Q. And you -- in the top there, the serial number of the  
17 machine gun is described.

18 A. Correct.

19 Q. And the descriptive data, the manufacturer, the type of  
20 firearm, the model, the caliber, the barrel length and the  
21 overall length are all described on the top line; correct?

09:44:43

22 A. Correct.

23 Q. And that is the same information that appears on the Forms  
24 3 and Forms 4?

25 A. Right.

09:45:03

## GARY SCHAIBLE - Cross

- 1 Q. Those are the six items of information; correct? 09:45:03
- 2 A. Correct.
- 3 Q. So that when -- this is a snapshot of the computer as it  
4 exists on the date that is in the upper right-hand corner?
- 5 A. I don't have a date in the upper right-hand corner. 09:45:23
- 6 Q. On the screen shot, you don't have a date and time?
- 7 A. No, not on the screen shot, no.
- 8 Q. All right. But since it's in the blue ribbon certificate,  
9 that date would be the effective date that this thing was  
10 prepared. This is a shot of the computer as it appeared on 09:45:50  
11 that date?
- 12 A. Correct.
- 13 Q. Now, if you'll look at -- do you have number 60?
- 14 A. Yes.
- 15 Q. The description is manufacturer, MIX; type; model. That's 09:46:03  
16 that. And the caliber is 9 millimeter. The barrel length is  
17 five seven five, 5.75 inches?
- 18 A. M'hum.
- 19 Q. And the overall length of the barrel is 11 inches;  
20 correct? 09:46:31
- 21 A. Correct.
- 22 Q. Now, if you would move down the forms to the form that  
23 went from Clark to my client, Mr. Rodman, for this machine gun.
- 24 A. Okay.
- 25 Q. How is the caliber barrel length and overall length -- 09:46:58

## GARY SCHAIBLE - Cross

1 what appears on the form?

09:47:05

2 A. On the form it shows .30 caliber. The barrel length of 24  
3 and an overall length of 41.

4 Q. So each of those in the screen shot, the actual database  
5 is inaccurate; correct?

09:47:21

6 A. They differ, correct.

7 Q. Right.

8 And when the -- the person that approved it at that  
9 time, the examiner, the people that work for you are supposed  
10 to correct the record in the NFRTR to conform to the form if  
11 it's approved; right?

09:47:37

12 A. If what was shown on the form is correct, then yes.

13 Q. Well, if it's approved, that's what was approved; right?

14 A. That's what was approved. Whether it was picked up as an  
15 error is a different matter.

09:48:04

16 Q. Is it signed as approved?

17 A. Yes.

18 Q. So that the person who received this form received a form  
19 that is different than the description in the database?

20 A. Correct.

09:48:21

21 Q. Okay. And now if you'll move to the number 64. Do you  
22 have 64?

23 A. Yes.

24 Q. Would you read the description on the screen shot, just  
25 the caliber, barrel length, overall length?

09:49:02

## GARY SCHAIBLE - Cross

- 1 A. Caliber, .45; barrel length 6.25; overall length, 11. 09:49:05
- 2 Q. And now on the Form 3 that came from Clark to Mr. Rodman,  
3 for that machine gun.
- 4 A. This is from Clark to Mr. Rodman you said?
- 5 Q. Yes. Caliber, barrel length, overall length. 09:49:35
- 6 A. Okay. It shows .30 caliber; barrel length of 24; overall  
7 length of 41.
- 8 Q. The variants in barrel length and overall length of three  
9 feet approximately; correct?
- 10 A. Yes. The overall length of 41. 09:50:03
- 11 Q. And once again, whoever approved that was supposed to  
12 change the description in the database and did not; correct?
- 13 A. Correct. If they subpoenaed that, there was something  
14 that we should look into.
- 15 Q. It would be something to look into. What was the date 09:50:26  
16 that it was approved?
- 17 A. September 21, 2000.
- 18 Q. And in 12 years nobody looked into it; correct?
- 19 A. As far as I know.
- 20 Q. Okay. Number 58. I think that was the one you had. 57, 09:50:40  
21 I'm sorry.
- 22 A. I have 64. Number 57.
- 23 Q. 57, yes.
- 24 A. Okay.
- 25 Q. And to save a little time, would the same discrepancies 09:51:03



## GARY SCHAIBLE - Cross

1 appear in that one? For instance, what is the serial number? 09:51:09

2 A. A6042028.

3 Q. And what does the screen shot, the actual computer, say?

4 A. 9 millimeter, 5.75 barrel length, 11-inch overall length.

5 Q. Okay. So the same discrepancies appear in that one. 09:51:32

6 A. I am getting there. Yes. The form shows .30 caliber, a  
7 barrel length of 22 inches and an overall length of 49.

8 Q. So that this, the computer, is inaccurate as far as this  
9 machine gun is concerned as of today, as of the date of the  
10 blue ribbon certificate? 09:52:17

11 A. Again, they differ. The descriptions, yes.

12 Q. And the person that has the -- that it's registered to has  
13 a different gun than the one that's described in the database;  
14 correct?

15 A. Different caliber, barrel length, and overall length, yes. 09:52:35

16 Q. And the next one is 56. To save a little time, if you  
17 could view the same data, compare the screen shot with the  
18 transfer itself and tell me if the screen shot is accurate,  
19 whether the computer is accurate.

20 A. And this would be for the transfer from Mr. Clark to 09:53:13  
21 Mr. Rodman?

22 Q. Yes. This is serial number -- what?

23 A. A6042027 and, yes, our database shows 9 millimeter with a  
24 5.75 barrel length and an 11-inch overall length. The form  
25 shows .30 caliber with a 22-inch barrel length and a 49-inch 09:53:34

## GARY SCHAIBLE - Cross

- 1 overall length. 09:53:39
- 2 Q. A different description; correct?
- 3 A. Correct.
- 4 Q. Inaccurate?
- 5 A. I'm sorry? 09:53:43
- 6 Q. Inaccurate. The database is inaccurate?
- 7 A. Or the form is inaccurate.
- 8 Q. Well, the form is approved.
- 9 A. Yes.
- 10 Q. So the database shows a different description than what's 09:53:51  
11 in the database?
- 12 A. And, again, should this have been picked up on? Maybe so.
- 13 Q. When was that approved, that form?
- 14 A. June 1, 2002.
- 15 Q. Two thousand and . . .? 09:54:12
- 16 A. Two.
- 17 Q. So in 10 years nobody has picked that up?
- 18 A. Correct.
- 19 Q. Now, the next one is number 49, Mr. Schaible, the number?
- 20 A. A6041869. 09:54:42
- 21 Q. And the description on the form transferring it to  
22 Mr. Rodman?
- 23 A. On the form it shows .30 caliber, barrel length of 24,  
24 overall length of 41.
- 25 Q. So the database is inaccurate on this firearm? 09:55:16

## GARY SCHAIBLE - Cross

- 1 A. Again, they differ. The database shows .45, 5.75, and 11. 09:55:20
- 2 Q. And what's the date of the transfer?
- 3 A. February 21, 2001.
- 4 Q. So that hadn't been picked up in 11 years?
- 5 A. Correct. 09:55:36
- 6 Q. And the next one is number 48.
- 7 A. Okay.
- 8 Q. Serial number?
- 9 A. A6041868.
- 10 Q. The description in the screen shot, the database? 09:56:12
- 11 A. Shows .45 caliber, 5.75 barrel and 11 overall.
- 12 Q. And the form transferring it from Clark to my client?
- 13 A. .30 caliber, 24-inch barrel length, 41-inch overall.
- 14 Q. Okay. The computer, once again, is inaccurate?
- 15 A. It's different. 09:56:37
- 16 Q. And the next one is number 69.
- 17 A. Okay.
- 18 Q. Serial number?
- 19 A. 820101457.
- 20 Q. And description? 09:57:10
- 21 A. In the database, it's a .45 caliber, the barrel length of
- 22 6.25 and overall length of 11.
- 23 Q. And the form transferring it from Clark to Mr. Rodman?
- 24 A. Shows a caliber of .30, a barrel length of 22, and an
- 25 overall of 36. 09:57:27

## GARY SCHAIBLE - Cross

1 Q. Okay. And the date of the transfer? 09:57:28

2 A. February 20, 2008.

3 Q. Okay. So the database is inaccurate for that machine  
4 gun?

5 A. Different. 09:57:46

6 Q. And the final one for Mr. Rodman is number 68.

7 A. Okay.

8 Q. The serial number?

9 A. 820101546.

10 Q. And the description in the database? 09:58:27

11 A. .45 caliber, 6.25 barrel length, 11-inch overall.

12 Q. All right. And what is the description of that machine  
13 gun on the transfer form from Clark to my client?

14 A. It is .30 caliber, 22-inch barrel length, and 36-inch  
15 overall. 09:58:48

16 Q. Okay. And the date of that transfer is the same as the  
17 other; right?

18 A. I don't remember what the other one is. February 20,  
19 2008.

20 Q. February 20, correct. And the database is inaccurate once 09:58:57  
21 more. That is a different machine gun?

22 A. Shows a difference in description, yes.

23 Q. We're nearing the end. I'm sure you'll be happy to hear  
24 that.

25 The next one is number 53. 09:59:13

## GARY SCHAIBLE - Cross

- 1 A. Okay. 09:59:37
- 2 Q. This is a serial number -- what is the serial number?
- 3 A. A6042000.
- 4 Q. And the description of the machine gun as it appears in  
5 the database? 09:59:55
- 6 A. .45 caliber, 5.5 -- I'm sorry, 5.75 barrel length, 11-inch  
7 overall.
- 8 Q. And the transfer form from Clark to -- who was the  
9 transferee on that one?
- 10 A. I'm sorry. Could you ask me that again? 10:00:15
- 11 Q. The Form 3 transferring it from Clark, who is the  
12 transferee?
- 13 A. From Mr. Clark, I show a transfer to Mr. Clark but  
14 nothing --
- 15 Q. It was never transferred? 10:00:58
- 16 A. -- nothing transferred from Mr. Clark.
- 17 Q. What is the description of the machine gun that was  
18 transferred to Mr. Clark?
- 19 A. Okay. It's not shown as a machine gun.
- 20 Q. It's not a -- 10:01:10
- 21 A. It's shown as an any other weapon.
- 22 Q. Oh. Okay. And does the description match?
- 23 A. No.
- 24 Q. Okay. So that one is inaccurate?
- 25 A. Descriptions differ between a form and a database, yes. 10:01:25

## GARY SCHAIBLE - Cross

- 1 Q. The database does not match the description of the 10:01:30  
2 registration form?
- 3 A. Right.
- 4 Q. Number 54, what's the serial number of that one?
- 5 A. I'm sorry, 54 or 64. 10:01:45
- 6 Q. 54. Five four.
- 7 A. Okay. That's A6042001.
- 8 Q. All right. And what is the -- how is that described in  
9 the computer?
- 10 A. .45 caliber, 5.75 barrel length, 11 overall. 10:02:21
- 11 Q. And how is that same machine gun described on the form  
12 transferring it from Mr. Clark to a Richard Simpson?
- 13 A. Okay. It is shown as a .30 caliber with a barrel length  
14 of 24 inches and an overall length of 40.
- 15 Q. And what's the date of that transfer? 10:02:50
- 16 A. October 2, 2003.
- 17 Q. All right. And so that one is inaccurate. The computer  
18 has an inaccurate description.
- 19 A. It has a different description, yes.
- 20 Q. Okay. Number 55. 10:03:05
- 21 A. Okay.
- 22 Q. What serial number is that?
- 23 A. It is A6042026.
- 24 Q. And the description in the computer, in the NFRTR?
- 25 A. Shows 9 millimeter, 5.75 barrel length, and an 11-inch 10:03:40

## GARY SCHAIBLE - Cross

1 overall length.

10:03:46

2 Q. Now, that machine gun or machine gun with that serial  
3 number was transferred from Clark to Richard Simpson. Do you  
4 have the Form 3 there -- Form 4, I'm sorry.

5 A. Yes, sir.

10:04:00

6 Q. And how is that machine gun described there?

7 A. .30 caliber, 23-inch barrel, 45-inch overall.

8 Q. And so the -- once again, the database is inaccurate?

9 A. It is different, yes.

10 Q. Is it accurate?

10:04:20

11 A. Well, the 9 millimeter, 5.75, and 11 were what was  
12 reported upon manufacture I would believe?

13 Q. That would be on the Form 2 from the date of birth.  
14 Sometime before '86?

15 A. Right.

10:04:37

16 Q. Okay. And it had been transferred a number of times after  
17 that?

18 A. Yes, it has.

19 Q. And anytime the description changes and is approved, the  
20 database must be corrected; correct?

10:04:50

21 A. If the examiner picks up on it and sees a difference, yes.

22 Q. That's what the examiner is supposed to do?

23 A. Correct.

24 Q. All right.

25 Now, the next one is number 59.

10:05:05

## GARY SCHAIBLE - Cross

- 1 A. Okay. 10:05:27
- 2 Q. What is the serial number of that, Mr. Schaible?
- 3 A. A6042030.
- 4 Q. All right. And what does the computer say is the  
5 description of that machine gun? 10:05:40
- 6 A. 9 millimeter, 5.75 inch barrel, 11 overall.
- 7 Q. All right. And that machine gun or machine gun with that  
8 serial number was transferred from Mr. Clark to Richard  
9 Simpson, correct, on the Form 4?
- 10 A. Correct. 10:05:57
- 11 Q. And what is the date of that transfer?
- 12 A. March 24, 2003.
- 13 Q. All right. And how is that machine gun described on the  
14 form?
- 15 A. .45 caliber, 10-inch barrel, 33-inch overall. 10:06:07
- 16 Q. Correct. Once again, the database is inaccurate.
- 17 A. It is different, yes, sir.
- 18 Q. The next-to-the-last one is number 63.
- 19 A. Okay.
- 20 Q. Serial number is what? 10:06:51
- 21 A. A6044921 (sic).
- 22 Q. And what's the description of that machine gun in the  
23 database?
- 24 A. It's a .45 caliber, 5.75 barrel, and 11-inch overall.
- 25 Q. And that machine gun was transferred on a Form 4 from 10:07:11



## GARY SCHAIBLE - Cross

- 1 Clark to Richard Simpson on what date? 10:07:16
- 2 A. October 2, 2003.
- 3 Q. And what is the description?
- 4 A. On the form that --
- 5 Q. On the form. 10:07:33
- 6 A. It shows .30 caliber, 19-inch barrel, 41-inch overall.
- 7 Q. And so, once again, we have an inaccurate description in
- 8 the database.
- 9 A. A different one, yes, sir.
- 10 Q. Okay. And the final one is serial number -- or number 71, 10:07:50
- 11 Exhibit 71.
- 12 A. Okay.
- 13 Q. What's the serial number on that one?
- 14 A. It is 820101589.
- 15 Q. And the description in the database? 10:08:29
- 16 A. .45 caliber, 11-inch barrel, 6.25 overall.
- 17 Q. And that machine gun was transferred from Clark to a
- 18 Richard Simpson on what date on the Form 3 -- Form 4, I'm
- 19 sorry.
- 20 A. March 22, 2005. 10:08:52
- 21 Q. And the description?
- 22 A. .30 caliber, 21.5-inch barrel, 49.5-inch overall.
- 23 Q. So that, once again, the database is inaccurate?
- 24 A. Yes, sir, there's a difference between the descriptions.
- 25 Q. All right. And the certificate that we talked about, the 10:09:15

## GARY SCHAIBLE - Cross

1 blue ribbon certificate, that form is used in criminal cases 10:09:22  
2 all over the country to prove the registration of -- the  
3 registration or non-registration of a machine gun; correct?

4 A. It would be the certified results of a search of the  
5 database, yes. 10:09:41

6 Q. In other words, that's evidence that that -- that unless  
7 the machine gun in question matches the description in the  
8 database, that firearm would be declared nonregistered; right?

9 A. Could you ask me that one again? I'm sorry.

10 Q. Yes. The blue ribbon certificate is evidence, provides 10:10:07  
11 evidence in criminal cases all over the country all the time of  
12 the registration, non-registration of a machine gun; correct?

13 A. Correct.

14 Q. And if it does not match the description in the database,  
15 it's declared nonregistered; right? 10:10:28

16 A. Well, in this case, the certificate says I certified that  
17 the following firearm is registered to Richard Alan Simpson and  
18 it gives that machine gun.

19 Q. They certified to the truth of the matter; correct?

20 A. Certified that it's registered to Mr. Simpson. 10:10:45

21 Q. Now, in view of this sampling that we've just gone  
22 through, would you be surprised to learn that all 34 of the  
23 firearms that Mr. Clark transferred, the database is  
24 inaccurate? Would that surprise you?

25 A. Well, again, I would say there's differences in what the 10:11:08

## GARY SCHAIBLE - Cross

1 description is.

10:11:12

2 Q. Well, a difference in a description would be inaccurate,  
3 wouldn't it?

4 A. And the form is part of that process. If the form is  
5 inaccurate -- we're relying on what's submitted on the form to  
6 transfer these firearms. And the form is being filed by  
7 someone who says under the penalties of perjury, I declare that  
8 I've examined this application to the best of my knowledge and  
9 believe that it is true, correct, and complete. So somewhere  
10 along the line if a description changed, someone was saying  
11 under penalties of perjury that, you know, this is the  
12 description.

10:11:23

10:11:44

13 Q. Well, do you have any basis to believe that he did not  
14 describe the caliber and the barrel length and the overall  
15 length accurately on the form?

10:12:03

16 A. When you say "he," who do you mean?

17 Q. Oh. The transferor, Clark. Clark was the transferor in  
18 each one of those.

19 A. Well, he's filing it under penalties of perjury.

20 Q. In fact, you've had them in custody since 2008  
21 approximately. Has anyone told you that any of those  
22 descriptions were inaccurate?

10:12:21

23 A. No.

24 MR. SANDERS: I have no further questions, Your  
25 Honor.

10:12:36

## GARY SCHAIBLE - Cross

1 THE COURT: Cross? Mr. Tate. 10:12:37

2 CROSS - EXAMINATION

3 BY MR. TATE:

4 Q. Good morning, Mr. Schaible. How are you, sir?

5 A. My voice is going. 10:12:54

6 Q. I understand.

7 Mr. Schaible, you've been with ATF in various jobs  
8 for about 40 years; correct?

9 A. Correct.

10 Q. And in that time, let's focus first on a period of time 10:13:10  
11 about 2006; okay? Let's focus on that period of time. What  
12 was your job in 2006?

13 A. It would have been -- I forget when my title changed but  
14 my title was either program manager or industry liaison for the  
15 NFA branch. 10:13:33

16 Q. Okay. And at that time, sometime during that period,  
17 let's see if we can put some kind of timeline, although I know  
18 that's about six years ago. You became aware of the Fickaretta  
19 memo; correct? Would that be fair to say?

20 A. I'm sorry, what memo is that? 10:13:50

21 Q. The memo from Theresa Fickaretta? You're not aware of the  
22 Theresa Fickaretta memo?

23 A. I have no idea which one you're referring to.

24 Q. Okay. All right. That's okay. You just told me no.

25 And at that time in 2006, you were made aware of by 10:14:02

# **Exhibit**

**D**

CR-10-01047-PHX-ROS (DKD), November 29, 2012

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

1			
2			
3			
4	United States of America,	)	
5		)	
6	Plaintiff,	)	
7	vs.	)	
8		)	CR-10-01047-PHX-ROS (DKD)
9	Randolph Benjamin Rodman and Idan	)	
10	C. Greenberg,	)	
11		)	
12	Defendants.	)	
13		)	November 29, 2012
14		)	8:46 a.m.
15		)	

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 3  
(Pages 364 through 587)

Official Court Reporter:  
**Elaine Cropper, RDR, CRR, CCP**  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 35  
Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

CR-10-01047-PHX-ROS (DKD), November 29, 2012

I N D E XTESTIMONY

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GARY SCHAIBLE	370	388 414	422	443
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KENDRA TATE	486	493 496	504	
JASON FRUSHOUR	511	519		
RALPH FOX	523	532	538	
SCOTT H. COLE	540	550	552	
JOHN BROWN	554			

E X H I B I T S

Number	Ident	Rec'd
3 86-0012729 model 1919 machine gun	542	
5 86-0013454 model 1919 machine gun	524	
19 A6042075 model 1919 machine gun-PICTURE ONLY	558	
23 820101086 model 1919 machine gun	569	
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42 Blue ribbon certification for 86-0012726	385	
48 Blue ribbon certification for A6041868	405	
49 Blue ribbon certification for A6041869	404	
53 Blue ribbon certification for A6042000	406	
54 Blue ribbon certification for A6042001	408	
55 Blue ribbon certification for A6042026	408	

United States District Court

## DANIEL PINCKNEY - Direct

1 witness? 11:22:52

2 THE COURT: Any objection?

3 MR. SANDERS: I'm sorry, Your Honor?

4 THE COURT: Can this witness be excused?

5 MR. SANDERS: Yes. 11:22:58

6 MR. VANN: Yes.

7

8 DANIEL PINCKNEY,

9 called as a witness herein by the Government, having been first

10 duly sworn or affirmed to testify to the truth, was examined 11:23:22

11 and testified as follows:

12 COURTROOM DEPUTY: Please state your name for the

13 record. Spell your last name, please.

14 THE WITNESS: Daniel Pinckney. P-I-N-C-K-N-E-Y.

15 COURTROOM DEPUTY: Have a seat right up here, sir. 11:23:37

16 THE WITNESS: Thank you.

17

**DIRECT EXAMINATION**

18 BY MR. VANN:

19 Q. Good morning, Mr. Pinckney.

20 A. Hi. 11:23:59

21 Q. Can you please tell the jury where you're currently  
22 employed?

23 A. I'm currently a program analyst with the Violent Crime  
24 Analysis Branch with ATF.

25 Q. And have you always been in that section of ATF? 11:24:08



DANIEL PINCKNEY - Direct

- 1 A. No, sir. 11:24:11
- 2 Q. Where have you worked at ATF?
- 3 A. I worked in the National Firearms Act branch as a legal  
4 instruments examiner prior to my current job and before that, I  
5 was a contractor with the ATF National Tracing Center. 11:24:23
- 6 Q. Approximately how long have you worked either for ATF as a  
7 contractor or directly for ATF as a government employee?
- 8 A. Since June of 2005.
- 9 Q. Now, approximately how long were you an NFA examiner?
- 10 A. Two years, just slightly over two years. 11:24:40
- 11 Q. Do you have any experience with firearms?
- 12 A. Yes.
- 13 Q. And what experience do you have with firearms?
- 14 A. A hobbyist. I collect standard firearms, rifles, pistols,  
15 shoot as a hobby and of course worked in the National Firearms 11:24:58  
16 Act branch. I processed forms.
- 17 Q. Did your work at the National Firearms Act branch increase  
18 your knowledge of firearms?
- 19 A. Yes. I never physically looked at or touched firearms but  
20 dealt a lot with serial numbers and weapon types in the process 11:25:15  
21 doing firearm tracing.
- 22 Q. And tracing as well?
- 23 A. Yes. Tracing firearms.
- 24 Q. And your employment with the tracing center for ATF, what  
25 exactly does the tracing center do? 11:25:29

United States District Court

## DANIEL PINCKNEY - Cross

- 1 pretty pricy. 11:42:58
- 2 Q. The resources were a little depleted by joining ATF?
- 3 A. Yes, sir.
- 4 Q. Okay. Now, in and about this short period that you were  
5 employed in Martinsburg, did you become acquainted with a guy 11:43:09  
6 named John Brown?
- 7 A. I didn't deal with his work directly, no, but I know of  
8 him, yes.
- 9 Q. You know of him and you knew what he was --
- 10 A. Yes. Yes. 11:43:26
- 11 Q. Did you ever meet him?
- 12 A. Yes.
- 13 Q. How many times?
- 14 A. Prior to this event, probably three maybe.
- 15 Q. And what were those occasions, what -- 11:43:38
- 16 A. He's the president of an organization called the National  
17 Firearms Act Trade and Collector's Association and he had  
18 dealings with ATF at the time. They were in the process of  
19 developing a reference manual for the community that detailed  
20 the process of NFA. 11:43:57
- 21 And through that, his organization had traveled to  
22 our facility and met with us on a couple of occasions to  
23 determine what they could publish to help the industry make the  
24 paperwork easier to process.
- 25 Q. Now, during that time period, did you have occasion to 11:44:15

## DANIEL PINCKNEY - Cross

1 Q. No?

01:33:05

2 A. No.

3 Q. Did you ever acquire for any reason a gun from John Brown?

4 A. Actually, I take that back. Yes, I have. I'm sorry.

5 Yes, I did buy a firearm from John Brown.

01:33:17

6 Q. And you testified a little earlier that you were  
7 prohibited from purchasing an NFA firearm as an ATF employee  
8 because of the ATF policies?

9 A. No, sir. I testified that I can't have any involvement in  
10 the transfer process but NFA employees may purchase NFA  
11 firearms.

01:33:37

12 Q. I see. And describe the gun that you fired.

13 A. The firearm I purchased from Mr. Brown was an AR15  
14 semi-automatic non-NFA firearm. It was just a standard Title 1  
15 firearm.

01:34:00

16 Q. I see. Did it have a suppressor?

17 A. No, sir.

18 Q. It wasn't an NFA integrally suppressed firearm?

19 A. The AR15 is not, no. There's another firearm I have that  
20 was transferred through John Brown but I did not buy it from  
21 John Brown. I bought it from a dealer in my state which you  
22 have to do.

01:34:15

23 Q. I see. So it was just transferred?

24 A. Yes. It, I guess, came in to John Brown through somebody  
25 else and then out from him to the dealer I purchased it from.

01:34:29

## DANIEL PINCKNEY - Cross

- 1 Q. And where did you purchase it? 01:34:33
- 2 A. At a dealer in my state in West Virginia, local to me.
- 3 Q. You bought from a dealer -- you're a resident of West  
4 Virginia?
- 5 A. Yes, sir. 01:34:45
- 6 Q. And you purchased from it a dealer in West Virginia?
- 7 A. Yes, that's who I had to do the transfer through in order  
8 to be legal because it's an NFA firearm. I had to do it in  
9 state. I could not do it out of state.
- 10 Q. How did it get from West Virginia to John Brown in 01:35:01  
11 Virginia that he did a transfer? You don't live in Virginia.
- 12 A. It came from the manufacturer who made it through John  
13 Brown to the dealer that I purchased it from.
- 14 Q. I see. And the dealer that you purchased it from  
15 completed the Form 4 for you? 01:35:21
- 16 A. Yes, sir.
- 17 Q. And that was processed?
- 18 A. Yes, sir.
- 19 Q. You weren't involved in the process?
- 20 A. No, sir. 01:35:33
- 21 Q. Now, were there any other NFA examiners who purchased the  
22 same type of weapon from --
- 23 A. I don't believe so.
- 24 Q. No?
- 25 A. I don't believe there was any other examiners, no. 01:35:45

## DANIEL PINCKNEY - Cross

- 1 Q. And you picked it up from the West Virginia dealer? 01:35:51
- 2 A. Yes, sir.
- 3 Q. And that time frame was what?
- 4 A. Probably -- it was after I left the NFA branch so probably
- 5 late 2007 or early 2008. I'm guessing. I honestly don't 01:36:12
- 6 remember exactly.
- 7 Q. Does the date January 9, 2010 --
- 8 A. It could have been very well that late.
- 9 Q. I see. And at this time, did you know Ernest Lintner?
- 10 A. Yes. 01:36:30
- 11 Q. Did you know a guy named Gilbert Atkins?
- 12 A. Yes.
- 13 Q. And if they received the same type of gun from the same
- 14 dealer from John Brown transferring it, you didn't know
- 15 anything about it? 01:36:49
- 16 A. Yes.
- 17 Q. Oh, you did know about it?
- 18 A. Yes. They were examiners. They were specialists in the
- 19 NFA branch at the time.
- 20 Q. I see. And a little bit about the weapon that we're 01:36:59
- 21 talking about.
- 22 A. Yes, sir.
- 23 Q. What is the value of that?
- 24 A. Probably -- the rifle itself without the suppressor,
- 25 probably in the \$150 to \$200 range. With the suppressor, 01:37:17

# **Exhibit**

**D**

CR-10-01047-PHX-ROS (DKD), November 29, 2012

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

1			
2			
3			
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5		)	
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7	vs.	)	
8		)	CR-10-01047-PHX-ROS (DKD)
9	Randolph Benjamin Rodman and Idan	)	
10	C. Greenberg,	)	
11		)	
12	Defendants.	)	
13		)	November 29, 2012
14		)	8:46 a.m.
15		)	

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United States District Court



## DANIEL PINCKNEY - Direct

1 witness? 11:22:52

2 THE COURT: Any objection?

3 MR. SANDERS: I'm sorry, Your Honor?

4 THE COURT: Can this witness be excused?

5 MR. SANDERS: Yes. 11:22:58

6 MR. VANN: Yes.

7

8 DANIEL PINCKNEY,

9 called as a witness herein by the Government, having been first

10 duly sworn or affirmed to testify to the truth, was examined 11:23:22

11 and testified as follows:

12 COURTROOM DEPUTY: Please state your name for the

13 record. Spell your last name, please.

14 THE WITNESS: Daniel Pinckney. P-I-N-C-K-N-E-Y.

15 COURTROOM DEPUTY: Have a seat right up here, sir. 11:23:37

16 THE WITNESS: Thank you.

17 **DIRECT EXAMINATION**

18 BY MR. VANN:

19 Q. Good morning, Mr. Pinckney.

20 A. Hi. 11:23:59

21 Q. Can you please tell the jury where you're currently  
22 employed?

23 A. I'm currently a program analyst with the Violent Crime  
24 Analysis Branch with ATF.

25 Q. And have you always been in that section of ATF? 11:24:08

DANIEL PINCKNEY - Direct

- 1 A. No, sir. 11:24:11
- 2 Q. Where have you worked at ATF?
- 3 A. I worked in the National Firearms Act branch as a legal  
4 instruments examiner prior to my current job and before that, I  
5 was a contractor with the ATF National Tracing Center. 11:24:23
- 6 Q. Approximately how long have you worked either for ATF as a  
7 contractor or directly for ATF as a government employee?
- 8 A. Since June of 2005.
- 9 Q. Now, approximately how long were you an NFA examiner?
- 10 A. Two years, just slightly over two years. 11:24:40
- 11 Q. Do you have any experience with firearms?
- 12 A. Yes.
- 13 Q. And what experience do you have with firearms?
- 14 A. A hobbyist. I collect standard firearms, rifles, pistols,  
15 shoot as a hobby and of course worked in the National Firearms 11:24:58  
16 Act branch. I processed forms.
- 17 Q. Did your work at the National Firearms Act branch increase  
18 your knowledge of firearms?
- 19 A. Yes. I never physically looked at or touched firearms but  
20 dealt a lot with serial numbers and weapon types in the process 11:25:15  
21 doing firearm tracing.
- 22 Q. And tracing as well?
- 23 A. Yes. Tracing firearms.
- 24 Q. And your employment with the tracing center for ATF, what  
25 exactly does the tracing center do? 11:25:29

United States District Court

## DANIEL PINCKNEY - Cross

- 1 pretty pricy. 11:42:58
- 2 Q. The resources were a little depleted by joining ATF?
- 3 A. Yes, sir.
- 4 Q. Okay. Now, in and about this short period that you were  
5 employed in Martinsburg, did you become acquainted with a guy 11:43:09  
6 named John Brown?
- 7 A. I didn't deal with his work directly, no, but I know of  
8 him, yes.
- 9 Q. You know of him and you knew what he was --
- 10 A. Yes. Yes. 11:43:26
- 11 Q. Did you ever meet him?
- 12 A. Yes.
- 13 Q. How many times?
- 14 A. Prior to this event, probably three maybe.
- 15 Q. And what were those occasions, what -- 11:43:38
- 16 A. He's the president of an organization called the National  
17 Firearms Act Trade and Collector's Association and he had  
18 dealings with ATF at the time. They were in the process of  
19 developing a reference manual for the community that detailed  
20 the process of NFA. 11:43:57
- 21 And through that, his organization had traveled to  
22 our facility and met with us on a couple of occasions to  
23 determine what they could publish to help the industry make the  
24 paperwork easier to process.
- 25 Q. Now, during that time period, did you have occasion to 11:44:15

## DANIEL PINCKNEY - Cross

- 1 Q. No? 01:33:05
- 2 A. No.
- 3 Q. Did you ever acquire for any reason a gun from John Brown?
- 4 A. Actually, I take that back. Yes, I have. I'm sorry.
- 5 Yes, I did buy a firearm from John Brown. 01:33:17
- 6 Q. And you testified a little earlier that you were
- 7 prohibited from purchasing an NFA firearm as an ATF employee
- 8 because of the ATF policies?
- 9 A. No, sir. I testified that I can't have any involvement in
- 10 the transfer process but NFA employees may purchase NFA 01:33:37
- 11 firearms.
- 12 Q. I see. And describe the gun that you fired.
- 13 A. The firearm I purchased from Mr. Brown was an AR15
- 14 semi-automatic non-NFA firearm. It was just a standard Title 1
- 15 firearm. 01:34:00
- 16 Q. I see. Did it have a suppressor?
- 17 A. No, sir.
- 18 Q. It wasn't an NFA integrally suppressed firearm?
- 19 A. The AR15 is not, no. There's another firearm I have that
- 20 was transferred through John Brown but I did not buy it from 01:34:15
- 21 John Brown. I bought it from a dealer in my state which you
- 22 have to do.
- 23 Q. I see. So it was just transferred?
- 24 A. Yes. It, I guess, came in to John Brown through somebody
- 25 else and then out from him to the dealer I purchased it from. 01:34:29

## DANIEL PINCKNEY - Cross

- 1 Q. And where did you purchase it? 01:34:33
- 2 A. At a dealer in my state in West Virginia, local to me.
- 3 Q. You bought from a dealer -- you're a resident of West  
4 Virginia?
- 5 A. Yes, sir. 01:34:45
- 6 Q. And you purchased from it a dealer in West Virginia?
- 7 A. Yes, that's who I had to do the transfer through in order  
8 to be legal because it's an NFA firearm. I had to do it in  
9 state. I could not do it out of state.
- 10 Q. How did it get from West Virginia to John Brown in 01:35:01  
11 Virginia that he did a transfer? You don't live in Virginia.
- 12 A. It came from the manufacturer who made it through John  
13 Brown to the dealer that I purchased it from.
- 14 Q. I see. And the dealer that you purchased it from  
15 completed the Form 4 for you? 01:35:21
- 16 A. Yes, sir.
- 17 Q. And that was processed?
- 18 A. Yes, sir.
- 19 Q. You weren't involved in the process?
- 20 A. No, sir. 01:35:33
- 21 Q. Now, were there any other NFA examiners who purchased the  
22 same type of weapon from --
- 23 A. I don't believe so.
- 24 Q. No?
- 25 A. I don't believe there was any other examiners, no. 01:35:45

## DANIEL PINCKNEY - Cross

- 1 Q. And you picked it up from the West Virginia dealer? 01:35:51
- 2 A. Yes, sir.
- 3 Q. And that time frame was what?
- 4 A. Probably -- it was after I left the NFA branch so probably
- 5 late 2007 or early 2008. I'm guessing. I honestly don't 01:36:12
- 6 remember exactly.
- 7 Q. Does the date January 9, 2010 --
- 8 A. It could have been very well that late.
- 9 Q. I see. And at this time, did you know Ernest Lintner?
- 10 A. Yes. 01:36:30
- 11 Q. Did you know a guy named Gilbert Atkins?
- 12 A. Yes.
- 13 Q. And if they received the same type of gun from the same
- 14 dealer from John Brown transferring it, you didn't know
- 15 anything about it? 01:36:49
- 16 A. Yes.
- 17 Q. Oh, you did know about it?
- 18 A. Yes. They were examiners. They were specialists in the
- 19 NFA branch at the time.
- 20 Q. I see. And a little bit about the weapon that we're 01:36:59
- 21 talking about.
- 22 A. Yes, sir.
- 23 Q. What is the value of that?
- 24 A. Probably -- the rifle itself without the suppressor,
- 25 probably in the \$150 to \$200 range. With the suppressor, 01:37:17

# **Exhibit**

**E**

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA  
3

4 United States of America, )  
5 )  
6 Plaintiff, )  
7 vs. )  
8 ) CR-10-01047-PHX-ROS (DKD)  
9 Randolph Benjamin Rodman and Idan )  
10 C. Greenberg, )  
11 )  
12 Defendants. )  
13 ) November 29, 2012  
14 ) 8:46 a.m.  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )

21 BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
22 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
23

24 Jury Trial - Day 3  
25 (Pages 364 through 587)

Official Court Reporter:  
Elaine Cropper, RDR, CRR, CCP  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 35  
Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription



CR-10-01047-PHX-ROS (DKD), November 29, 2012

I N D E XTESTIMONY

<b>WITNESS</b>	<b>Direct</b>	<b>Cross</b>	<b>Redirect</b>	<b>Recross</b>
GARY SCHAIBLE	370	388 414	422	443
DANIEL PINCKNEY	444	455 477	482	
KENDRA TATE	486	493 496	504	
JASON FRUSHOUR	511	519		
RALPH FOX	523	532	538	
SCOTT H. COLE	540	550	552	
JOHN BROWN	554			

E X H I B I T S

Number		Ident	Rec'd
3	86-0012729 model 1919 machine gun	542	
5	86-0013454 model 1919 machine gun	524	
19	A6042075 model 1919 machine gun-PICTURE ONLY	558	
23	820101086 model 1919 machine gun	569	
31	820101592 model 1919 machine gun	569	
42	Blue ribbon certification for 86-0012726	385	
48	Blue ribbon certification for A6041868	405	
49	Blue ribbon certification for A6041869	404	
53	Blue ribbon certification for A6042000	406	
54	Blue ribbon certification for A6042001	408	
55	Blue ribbon certification for A6042026	408	

United States District Court

## SCOTT H. COLE - Redirect

1 Mr. Greenberg's reputation being truthful and honest with you 03:52:54  
2 in your dealings, did he ever point out on the firearm where  
3 the serial number was welded on the inside of the firearm from  
4 another gun?

5 A. No. 03:53:08

6 Q. Thank you.

7 MS. LEMKE: No further questions.

8 THE COURT: All right.

9 You may step down.

10 (Witness excused.) 03:53:14

11 THE COURT: Your next witness?

12 MS. LEMKE: The government calls John Brown to the  
13 stand.

14 COURTROOM DEPUTY: Come forward, please. Stand in  
15 front of the microphone. 03:53:41

16 JOHN BROWN,  
17 called as a witness herein by the Government, having been first  
18 duly sworn or affirmed to testify to the truth, was examined  
19 and testified as follows:

20 COURTROOM DEPUTY: State your name for the record. 03:53:47  
21 Spell your last name, please.

22 THE WITNESS: John Brown, B-R-O-W-N.

23 COURTROOM DEPUTY: Have a seat up here.

24 MR. VANN: Just for confirmation on the record, may  
25 Mr. Cole be excused? 03:53:58

## JOHN BROWN - Redirect

1 is that right below the screwdriver? 04:06:51

2 A. The top cover.

3 Q. Had you ever disassembled this firearm prior to abandoning  
4 this firearm to ATF?

5 A. No, ma'am. I'm not gunsmith and I apologize if I got the 04:07:02  
6 parts wrong.

7 Q. Okay. This particular firearm, can you tell me how it  
8 happened that you abandoned this firearm to ATF?

9 A. The first step in that process was I actually called to  
10 check on the transfer of this gun, what the status of that was; 04:07:26  
11 and when I talked to my examiner, she informed me that the gun  
12 had a problem in the transfer and that someone would be  
13 contacting me about that.

14 Q. Did that surprise you?

15 A. Yeah. 04:07:40

16 Q. What did you do?

17 A. I waited.

18 Q. Did you do anything other than just wait?

19 A. I examined the gun to try to figure out if I could  
20 determine, you know, what the problem, what it was. The serial 04:07:50  
21 numbers clearly stated on the right side-plate so I thought,  
22 well, there's something else I don't know about.

23 Q. And when you say it was clearly stated on the right  
24 side-plate, are you talking about on the inside or the outside?

25 A. On the outside. 04:08:05

## JOHN BROWN - Redirect

1 Q. So did you eventually hear back from ATF? 04:08:11

2 A. I got a call from Mr. Vasquez.

3 Q. And what were you -- what did you talk to Mr. Vasquez  
4 about?

5 A. He asked me if I could make arrangements to bring the gun 04:08:20  
6 to Martinsburg for examination.

7 Q. Do you know Mr. Vasquez?

8 A. Yes.

9 Q. How do you know him?

10 A. Mr. Vasquez is instrumental -- my son is a major in the 04:08:29  
11 Marine Corps today and he has been instrumental in helping me  
12 help coach my son in all three deployments that he's been on.

13 Q. He has been deployed more than once?

14 A. Yes, ma'am.

15 Q. Where to? 04:08:47

16 A. He was deployed in Iraq the first time.

17 MR. SANDERS: Objection. Relevance.

18 THE COURT: Sustained.

19 THE WITNESS: South America --

20 THE COURT: No. I'm sorry. No more answers. 04:08:55

21 THE WITNESS: Okay.

22 BY MS. LEMKE:

23 Q. Did you say Mr. Vasquez was instrumental in your  
24 relationship with your son who is deployed?

25 A. Yes, ma'am. 04:09:06

## JOHN BROWN - Redirect

1 Q. Can you explain how? 04:09:08

2 A. Well, when your son is in harm's way and he's a Marine --

3 MR. TATE: Objection. Relevance.

4 THE COURT: Sustained, sustained.

5 MS. LEMKE: Your Honor, it goes towards any potential 04:09:20  
6 bias this witness may have.

7 THE COURT: Let's come to the sidebar.

8 (At sidebar.)

9 THE COURT: Mr. Tate?

10 MR. TATE: Judge, the objection is what Mr. Brown's 04:09:38  
11 son is doing in Iraq and all of that has nothing to do with  
12 this particular case. It's just the government --

13 THE COURT: You've got enough in there right now.  
14 You don't have to get into any more details of how much he  
15 helped him or what he did or -- you know, how he suffered. All 04:09:50  
16 of that.

17 (End sidebar.)

18 BY MS. LEMKE:

19 Q. Mr. Brown, in addition to Mr. Vasquez helping you in  
20 regards to your son, do you have any other personal 04:10:12  
21 associations with Mr. Vasquez?

22 A. Occasionally, because I run the National Firearms Act  
23 Trade and Collector's Association, we've had technical issues  
24 that we've actually approached Mr. Vasquez to get help on.

25 Q. Now, is that personal or is that work related? 04:10:29

## JOHN BROWN - Redirect

- 1 A. It's work -- well, the NFA TCA is a nonpaying job, so I 04:10:30  
2 would have to say personal.
- 3 Q. So can you explain what the NFA TCA does?
- 4 A. Yes, ma'am. Nine years ago I started an organization  
5 that -- whose mission was to lobby on NFA owners nationwide and 04:10:45  
6 we actually started that initiative by developing a National  
7 Firearms Act handbook which was a more humane translation of  
8 what we call regulations.
- 9 Q. Now, when you are saying humane translation of the  
10 regulations, you are just trying to make it readable? 04:11:08
- 11 A. Yes.
- 12 Q. But you still were trying to make sure of that readable  
13 versions were what the law said?
- 14 A. Correct.
- 15 Q. Mr. Vasquez helped with that project? 04:11:22
- 16 A. No, ma'am.
- 17 Q. What did he do as far as your negotiation with the NFA  
18 TCA?
- 19 A. Mr. Vasquez had nothing to do with the NFA handbook. He  
20 was assistant branch chief of the Firearms Technology Branch. 04:11:31  
21 So the work on the NFA handbook was actually outsourced to two  
22 retired ATF employees, Jack Patterson and Ed Owen.
- 23 Q. When it came to the production of that handbook -- you  
24 said it was about nine years ago that you started that.
- 25 A. We actually started that about seven years ago, yeah. 04:11:52

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	CR-10-01047-PHX-ROS (DKD)
Randolph Benjamin Rodman and Idan	)	
C. Greenberg,	)	
	)	
Defendants.	)	
	)	December 4, 2012
	)	8:35 a.m.
	)	

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE  
REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 4  
(Pages 588 through 696)

Official Court Reporter:  
**Elaine Cropper, RDR, CRR, CCP**  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 35  
Phoenix, Arizona 85003-2151  
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

CR-10-01047-PHX-ROS (DKD), December 4, 2012

I N D E XTESTIMONY

<b>WITNESS</b>	<b>Direct</b>	<b>Cross</b>	<b>Redirect</b>	<b>Recross</b>
JOHN BROWN		591 620	627	
THOMAS STOUGHTON	651	660 663	664	
RICHARD BRENGMAN	668	677		
ALAN BOROSHOK	679			
RICHARD BRENGMAN		687		

E X H I B I T S

Number		Ident	Rec'd
43	Blue ribbon certification for 86-0012727	669	
58	Blue ribbon certification for A6042029	645	
60	Blue ribbon certification for A6042075	591	
72	Blue ribbon certification for 820101592	636	
140	Note from Clark to Hal	685	686
245	05/02/01 Form 3 Rodman to Stoughton s/n A6041867	653	

RECESSES

	Page	Line
(Recess at 9:38; resumed at 9:55.)	631	22
(Recess at 10:38; resumed at 10:52.)	659	23



## JOHN BROWN - Cross

- 1 that book chapter by chapter, reviewed by ATF counsel. 09:08:24
- 2 Q. Correct. And nobody ever mentioned to you --
- 3 A. No.
- 4 Q. -- anything about a recent trend that ATF had discovered?
- 5 A. No, sir. 09:08:40
- 6 Q. You weren't working with FTB at all?
- 7 A. No. The only reason I would work with FTB, if I had a
- 8 technical question about something, and you can get that
- 9 answered by calling them, one of the FOEs.
- 10 Q. Did you ever have occasion to ask a technical question 09:09:04
- 11 about MAC receivers during the course of this period?
- 12 A. No.
- 13 Q. Mr. Brown, how well do you know Special Agent Sander?
- 14 He's the person sitting to your right at the prosecution table.
- 15 A. As well as you can know an ATF agent. I have been 09:09:50
- 16 contacted by Mr. Sander on this case several times.
- 17 Q. I see. He's the case agent in charge of the investigation
- 18 that led us here; correct?
- 19 A. Correct.
- 20 Q. Now, on May 16, 2008, did you have occasion to call him? 09:10:07
- 21 Do you remember that?
- 22 A. I may have. I don't remember that, Mr. Sanders.
- 23 Q. You may have.
- 24 A. Okay.
- 25 Q. Well, he described you as a confidential source. Does 09:10:27

## JOHN BROWN - Cross

1 that surprise you?

09:10:33

2 A. I don't know if that would surprise me.

3 Q. And he reported that the purpose of your call was to  
4 provide information.

5 A. Okay.

09:10:41

6 Q. Now, one of the pieces of information was that you told  
7 him that you knew what was going on in the Clark investigation;  
8 is that correct?

9 A. Okay. Yes, sir.

10 Q. What is the basis of your knowledge of what's going on in  
11 the Clark investigation?

09:10:58

12 A. At that particular period of time, Mr. Sanders, the  
13 Internet as well as the industry was rampant with rumors about  
14 a case that involved converting MACs to other machine guns.

15 Q. So you decided you would call the case agent who knows  
16 everything about this investigation and tell him that you know  
17 what's going on?

09:11:18

18 A. Well, I'm not sure that that was the conversation I had  
19 with him. But I've talked to him several times.

20 Q. That he may have lied in an official report?

09:11:35

21 A. No. That's not what I said.

22 Q. So what was the basis of your knowledge that you wanted to  
23 pass on to him?

24 A. What was the date of the conversation, Mr. Sanders?

25 Q. May 16 of 2008. Do you know what was going on at this

09:11:57

## JOHN BROWN - Cross

1 Q. And that's a yes?

09:24:40

2 A. Yes.

3 Q. And you mentioned -- let's jump to October 31 of 2006.  
4 You had mentioned that you received a call from Mr. Vasquez to  
5 bring the particular Browning in to be examined; correct?

09:24:55

6 A. Correct.

7 Q. And when he called you, he didn't tell you anything about  
8 why he wanted to examine it. He just said drive here, bring it  
9 in. And I'm not going to tell you why I'm examining it. Is  
10 that -- was that the gist of the conversation?

09:25:10

11 A. Yes, sir.

12 Q. And you didn't think anything of asking him -- I mean,  
13 Mr. Vasquez was your personal friend; correct?

14 A. As far as an ATF person can be a friend.

15 Q. Okay. And you didn't think hey, Rick, you're telling me  
16 to bring this gun in and you're not going to tell me why?

09:25:25

17 A. Mr. Vasquez is very good at saying I need you to do this  
18 and don't ask me why.

19 Q. Excuse me, sir. My answer is just yes or no. You have  
20 never asked him why?

09:25:42

21 A. Yes.

22 Q. So you arrive at the facility October 31, 2006. Do you  
23 hand-carry the weapon in to the facility?

24 A. I'm not allowed to do that, no.

25 Q. Okay. So they send agents out or someone out to bring the

09:25:59

## JOHN BROWN - Cross

1 firearm in to the facility?

09:26:04

2 A. Yes.

3 Q. And you accompany them and go through whatever security  
4 they have and arrive there where Mr. Vasquez and other persons  
5 are; correct?

09:26:15

6 A. Yes.

7 Q. Now, you say at some point they begin to examine the  
8 weapon and Mr. Vasquez tells his friend, Mr. Brown, you have  
9 got to go and stay in the other room; correct?

10 A. Yes.

09:26:31

11 Q. They examine the weapon. You said you heard some  
12 chuckling. Nobody says anything to you and you are just asked  
13 to leave. That fair to say?

14 A. Yes.

15 Q. No one says anything about the weapon being contraband or  
16 anything like that to you?

09:26:45

17 A. No.

18 Q. Well, sir, you expressed some concern with taking the  
19 weapon out. If no one told you that it was contraband, why  
20 would you express concern about taking a weapon home?

09:26:59

21 A. Simply from their reaction after the examination.

22 Q. So about how long was this examination? I know you don't  
23 have a stopwatch and you weren't timing it, but how long did  
24 they stay in one room and examine it while you were in the  
25 other room?

09:27:21

## JOHN BROWN - Cross

1 A. I would say 15 to 20 minutes.

09:27:21

2 Q. 15 to 20 minutes. They come back. Your friend Rick  
3 Vasquez joins you and he just says, "See ya, Mr. Brown. You  
4 can go. And take the weapon with you"; correct?

5 A. Not exactly.

09:27:36

6 Q. The fact was, Mr. Brown, your friend Rick Vasquez told you  
7 exactly what was wrong with that weapon, didn't he?

8 A. No, sir.

9 Q. Because that alerted you to go back and check your  
10 inventory for the other two Clark guns that had passed through  
11 your inventory, didn't it, sir?

09:27:54

12 A. No, sir.

13 Q. So, sir, when you testified on Thursday that you then went  
14 back and checked your inventory for other Clark guns, how would  
15 you know what to check for, sir, if they didn't tell you  
16 anything was wrong with the firearm?

09:28:08

17 A. Mr. Tate, when I called my examiner to check on A06 serial  
18 number, my examiner explained to me that there was something  
19 wrong with the transfer. I explained to her that we had  
20 transferred that gun three times already. She said if I look  
21 at the Form 2 or 1 when the gun was originally registered, it  
22 was a six-and-a-half-inch barrel and .45 ACP. That alerted me  
23 to take a look.

09:28:27

24 Q. Right, sir. But you had made that mistake before on  
25 another firearm where you said you had made a mistake in

09:28:46

## JOHN BROWN - Cross

1 filling out the form and the subsequent purchaser, transferee, 09:28:50  
2 said, "Hey, there's something on this form," and you called  
3 your examiner and said, "Look, I made a mistake on the form";  
4 correct?

5 A. Correct. 09:29:01

6 Q. Right. So in this particular instance, they told you more  
7 was wrong with that firearm than just something with the  
8 paperwork; correct?

9 A. I don't recall but I knew enough from the conversation to  
10 be on the alert. 09:29:19

11 Q. Okay. Let's take a look at that. So you drive there with  
12 this firearm not knowing what's wrong with it but you know that  
13 Rick Vasquez, acting chief, wants to take a look at it;  
14 correct?

15 A. Correct. 09:29:35

16 Q. You leave that meeting knowing there's something wrong  
17 with that firearm, and you better check the other 23 in your  
18 inventory but nobody tells you what's wrong; correct?

19 A. The other two in my --

20 Q. Sir, is that a yes or no? 09:29:49

21 A. Yes.

22 Q. Sir, after that meeting with Rick Vasquez and that  
23 contraband firearm you then go and find where those other two  
24 firearms had passed through your inventory; correct?

25 A. Correct. 09:30:08

## JOHN BROWN - Cross

- 1 Q. Now, sir, you normally -- well, normally. You have, sir, 09:30:13  
2 transferred for other firearms examiners, your company has done  
3 transfers for your friend Rick Vasquez; correct?
- 4 A. Yes, sir.
- 5 Q. For Mr. Lintner; correct? 09:30:32
- 6 A. Yes, sir.
- 7 Q. And Mr. Pinckney; correct?
- 8 A. Yes, sir.
- 9 Q. Now, Mr. Sanders had asked you that on May 16, 2008, you  
10 had a conversation with Special Agent -- so we don't get these 09:31:06  
11 two confused -- Sander; correct?
- 12 A. Correct.
- 13 Q. Because we have Bob Sanders and Special Agent Sander. You  
14 have a conversation with him and he names you as a confidential  
15 source; correct? Let me just ask you, were you aware that he 09:31:24  
16 named you as a confidential source?
- 17 A. No, sir.
- 18 Q. Now, sir, isn't it fair to say that you were aware of what  
19 was going on with the Clark firearms ever since October 31 of  
20 2006 when you found out you had one; correct? 09:31:53
- 21 A. I had a sense, yes.
- 22 Q. You had more than a sense. You had some conversation with  
23 folks about those firearms; correct?
- 24 A. Yes.
- 25 Q. Now, and then when you found the other two firearms that 09:32:05

## JOHN BROWN - Redirect

1 had passed through your inventory, you had another conversation 09:32:09  
2 with him, didn't you?

3 A. Yes.

4 Q. And the fact is, sir, when you mentioned when Mr. Sanders  
5 asked you about a formal interview and sitting down, most of 09:32:31  
6 your conversations with ATF were informal, either phone calls  
7 or through your friend Rick Vasquez or most of your  
8 conversations were informal conversations, weren't they, sir?

9 A. Yes.

10 Q. And that's how you were able to keep abreast of and knew 09:32:56  
11 what was going on from 2006 all the way until October of 2012  
12 what was going on with those Clark weapons, weren't you?

13 A. Yes, sir.

14 MR. TATE: That's all I have, Judge.

15 THE COURT: Redirect? 09:33:16

16 MS. LEMKE: Yes, Your Honor.

17 **REDIRECT EXAMINATION**

18 BY MS. LEMKE:

19 Q. Mr. Brown, on Thursday, I had asked you if you are a  
20 confidential informant. Are you a confidential informant? 09:33:27

21 A. No, ma'am.

22 Q. Were you ever given paperwork to sign up to provide  
23 information to ATF or any law enforcement agency?

24 A. No, ma'am.

25 Q. Defense counsel raised the issue about you being a 09:33:38



## JOHN BROWN - Redirect

1 A. No. 10:23:30

2 Q. Defense counsel, Mr. Tate, was asking you about Mr.  
3 Vasquez not including you in -- I guess is the way to say,  
4 including you in about why he wanted you to come down to  
5 Martinsburg with your firearm. You indicated it was not an 10:24:06  
6 unusual situation for Mr. Vasquez to not provide you all  
7 information that he knew; is that correct?

8 A. Yes.

9 Q. You wanted to explain why that was. Could you tell us?

10 A. The NFA TCA deals with ATF on a weekly basis, either 10:24:21  
11 through Firearms Technology Branch or the NFA branch with a  
12 variety of different questions. And it's not unusual for us to  
13 set up meetings with very high-level agenda before we get down  
14 to the details. And this was a circumstance. I didn't require  
15 the details. He said, "I need to you come. I need you to 10:24:44  
16 bring a firearm."

17 Q. Are you -- then in your dealings with the ATF, the NFA  
18 branch, the FTB branch, with Mr. Vasquez specifically, is it  
19 unusual for them to withhold information that you would not be  
20 privileged to when they are asking for you to provide 10:25:05  
21 information?

22 A. I'm not sure I understand the question.

23 Q. Is it -- to have knowledge, is it unusual that ATF, the  
24 NFA branch, FTB branch, Mr. Vasquez, has to withhold  
25 information from you because it's privileged information? 10:25:24

# **Exhibit**

**26**

1895

## PUBLIC SUBMISSION

<b>As of:</b> November 14, 2013
<b>Received:</b> November 04, 2013
<b>Status:</b> Posted
<b>Posted:</b> November 14, 2013
<b>Tracking No.</b> 1jx-88qg-4da1
<b>Comments Due:</b> December 09, 2013
<b>Submission Type:</b> Paper

**Docket:** ATF-2013-0001

Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm

**Comment On:** ATF-2013-0001-0001

Machine Guns, Destructive Devices and Certain Other Firearms: Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm

**Document:** ATF-2013-0001-1895

Comment on FR Doc # 2013-21661

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### Submitter Information

**Name:** Jeffrey Folloder

**Address:**

20603 Big Wells Drive

Katy, TX, 77449

**Organization:** NFATCA

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### General Comment

See Attached

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### Attachments

Folloder, Jeffrey

**National Firearms Act  
Trade & Collectors Association®**

November 1, 2013



Brenda Raffath Friend, Mailstop 6N-602  
Office of Regulatory Affairs  
EPS - BATFe  
US Department of Justice  
99 New York Avenue NE  
Washington DC 20226

**ATTN: ATF 41P**

Dear Ms. Friend,

In light of the complexity of issues involved with items that 41P seeks to address at the federal, state and local levels, as well as the intricacies surrounding the application of the various state laws regarding corporations, trusts and other legal entities and the federal government shutdown of 16 days, the NFATCA would respectfully request that the comment period for 41P be extended beyond the original December 9, 2013 deadline. It is imperative that everyone be given ample opportunity to voice their concern on such an important set of issues.

Sincerely,

**Jeffrey E. Folloder**  
*Executive Director*

**John K. Brown, III**  
President  
**Teresa Starnes**  
Vice President  
**Jeffrey E. Folloder**  
Executive Director, Sec/Tres

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Robert Segel,  
*Small Arms Review*

*"Power Through Experience"*

# **Exhibit**

**27**

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	Case No. CR-08-041-L
	)	
LARRY DOUGLAS FRIESEN,	)	
	)	
	)	
Defendant.	)	

**DEFENDANT’S MOTION IN LIMINE TO PROHIBIT GOVERNMENT’S  
INTRODUCTION OR REFERENCE TO RECORDS MAINTAINED IN THE  
NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD**

COMES NOW the Defendant, Doug Friesen, and moves this Honorable Court to prohibit the Government from introducing, mentioning, or otherwise allude or refer to any records from the National Firearms Registration and Transfer Record (NFRTR). In support of said Motion, Defendant Friesen submits the following, to-wit:

The NFRTR is a data base administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives<sup>1</sup> (ATF) to track legally owned machine guns and other “firearms”<sup>2</sup> required to be

<sup>1</sup> The Bureau of Alcohol, Tobacco and Firearms was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives under legislation which transferred it from the Department of the Treasury to the Department of Justice, and its law enforcement and administrative functions from the Secretary of the Treasury to the Attorney General, on January 24, 2003. 6 U.S.C. § 531; 116 Stat. 2135 (2003).

<sup>2</sup> Under the NFA a “firearm” is a term of art, and means “(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) 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; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) 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; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . . and (8) a destructive device. The term ‘firearm’ shall not include an antique

registered under the National Firearms Act of 1934<sup>3</sup> (NFA). Said database is inaccurate and incomplete; its error rate is currently unknown; and that unless it can be independently and reliably validated, NFRTR data should be excluded as evidence in a criminal trial.

ATF routinely uses NFRTR data to justify seizing and forfeiting firearms it deems to be unregistered or illegally possessed, issuing search and/or arrest warrants, producing Certificates of Nonexistence of a Record (CNR) for NFA firearms at criminal trials which attest that no record of registration for particular firearms can be located in the NFRTR; determining that a specific firearm is not registered to a specific person; and for other law enforcement activities such as approving or disapproving applications to transfer ownership of NFA firearms.

There are no known data that reliably establish the current accuracy and completeness of the NFRTR. The last audit of the NFRTR according to Generally Accepted Government Auditing Standards (GAGAS), by the Treasury Department Inspector General (Treasury IG) in 1998, raises more questions than it answers. The reasons are that the audit (1) disclosed "critical error" rates of 4.3 percent and 18.4 percent for one category of NFRTR transactions, and (2) was limited in scope.<sup>4</sup> The bad news was reliably documented April 23, 1998, when Treasury IG auditor Gary Wilk reported in a Work Paper:

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firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." 26 U.S.C. § 5845(a).

<sup>3</sup> 26 U.S.C. § 5801 *et seq.*

<sup>4</sup> These errors apply to Form 4467 data, which may be more inaccurate than the 4.3% critical error rate which can be calculated from data the Treasury IG disclosed in its December 1998 audit report. Office of Inspector General, U.S. Department of Treasury, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, Dec. 18, 1998 at 12, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>. (Hereafter December 1998 Treasury IG Report.) Treasury IG auditor Carol Burgan stated that "error definitions for critical data fields during sampling" include weapon serial number and registrant's last name (each must "be 100% correct"), and "weapon description"). Work Paper F-25, Feb. 29, 1998, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf). Treasury IG auditor Gary Wilk determined "our Discovery sample indicated a 18.4 percent error rate, one error per error Form

- **Form 4467 was a critical indicator for our audit. We determined, based on our discovery sample, that the combined error rate for original documentation and the computer database was 18.4 percent.**
- **We were able to determine that the error rate was in excess, with 95 percent confidence, +/- 7 percent, of the NFA Branch specified error rate limit of (+/-) 5 percent. Based on our Discovery error estimate we did not implement the full statistical sampling plan.**

**Conclusion:**

**The NFA database - National firearms Registration and Firearms Record (NFRTR) does not contain less than the 5 percent error rate limit for Critical data established by the Chief, Firearms and Explosives Division, ATF.**

5

During a June 17, 1998, meeting at Treasury Department Office of Inspector General Headquarters to discuss the foregoing audit findings, an NFA Branch representative

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4467 in a 'Critical' field." Work Paper H-1 + Attachments H1-H143, April 6, 1998, *available at* [http://www.nfaoa.org/documents/Work\\_Papers\\_H.pdf](http://www.nfaoa.org/documents/Work_Papers_H.pdf).

Form 4467 ("Registration of Certain Firearms During November 1968") was used to register unregistered NFA firearms during an amnesty period from November 2, 1968, to December 1, 1968, established by the Gun Control Act of 1968 (P.L. 90-618; Stat. 1235, § 207(b)). The 1998 Treasury IG audit was limited to three categories of NFA transactions (approximately 3.3 percent of the total 2,571,766 transactions "for the years 1934 through July 31, 1998" (December 1998 report, *id.* at 2); none included Form 1, Form 2, Form 3, Form 4 and Form 5 categories, which account for 2,184,454 transactions (85 percent of total transactions). These forms differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture and/or deal in or import NFA firearms.

<sup>5</sup> Work Paper H-0, April 23, 1998 at 2, reviewed May 7, 1998, by Audit Manager Robert K. Bronstrup. In "Discovery" sampling, the auditor draws a random sample, typically 60 to 70 records or more, to determine the presence or absence of irregularities and the need for a full audit. If no irregularities are found, the data base is presumed to be error-free and a full audit is not conducted. If even 1 irregularity is found, the data base cannot be assumed to be error-free; the audit must be extended; and a larger sample drawn to reliably estimate the error rate for the data base. Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*. New York: McGraw-Hill Book Company, 1984 at 132-140.

Treasury IG auditor Gary Wilk reported that after reviewing "528 records and documents" in Discovery sampling:

- **We discovered a total of 395 errors or omissions of which 176 were Critical to the NFA mission and the remaining 219 were Administrative.**

Work Paper H-0, April 23, 1998 at 1.



██████████ asked for an explanation of the analysis results obtained by the OIG audit of the physical and electronic records maintained by ATF and known as the NFRTR. ██████████ further, added that ██████████ reason for asking was that the results obtained by the OIG audit were disappointing at best and could have serious consequences for the ATF firearms registry mission.

6

After Treasury IG auditor Gary Wilk “offered that perhaps ATF would prefer to identify a term other than ‘critical’ as the identifier for the errors identified by this audit report,”<sup>7</sup> one or more NFA Branch representatives asked the Treasury IG auditors to change the definition of “critical error” to obtain a lower rate, and the auditors did so. The Treasury IG did not mention or publish the 18.4 percent rate (or any other error rate) in its December 1998 report or its October 1998 report; whether “critical errors” were present in other major NFRTR categories was not addressed.

The limited audit findings the Treasury IG published regarding errors in the NFRTR as shown in the table below, copied from the December 1998 Treasury IG report, are misleading. In part the reasons are that, as will be documented in this motion, the Treasury IG auditors did violated GAGAS under at least two major standards: (1) failing to extend the audit to determine the impact of the large number of “critical errors” disclosed as the result of Discovery sampling analysis, which required them to report their effects upon the audit results, in view of the auditors’ failure to fully disclose the results of their Discovery sampling analyses , and (2) failing to be organizationally independent. This motion will later discuss the implications of violating GAGAS.

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<sup>6</sup> Work Paper F-37, June 30, 1998 at 1, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf). In this Work Paper, Treasury IG auditor Gary Wilk “explained that our definition [of “critical error”] had come from our understanding” of definitions provided earlier by NFA Branch representatives, who now “appeared to obtain an improved appreciation of the specific requirements that determined the outcome of the audit.”

<sup>7</sup> Id. at 1.

**SUMMARY OF SAMPLE DISCREPANCIES**

	<b>FORM 4467</b>	<b>LETTER</b>	<b>OTHER</b>	<b>TOTAL</b>
<b>Sample Size</b>	<b>141</b>	<b>179</b>	<b>223</b>	<b>543</b>
<b>Discrepancies on Registry Database Reports</b>				
<b>Name:</b>				
Missing	2	1	0	3
Incorrect	0	0	0	0
<b>Serial Number:</b>				
Missing	0	0	0	0
Incorrect	1	0	0	1
<b>Computer Records Not Found</b>	0	10	0	10
<b>Original Records Not Found</b>	0	4	16	20
<b>Miscellaneous<sup>2</sup></b>	3	0	0	3
<b>TOTALS</b>	6	15	16	37

Source: Database analysis results are dependent on the retrieval methods used. The results shown above are based on a combination of data retrieval methods.

8

Sworn testimony in *Friesen* by NFRTR custodian Denise Brown in this Court on September 17, 2008, about the current accuracy of the NFRTR was not informative or encouraging. When asked by defense counsel "how accurate are the NFRTR records?" Custodian Brown replied: "I don't have a number." When asked to confirm whether "there are inaccuracies in them [NFRTR data], are there not, ma'am?," she answered "Yes, there are."<sup>9</sup>

ATF officials have willfully failed to disclose that ATF has (1) lost or destroyed firearm registration documents, (2) added registration documents provided by firearms owners to replace those which ATF lost, destroyed, or could not locate, (3) knowledge that the NFRTR contains

<sup>8</sup> December 1998 Treasury IG Report at 12, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>.

<sup>9</sup> *United States of America vs. Larry Douglas Friesen*, Case No. CR-08-41L, United States District Court for the Western District of Oklahoma, Transcript of Jury Trial, Vols. I-VIII, Sept. 17-Oct. 1, 2008, before the Honorable Tim Leonard, U.S. District Judge at 75-76. (Hereafter *United States of America vs. Larry Douglas Friesen* (2008).)

serious material errors that affect the reliability of its certifications in federal court that a particular firearm is not registered to a defendant, and (4) from time to time, depending on the circumstances, inconsistently applied various definitions of “critical error” in characterizing errors in the NFRTR, as this motion will document. Their actions, reported in documents created and published by the Government since 1979, particularly during the 1990s and continuing to present, violate due process, and obstruct justice.<sup>10</sup> There is evidence, discussed throughout this motion, that ATF has been withholding *Brady* material<sup>11</sup> by failing to disclose potentially exculpatory evidence at criminal trials. Both the Attorney General and his predecessor (Secretary of the Treasury) have failed to establish a new amnesty period to correct errors in the NFRTR because firearm registration documents are missing, as will be shown is required by the Criminal Division of the Department of Justice. Consequently, ATF’s use of NFRTR data whose validity and reliability has not been independently established does not represent an acceptable standard for federal law enforcement in criminal prosecutions.

The Congress heard testimony in 1979 that ATF alleged J. Curtis Earl, a federally licensed NFA dealer, illegally possessed 475 unregistered firearms.<sup>12</sup> More than two decades later, the attorney who represented Mr. Earl informed a Subcommittee Chairman during a 2001 Congressional hearing about continuing inaccuracies in NFRTR records, that Mr. Earl

[T]urned to his file cabinet and began to produce the original records of their registration, and one by one the firearms came off the floor and back onto his

---

<sup>10</sup> There are no published law review articles on the NFRTR, and little pertinent case law. The most comprehensive legal review of NFRTR issues to date is in an unpublished article. Joshua Prince, “Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when its ‘Files are Missing’” (2008), available at [http://www.nfaoa.org/documents/Violating\\_Due\\_Process20Aug2008.pdf](http://www.nfaoa.org/documents/Violating_Due_Process20Aug2008.pdf)

<sup>11</sup> *Brady vs. Maryland*, 373 U.S. 83 (1963).

<sup>12</sup> Congressional Hearing, Committee on Appropriations, United States Senate, *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms*, 96th Cong., 1st Sess. at 39 (1979), available at [http://www.nfaoa.org/documents/1979\\_Hearing\\_Excerpts.pdf](http://www.nfaoa.org/documents/1979_Hearing_Excerpts.pdf).

racks. At the end, he could show that he had registered every single one of these 475 firearms. ATF's records were grossly incorrect.<sup>13</sup>

In November 1979, in response to a request by then-Senator James A. McClure, the Criminal Division of the Department of Justice stated if ATF determines that "a particular individual or weapon is registered" and ATF finds that its "files are missing," then "the only solution would be to declare another amnesty period."<sup>14</sup> Sections of this Memorandum that include the preceding quoted phrases are reproduced below.

No amnesty period was established as the result of Mr. Earl's case.

soventeen problem areas in the record system (see pp 3-4). The most significant of these in terms of its effect on the validity of a certification is where both the index card and the registration record are missing. It must be explained, however, that the only way to determine whether this situation exists is by first knowing that a specific individual or weapon is registered and the finding that both files are missing. Obviously, if the individual has never registered a firearm or if the firearm has never been registered by anyone, no record whatsoever will exist. The report does not suggest that this problem actually existed and it cites no examples where both records were determined to be missing. 5/ Indeed, none of the ATF personnel we interviewed were aware of any case where this happened. Most of

5/ If this problem actually existed, the only solution would be to declare another amnesty period. The Secretary is empowered to do this under existing legislation.

<sup>15</sup>

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<sup>13</sup> Letter to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government dated April 10, 2001, from David T. Hardy, Esq., available at <http://www.nfaoa.org/documents/BardHard.pdf>.

<sup>14</sup> U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, Nov. 29, 1979 at 4, available at <http://www.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>.

Under § 207(d) of the Gun Control Act of 1968, the Secretary of the Treasury (now the Attorney General) is empowered to administratively establish unlimited numbers of amnesty periods lasting up 90 days per amnesty period, with immunity from prosecution, "as the Secretary determines will contribute" to purposes of the NFA, upon publication in the *Federal Register* of his intention to do.

<sup>15</sup> Id. at 4.

In 1997, as the result of allegations by Eric M. Larson, a private citizen,<sup>16</sup> the Chairman, House Committee on Government Reform and Oversight, directed the Treasury IG to audit the NFRTR.<sup>17</sup> One of the audit reports, published in 1998, describes the use and results of Discovery sampling to establish there were “discrepancies” in three categories of NFRTR data, including missing or incorrect name; missing or incorrect serial number; computer records not found; and original records not found.<sup>18</sup> The Treasury IG failed to investigate a credible allegation that “ATF had registered firearms for which the agency had no documentation, but their owners did,”<sup>19</sup> and “did not include a review of the accuracy of ATF’s certifications in criminal prosecutions that no record of registration of a particular weapon could be found” in the NFRTR.<sup>20</sup>

Continuing efforts by citizens, federally licensed firearms dealers and gun collectors, and testimonies and statements from 1996 to 2001 at Congressional hearings involving the accuracy

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<sup>16</sup> Eric M. Larson has been a Senior Analyst, U.S. Government Accountability Office (GAO), since 1987. Mr. Larson’s research, Congressional testimonies from 1996 to 2001, and continuing work involving the NFRTR has been and continues to be done in his personal capacity as a private citizen, and does not represent the policy or position of GAO.

<sup>17</sup> Letter from Dan Burton, Chairman, Committee on Government Reform and Oversight, House of Representatives dated June 25, 1997, to the Honorable Valerie Lau, Inspector General, Department of the Treasury. Work Paper D-4, October 14, 1997, by Diane Kentner at 5, *available at* [http://www.nfaoa.org/documents/Work\\_Papers\\_D.pdf](http://www.nfaoa.org/documents/Work_Papers_D.pdf). Chairman Burton’s letter states: “From the correspondence and testimony I received . . . it appears that the concerns raised by Mr. Larson may be valid and legitimate. Consequently, I believe an investigation by the OIG into [his] allegations would be appropriate to reveal any possible improprieties or mismanagement at the ATF, and to recommend solutions that would improve and strengthen ATF’s registration and record-keeping of firearms.”

<sup>18</sup> December 1998 Treasury IG Report at 12, *available at* <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>. The 1998 Treasury IG reports do not use the term “critical error,” and instead refer to them as “discrepancies.”

<sup>19</sup> Congressional Research Service, *Memorandum: ATF’s National Firearms Registration and Transfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005 at 12, *available at* <http://www.nfaoa.org/documents/CRSmemoNFRTR0001.pdf>. The memorandum also states: “While the OIG found discrepancies in the sampled records . . . the critical error rates were not given in the text of the audit report. Nevertheless, based on its own findings and ATF efforts to improve the NFRTR, the Treasury OIG chose not to perform a full sampling and audit of the NFRTR.” *Id.* at 14.

<sup>20</sup> *Id.* at 12.

and completeness of the NFRTR resulted in another Government examination of the NFRTR. In the June 2007 report of its “review” of the NFRTR, the Department of Justice Inspector General (Justice IG) stated:

We reviewed ATF processes related to requesting records checks from the NFRTR and determined that when an error is detected, the NFA Branch staff thoroughly research the NFRTR and the imaging database to find out if a weapon is actually registered. Additionally, the NFA requires owners to retain the approved NFA weapons application as proof of a weapon’s registration and make it available to ATF upon request. **If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database.**<sup>21</sup> [emphasis added]

The Justice IG’s finding that “ATF assumes the error is in the NFRTR and fixes it in the database” when firearms owners produce copies of their registration documents leaves unanswered questions. Commenting on the foregoing determination, Stephen P. Halbrook, a nationally and internationally recognized authority on U.S. firearms law, observed:

... if the owner or the executor of a deceased owner cannot find the registration paperwork, which may be lost or destroyed, and if the record cannot be found in the NFRTR, then a voluntary abandonment of the firearm may be induced or even a criminal prosecution initiated. On such issues the report is not sufficiently informative.<sup>22</sup>

The loss or destruction of an NFA firearm registration document by anyone is not a trivial matter because all violations of the NFA are serious felony offenses, and the penalties are substantial.<sup>23</sup> Persons who are convicted of illegal possession of a machine gun are singled out for particularly harsh treatment. The reason is that under Title 18 § 922(o), the Government is

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<sup>21</sup> U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ National Firearms Registration and Transfer Record*, I-2007-006, June 2007 at 31, available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>. Hereafter June 2007 Justice IG Report.

<sup>22</sup> Stephen P. Halbrook. *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 575.

<sup>23</sup> Violators may be fined not more than \$250,000, and imprisoned not more than 10 years, or both. In addition, any vessel, vehicle or aircraft used to transport, conceal or possess an unregistered NFA firearm is subject to seizure and forfeiture, as is the weapon itself. 49 U.S.C § 781-788, 26 U.S.C. § 5861 and § 5872.

not required to prove that a machine gun is not registered to convict a defendant of Possession of Unregistered Firearm.

The 2007 determination appears to meet the standard the Criminal Division of the Department of Justice established in 1979 for a new amnesty period as “the only solution” when ATF’s “files are missing.”

When Eric M. Larson filed a FOIA request to the Justice IG to obtain copies of the Work Papers created during its review of the NFRTR, to further clarify its determination, the Justice IG responded by sending them to ATF’s Disclosure Division for processing.<sup>24</sup>

It is unusual for an Inspector General to send Work Papers to an agency over which it has oversight responsibility for FOIA processing, because of the potential for conflict of interest it represents for both the agency and the Inspector General. Despite Mr. Larson’s repeated efforts to obtain them, ATF has thus far not provided copies of the requested Work Papers. A copy of the July 25, 2008, letter ATF sent to Mr. Larson after receiving the Work Papers from the Justice Department IG, appears on the next page.

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<sup>24</sup> Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF dated July 25, 2008, to Eric M. Larson, bearing identifier REFER TO: 08-726.



**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

JUL 25 2008

Washington, DC 20226

www.atf.gov

REFER TO: 08-726

Mr. Eric Larson  
P.O. Box 5497  
Takoma Park, MD 20913

Re: Work Papers – Report Number 1-2007-006

Dear Mr. Larson:

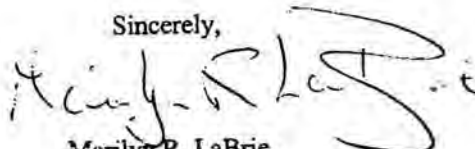
This is in reference to your Freedom of Information Act request, that you submitted to the Department of Justice. Your request was forwarded to this Agency together with a large volume of records.

It is our intent to grant your request in part. We are sorry that our processing has been delayed but we will endeavor to provide a response as soon as possible.

We are processing your request as an "all others requestor" therefore you are entitled to 100 free copies and 2 free hours of search. We will inform you if we anticipate any costs for copies that are not covered by the foregoing.

We regret the delay and will do all we can to provide a response.

Sincerely,

  
Marilyn R. LaBrie  
Team Leader, Disclosure Division

The Government still declines to establish an amnesty period to correct errors in the NFRTR. For example, in a January 14, 2009, letter, the Department of Justice Deputy Inspector General Paul K. Martin told Senator Barbara Mikulski, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, the following:





**U.S. Department of Justice**

Office of the Inspector General

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January 14, 2009

The Honorable Barbara A. Mikulski  
United States Senate  
Hart Senate Office Building  
Suite 503  
Washington, D.C. 20510-2003

Attention: Benson Erwin

Dear Senator Mikulski:

We received your correspondence of October 28, 2008, forwarding a letter from Mr. Eric Larson regarding the Office of the Inspector General's (OIG) review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) management of the National Firearms Registration and Transfer Record (NFRTR) database and Mr. Larson's Freedom of Information Act (FOIA) request to the OIG. We will first address the concern with the OIG's review of the NFRTR and, second, with Mr. Larson's FOIA request.

Mr. Larson stated in his letter that he was concerned that the OIG did not review the "material inaccuracies" in the NFRTR and these errors "expose innocent firearms owners to legal jeopardy." Mr. Larson also asks the OIG to issue an opinion on the need for an amnesty period to register National Firearms Act (NFA) weapons. We are aware of Mr. Larson's concern about errors in the NFRTR and his desire for a new amnesty period for the registration of additional NFA weapons. However, our review focused on ATF's management of the NFRTR and the processing of NFA weapons' forms and did not address the issue of an amnesty period. The OIG has no opinion on the establishment of a new amnesty period in which to register NFA weapons. While our review found that there are some technical and programming issues that could cause administrative errors in records, we also found that ATF is taking the appropriate actions to correct these issues and is proactively correcting any errors found in individual records. Moreover, we found no instance in which errors in the NFRTR resulted in inappropriate criminal charges against individuals or federal firearms licensees.

Regarding Mr. Larson's FOIA request, the OIG received a FOIA request from Mr. Larson on July 26, 2007, seeking information pertaining to our review, including the work papers associated with the review. We have fully processed this request.

On August 16, 2007, we provided Mr. Larson with a copy of the report relating to our review. By letter dated September 18, 2007, we informed Mr. Larson that the work papers contained three categories of material: (1) documents that originated with other offices/agencies; (2) public source documents; and (3) documents generated by the OIG that contain information originating from other offices/agencies. We asked Mr. Larson whether he wanted copies of the public source material and whether he wished us to refer the material originating with the other offices/agencies to those entities. We also informed him that we would process the documents generated by the OIG after consultation with the other offices/agencies.

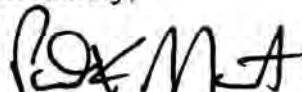
By letter dated September 27, 2007, Mr. Larson responded that he wanted copies of the public source documents and that we should make the referrals to the other entities. We thereafter referred to the Department of the Treasury and the ATF documents that originated with their offices. We informed Mr. Larson of these referrals, telling him that the Department of the Treasury and ATF would respond directly to him regarding the referred documents. We also sent Mr. Larson copies of the public source material.

After consulting with ATF regarding the OIG-generated material, we informed Mr. Larson on December 5, 2008, that these documents were exempt from disclosure pursuant to 5 U.S.C. §552(b)(5). We also informed Mr. Larson regarding his right to appeal our determination.

We are forwarding a copy of this letter to Mr. Larson.

Please feel free to contact us if you have additional questions about the work of the OIG.

Sincerely,



Paul K. Martin  
Deputy Inspector General

cc: Mr. Eric Larson

While Deputy Inspector General Martin correctly states “[w]e have fully processed” Mr. Larson’s FOIA request, his statement is misleading because the Justice IG transferred the documents Mr. Larson requested to ATF for FOIA processing. The Justice IG’s action is reminiscent of how the Government long avoided disclosing documents pertinent to Waco in

response to a FOIA request by shifting the paperwork and related responsibilities between the Department of Justice, ATF, and the Texas Rangers, before a Federal District Judge ordered a halt to such evasions and ordered that the documents be produced for his Court, and they were.<sup>25</sup>

**“Institutional Perjury”: The Busey Videotape and *LeaSure***

The most recent efforts to persuade ATF to render the NFRTR accurate and complete originated from statements about its inaccuracy during an October 1995 “ROLL CALL TRAINING” session at ATF headquarters that was also videotaped.<sup>26</sup> During the session, which was broadcast throughout ATF, then-NFA Branch Chief Thomas Busey stated “. . . **when we testify in court, we testify that the database [NFRTR] is 100 percent accurate. That’s what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true.**”<sup>27</sup> (Emphasis added). Asserting the error rate in the NFRTR was recently reduced as the result of activities of a “quality review team,” Mr. Busey stated:

. . . when I first came in a year ago, our error rate was between 49 and 50 percent, so you can imagine what the accuracy of the NFRTR could be, if your error rate’s 49 to 50 percent. The error rate now is down to below 8 percent, and that’s total. That’s common errors and critical errors.<sup>28</sup>

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<sup>25</sup> David T. Hardy, *This Is Not An Assault: Penetrating the We of Official Lies Regarding the Waco Incident*. Xlibris Corporation, 2001 at 91-108.

<sup>26</sup> A certified copy of the session is transcribed under the title “ROLL CALL TRAINING, 10-95, TOM BUSEY.” *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 104th Cong., 2d Sess., Part 5 at 182-205, available at <http://www.nfaoa.org/documents/1996testimony.pdf>. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*.)

<sup>27</sup> *Id.* at 192.

<sup>28</sup> *Id.* at 202. Mr. Busey was apparently referring to an internal ATF “Quality Review” initiative that “commenced operations on July 25, 1994,” according to a “productivity report” prepared February 9, 1996. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 1st Sess., Part 5 at 102, available at <http://www.nfaoa.org/documents/1997testimony.pdf>. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*.)

In response to Mr. Larson’s FOIA request for information about the quality review initiative Mr. Busey described, ATF sent approximately 100 loose pages consisting of weekly reports and other documents. The result of the

Mr. Busey's statements that ATF personnel "always testify" in court that the NFRTR "is 100 percent accurate," and "[a]s you probably well know, that may not be 100 percent true," were termed "institutional perjury" by an attorney who learned of the videotape, obtained a transcript of Mr. Busey's statements by filing a FOIA request, and published an article about the incident.<sup>29</sup> During the session Mr. Busey also said the error rate in the NFRTR was between 49 percent and 50 percent in the year before he arrived, and "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4<sup>30</sup> waved in your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that's happened. I'm not sure."<sup>31</sup>

The videotape of Mr. Busey's remarks, now available on the Internet, has more impact than his published words. The reasons are that Mr. Busey's statements were not spontaneous remarks; Mr. Busey prepared his statements in advance, can be seen reading them, and smirks while saying: "I've heard that's happened. I'm not sure." In response to Mr. Larson's FOIA request for a copy of the Busey videotape, ATF responded:

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initiative is unclear because it is not apparent whether there was a final report, and there are no separate explanations or summaries of the weekly reports.

<sup>29</sup> "Institutional Perjury," by James H. Jeffries III. *Voice for the Defense*, Vol. 25, No. 8, October 1996 at 28-30; available at <http://www.nfaoa.org/documents/Jeffriesarticle.pdf>, reprinted in the *Congressional Record* (Extensions of Remarks), Vol. 142, August 2, 1996 at E1461-E1462, available at <http://www.nfaoa.org/documents/JeffriesCongRec.pdf>.

<sup>30</sup> ATF Form 4, currently titled "Application for Tax Paid Transfer and Registration of Firearm," is prepared in duplicate original and used to transfer the ownership of registered NFA firearms. After ATF approves the Form 4 application, ATF (1) keeps one approved copy for entry into the NFRTR, and (2) sends the other approved copy to the firearm owner (transferor), who must subsequently transfer the firearm (and the other approved copy) to the new owner (transferee) within a reasonable time or cancel the transfer. The NFA prohibits the physical transfer of the firearm by the transferor to the transferee before ATF approves the transfer.

<sup>31</sup> Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*, available at <http://www.nfaoa.org/documents/1996testimony.pdf>.

You have requested "a complete and unredacted copy of the videotape created by the Bureau of Alcohol, Tobacco and Firearms which pictures Mr. Thomas Busey, Chief, National Firearms Act Branch, during a "Roll Call Training Session, or about October 18, 1995". Your request is denied pursuant to Title 5, U.S.C. 552 (b)(6) as release of this video tape would constitute an invasion of Mr. Busey's privacy.

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The Busey videotape was used, in part, to overturn five convictions of John D. LeaSure for possession of unregistered firearms in a May 1996 bench trial, during which ATF Specialist Gary Schaible testified he was aware of "occasions . . . in the NFA Branch of clerks throwing away transmissions because they don't want to fool with them" rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).<sup>33</sup> Under cross-examination, when asked "that's one of the things [NFA Branch clerks throwing away documents] that could happen to you?," Mr. Schaible replied "Certainly."<sup>34</sup>

Citing Mr. Schaible's testimony (in which he also confirmed the Busey video had been broadcast throughout and was common knowledge within ATF Headquarters), the presiding Judge ruled " . . . it throws a disagreeable proposition on my finding somebody guilty on records when their chief man [Mr. Busey] says they were 49 percent wrong," and dismissed five

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<sup>32</sup> Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF, to Eric M. Larson dated March 18, 1998, bearing symbols L:D:MRL 98-514. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 2d Sess., Part 5 at 170, available at <http://www.nfaoa.org/documents/1998testimony.pdf>. Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*.

A videotape of the training session was obtained by an attorney who subpoenaed it for trial and made a copy when the U.S. Attorney that prosecuted the case failed to submit a timely order to the court to prohibit its public disclosure, available at [http://www.nfaoa.org/documents/rollcall\\_highlights.mp4](http://www.nfaoa.org/documents/rollcall_highlights.mp4).

<sup>33</sup> *United States of America vs. John Daniel LeaSure*, Crim. No. 4:95cr54, E.D. Va.—Newport News Div., Transcript of Proceedings before the Honorable John A. MacKenzie (May 21, 1996) at 42-43, available at <http://www.nfaoa.org/documents/LeaSureTrial.pdf>. (Hereafter *United States of America vs. John Daniel LeaSure* (1996).)

<sup>34</sup> *Id.* at 42-43.

convictions under the NFA for possession of unregistered firearms.<sup>35</sup> The *LeaSurre* transcript states that Mr. Schiabile was a witness “called on behalf of the Government, having been first duly sworn, was examined and testified” to the above facts.<sup>36</sup> ATF did not appeal the verdict.

ATF acted to contain the damage resulting from Mr. Busey’s statements by (1) adding “corrections” by Mr. Schaible to transcribed copies of the videotape of Mr. Busey’s remarks disclosed by ATF in response to FOIA requests, and (2) requesting the Audit Services Division of the Department of the Treasury to audit the NFRTR. On February 13, 1996, Mr. Schaible stated under penalty of perjury that, to the best of his knowledge, no NFA Branch personnel have ever testified that the NFRTR is 100 percent accurate, and “the reference to an error rate of 49-50 percent is based on an informal, undocumented estimate by personnel from the Firearms and Explosives Regulatory Division.”<sup>37</sup>

In *Rith*, a 1999 court case that included a challenge to the accuracy and completeness of the NFRTR arising from the Busey videotape, after hearing opposing evidence the Court ruled “[t]he record establishes that the NFRTR database has sufficient guarantees of trustworthiness to satisfy the Sixth Amendment.”<sup>38</sup> The Court based its opinion on (1) statements by Mr. Busey that “a quality review team . . . instituted in 1994” had reduced “the critical-error rate to below three percent,” and (2) “a copy of an audit performed February 7, 1996, by the Audit Services Division of the Department of the Treasury” showing a 1.5 percent “critical-error” rate.<sup>39</sup> The

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<sup>35</sup> *Id.* at 45.

<sup>36</sup> *Id.* at 23.

<sup>37</sup> Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*, available at <http://www.nfaoa.org/documents/1996testimony.pdf>.

<sup>38</sup> *United States of America vs. Rith*, 164 F.3d 1323 at 1336, 51 Fed. R. Evid. Serv. 197 (10th Cir. 1999). Hereafter *United States of America vs. Rith* (1999).

<sup>39</sup> *Id.* at 1336.

Court added: “the accuracy of the registration check is buttressed by a second level review by a branch chief.”<sup>40</sup> It is unclear whether the Audit Services Division of the Department of the Treasury published a formal report of its 1996 audit of the NFRTR; the audit processes it followed are unknown and may not have been fully disclosed to the Court.

ATF and the Audit Services Division may have perpetrated a fraud upon the Court in *Rith*. The reasons are that (1) Mr. Busey’s statements about improvements in the “critical-error” may have been self-serving, (2) there is no evidence that a final report on the “quality review team” accomplishments was rendered, or that the results of the “accomplishments” and reduction of the “critical-error” rate were independently validated, (3) it is unclear whether the 1996 audit was conducted according to GAGAS, and (4) the Audit Services Division auditors may have been improperly influenced by NFA Branch representatives to manipulate the outcome of the audit.

The Audit Services Division is a sister component of ATF; has no oversight authority over ATF; and the purpose of the audit was to establish that the NFRTR was accurate enough to justify criminal prosecutions. It is improbable that one component of a federal law enforcement agency would engage in conduct that would reflect badly upon another component, or the agency itself; and questioning the legal basis for a federal law enforcement activity would be sensitive because of potential legal liabilities, such as overturning convictions and payments to citizens for damages for wrongful convictions.

There are reasons to doubt the independence of Treasury Department and other Government officials regarding their characterization of “errors” in the NFRTR. There are also reasons to question the validity and reliability of Mr. Busey’s characterization of what he termed

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<sup>40</sup> Id. at 1336.

“common errors” and “critical errors” and “error rate” in the October 1995 “ROLL CALL TRAINING” session because (1) these terms do not correspond to terms used by the quality control team, and (2) inspection of “Weekly – Quality Review Report” documents disclose that the quality review team manipulated the NFRTR error rate by changing the definition of “Significant Error” by renaming it “Error.”<sup>41</sup> Error and error rate reports created by the quality review team, obtained via a FOIA request by Mr. Larson, are not straightforward and their meaning is difficult to interpret; for example, one weekly report states:

**Since 6/30/94 reviewed 25611 Errors 1567 Significant errors 373**  
**Common Error rate .01% Significant error rate .01%**<sup>42</sup>

No valid and reliable overall error rate of any type could be identified from any of the documents because numbers of “Errors” and “Significant errors” were different among nearly 100 different weekly reports ATF disclosed in responding Mr. Larson’s FOIA request.

<sup>41</sup> ATF’s “Quality Review” team manipulated the definition of “error” as follows. One document states: “On approximately October 3, 1994, we began defining and separating the significant errors from the common errors,” and this document defined “Significant Errors” as shown below:

**Significant Errors:**

1. Misspelled and/or Incomplete names.
2. Voided application--didn't indicate current firearm possessor.
3. \$200/\$5 remittance not posted.
4. Never mailed approved form to transferor
5. Approved wrong firearm to transferee.
6. Approved form never updated in NFRTR.

Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 103, available at <http://www.nfaoa.org/documents/1997testimony.pdf>.

Another weekly report reclassified “Significant Errors” as “Errors” except for slightly changing one type of error, namely, “2. Voided application - - didn’t indicate previous owner,” as shown below:

**Errors:**

1. Misspelled and/or Incomplete names.
2. Voided application--didn't indicate previous owner.
3. \$200/\$5 remittance not posted.
4. Never mailed approved form to transferor
5. Approved wrong firearm to transferee.
6. Approved form never updated in NFRTR.

Id. at 104.

<sup>42</sup> Id. at 103.



NFRTR Data Inaccuracies: Early Statistical Evidence, 1992 to 1996

Because of Mr. Busey's statements that records of Forms 4 could not be located in the NFRTR, Mr. Larson sought to determine if there was any independent statistical evidence that ATF had lost or destroyed NFA registration documents by analyzing publicly available NFRTR data on "NFA registration activity" from 1992 to 1996. Mr. Schaible's testimony *LeaSure* indicated that ATF may have added registration documents obtained from firearms owners to the NFRTR after discovering that NFA Branch clerks had thrown documents away rather than work on them.

Under a FOIA request, Mr. Larson obtained copies of reports of annual "NFA registration activity" from 1992 to 1996 from the NFA Branch, which list 11 categories of firearms registration activity represented in the NFRTR.<sup>43</sup> Inspection of the data indicates that some data lack face validity; that is, does not measure what it purports to measure. The reason is that there are records of NFA registration activity during and prior to the 1920s, a logical impossibility because the NFA was not enacted until 1934. Just as when a clock incorrectly strikes 13 on the hour, causing one to question what hour it really is and raising doubts about

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<sup>43</sup> The NFRTR data Mr. Larson obtained are available in Eric M. Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*. Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 5-6, available at <http://www.nfaoa.org/documents/Critiqueof1998IGreports.pdf>.

The NFRTR data categories are: Form 1, Form 3, Form 4, Form 5, Form 6, Form 9, Form 10, and Form 4467, and differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture, import, and/or deal in NFA firearms, and whether the transfer is tax paid or tax exempt. Form 2, currently titled "Notice of Firearms Manufactured or Imported," is a record of notice to ATF used exclusively by and sent to ATF by SOTs, not an application form. The "Letter" category has been used to register or transfer NFA firearms when ATF forms have not been available, but these transactions are uncommon.

Treasury IG auditors reported that ATF has not formally defined the "Other" category, and stated it included "a procedure where movie industry supply houses and movie industry property masters filed applications by telegraph in lieu of filing a Form 3 in order to expedite processing by ATF." October 1998 Treasury IG Report at 18, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

what hour it really was during all the other times the clock was supposed to be striking correctly on the hour during previous strikes, records of NFA registration activity before 1934 raise doubts about the accuracy of records of NFA registration activity for other years.

These data tables of NFA registration activity during 1992 to 1996 are reproduced below in the same form ATF sent them to Mr. Larson.

DATA THROUGH 12/31/92		BUREAU OF ALCOHOL, TOBACCO AND FIREARMS NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON										RUN: 2/01/93 15:31	
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL	
1992	357	71296	26652	6527	46462	2	20385	289	40		30	172040	
1991	224	78062	20914	5390	42117	1	36848	258			35	183049	
1990	692	88893	22823	6807	56015	4	27877	289	43		134	203577	
1989	271	69932	23605	8165	31198	12	18133	281	51		106	151754	
1988	342	24860	39747	7699	8319	2	1473	403	66		450	83361	
1987	409	17427	34492	8311	9388	2	745	324	144	1	717	71960	
1986	935	69957	22944	5158	4888			528	381	181	3	749	105724
1985	645	14666	15512	3524	6245	1	1306	334	45	1	726	43005	
1984	534	14846	14720	3911	5437	1	1506	294	3	3	335	41590	
1983	458	11143	11132	5203	3072	27	248	367	4	1	29	29684	
1982	324	7720	11417	2770	2671	9	1	481	2	3	37	25435	
1981	270	7101	8148	3734	2718	24	1	341	10	1	18	22366	
1980	163	3072	6830	5040	1634	6	1	329	7	4	23	15109	
1979	108	3284	6988	2150	1513	13	6	353	5	1	20	14441	
1978	80	1430	5498	1879	1257	7	1	729	5	6	17	10909	
1977	77	1988	6006	1535	1737	2	1	590	14	1	22	11973	
1976	30	878	10943	979	1754	20	5	457	3	39	26	15134	
1975	78	1399	3279	567	1830	18	3	613	10		49	7846	
1974	29	1017	2961	579	1688	9	3	507	15	5	8	6821	
1973	16	1351	2033	353	1782	5	7	513	8	17	16	6101	
1972	30	4017	1963	261	1511	14	9	639	33	84	19	8580	
1971	24	2241	209	36	251	10		311	1959	26	19	5086	
1970	38	191	19	10	24	16		1	1563	272	34	2168	
1969	36	760	41	13	41	8	1		1148	2086	19	4865	
1968	1510	1277	366	192	935	7		4	29	54487	37	58844	
1967	909	1144	306	181	844	2			5	64	10	3465	
1966	900	1293	435	134	1062	2				8	20	3856	
1965	841	1246	428	142	1047	7		1	1	2	21	3736	
1964	744	937	275	139	699	6		1		3	4	2808	
1963	709	720	291	126	808	3	4		1	2	8	2672	
1962	734	1111	272	204	789	3			1	14	7	3135	
1961	809	1466	548	152	1330	5		1	4	2	4	4321	
1960	790	657	314	148	654	20			2	6	1	2592	
1950 TO 1959	6629	5955	2165	1150	2917	861	16	2	6	23	47	19771	
1940 TO 1949	6574	7231	4704	361	4995	8455	5	2	4	9	57	32307	
1930 TO 1939	11422	191	548	15	786	22	1	14	26	25	1280	14250	
1920 TO 1929	12	4	12	2	7	1				6	9	53	
PRIOR TO 1920	1	36	21	2	37	1	2	1	1	4	15	121	
UNKNOWN	12	304	32	22	170	6	24		6	58	3513	4147	
TOTAL	58766	521103	309593	79573	250462	9614	109140	9110	5437	57187	8671	1398656	

DATA THROUGH 12/31/93

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/04/94 7:11

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1993	299	107362	27228	7749	67625		27905	405	11		25	238609
1992	357	75754	26834	6556	46561	2	20391	289	40		25	176809
1991	226	78157	20983	5400	42124	1	56834	258			33	184016
1990	692	89697	22858	6821	56084	4	27827	289	44		132	204448
1989	271	69927	23728	8176	31210	12	18133	281	51		104	151893
1988	342	24851	39767	7703	8370	2	1473	403	66		450	83427
1987	409	17491	34519	8318	9421	2	745	324	143	1	714	72087
1986	936	70211	22959	5162	4903		528	381	181	3	744	106008
1985	645	14728	15520	5526	6289	1	1306	334	45	1	725	43111
1984	534	14849	14725	3913	5437	1	1506	294	3	3	336	41601
1983	458	11142	11144	3204	3078	27	248	367	4	1	29	29702
1982	325	7720	11420	2771	2674	9	1	481	2	3	37	25451
1981	270	7108	8148	3735	2720	23	1	341	10	1	18	22375
1980	162	3073	6830	3040	1637	6	1	329	7	4	22	15111
1979	108	3285	6990	2150	1513	13	6	354	5	1	19	14444
1978	80	1430	5497	1878	1257	7	1	729	4	6	17	10906
1977	77	1987	6009	1535	1737	2	1	590	14	1	22	11975
1976	30	879	10945	979	1754	19	5	459	3	39	26	15138
1975	78	1399	3280	567	1831	18	3	613	10		49	7848
1974	29	1017	2961	579	1689	9	3	507	15	5	8	6822
1973	16	1351	2030	353	1783	5	7	513	8	17	15	6098
1972	30	4028	1963	261	1511	14	11	638	33	84	19	8584
1971	24	2242	209	36	251	10		311	1959	26	19	5087
1970	38	192	18	10	23	16		1	1566	272	32	2168
1969	36	760	45	13	42	8	1		1140	2010	18	4071
1968	1509	1278	368	193	935	7		4	29	54485	37	58845
1967	909	1143	306	181	844	2			5	64	10	3464
1966	900	1293	435	136	1062	2				8	20	3856
1965	841	1246	428	142	1047	7		1	2	2	21	3737
1964	744	937	275	139	699	6		1		3	4	2888
1963	709	720	291	126	808	3	4		1	2	8	2672
1962	734	1111	272	205	789	3			1	14	7	3136
1961	810	1466	548	152	1330	5		1	4	2	4	4322
1960	791	657	314	148	655	20			2	6	1	2594
1950 TO 1959	6629	5956	2164	1151	2915	860	16	2	6	23	47	19769
1940 TO 1949	6572	7230	4703	363	4908	8456	5	2	4	9	57	32309
1930 TO 1939	11422	191	548	15	706	22	1	14	26	25	1280	14250
1920 TO 1929	12	4	12	2	7	1				6	10	54
PRIOR TO 1920	1	36	21	2	37	1	2	1	1	4	15	121
UNKNOWN	12	320	32	23	263	6	24		6	58	3749	4493
TOTAL	39067	634228	337325	87413	318520	9612	136989	9517	5451	57189	8908	1644219

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS											RUN: 1/26/95 10:03	
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON												
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1994	1270	100130	22498	7838	62258		35392	2857	2		1	232246
1993	309	108830	27638	7819	67739		28118	407	11		19	240881
1992	358	76161	26878	6568	46587	2	20366	290	40		21	177271
1991	225	78280	21018	5411	42243	1	36814	261			29	184282
1990	691	89287	22888	6830	56066	4	27504	289	44		130	203733
1989	271	69582	23755	8176	31138	12	18132	281	51		96	151494
1988	341	25164	39769	7707	8386	2	1473	493	66	1	448	83760
1987	412	17180	34536	8321	9441	2	745	328	144	1	708	71730
1986	938	78278	22970	5172	4905		527	381	181	3	737	106092
1985	645	14742	15534	3529	6281	1	1306	334	45	1	722	63140
1984	535	14848	14730	3915	5437	1	1506	294	3	3	536	41608
1983	454	11137	11145	3207	3078	27	248	367	4	1	26	29694
1982	325	7724	11414	2770	2674	9	1	481	2	3	37	25440
1981	270	7127	8152	3737	2720	23	1	342	10	1	18	22401
1980	162	3073	6829	3044	1637	6	1	329	7	4	22	15114
1979	108	3285	6988	2151	1515	13	6	354	5	1	18	14644
1978	88	1430	5497	1879	1257	7	1	730	4	6	16	10987
1977	77	1987	6010	1537	1737	2	1	590	14	1	22	11978
1976	30	879	10947	983	1756	19	5	458	3	39	26	15145
1975	79	1401	3280	567	1831	18	3	614	10		98	7851
1974	29	1818	2961	579	1690	9	3	507	15	5	8	6824
1973	16	1353	2032	353	1783	5	7	513	8	18	14	6102
1972	30	4020	1963	261	1511	14	11	638	33	84	19	8584
1971	24	2241	209	36	250	10		311	1960	26	19	5086
1970	38	192	18	10	23	16		1	1567	271	32	2168
1969	36	760	43	13	42	8	1		1140	2016	18	4877
1968	1510	1277	368	193	935	7		4	29	54485	36	58844
1967	909	1141	306	181	844	2			5	64	9	3461
1966	902	1293	436	136	1059	2				8	20	3854
1965	841	1246	429	142	1047	7		1	2	2	20	3737
1964	744	934	276	139	698	6		1		3	4	2895
1963	709	720	291	126	808	3	4		1	2	8	2672
1962	734	1115	277	205	787	3			1	14	7	3143
1961	810	1463	548	153	1329	5		1	4	2	4	4319
1960	792	657	314	148	655	20			2	6	1	2595
1950 TO 1959	6631	5952	2164	1152	2915	859	16	2	6	23	46	19766
1940 TO 1949	6571	7230	4695	363	4914	8452	5	2	4	9	56	32301
1930 TO 1939	11422	196	548	17	708	22	1	14	26	26	1268	14248
1920 TO 1929	12	4	12	2	8	1				6	9	54
PRIOR TO 1920	1	36	22	2	37	1	2	1	1	4	15	122
UNKNOWN	30	329	33	26	273	6	24	1	6	57	3159	3944
TOTAL	40362	735622	360421	95398	381002	9607	17224	12379	5456	57196	8252	1877919

DATA THROUGH 12/31/95		BUREAU OF ALCOHOL, TOBACCO AND FIREARMS NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON										RUN: 1/02/96 11:28	
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL	
1995	1124	95645	17277	8059	66367	2	31563	1492	19			221488	
1994	1272	104681	22794	7870	62350		35384	2845	2			237130	
1993	500	108202	27694	7657	67741		28117	406	11		18	240406	
1992	358	76134	24803	6573	44593	2	20364	290	68		21	177258	
1991	225	78255	21028	5428	42246	1	36804	242			25	184266	
1990	491	89266	22912	4635	56070	4	27497	289	64		130	283728	
1989	271	69548	23761	8181	51138	12	18128	281	51		94	151485	
1988	341	25129	39798	7712	8388	2	1473	403	44	1	445	83758	
1987	412	17191	34546	6330	9441	2	745	320	144	1	787	71749	
1986	959	70501	22974	5174	4909		527	301	163	3	735	106328	
1985	445	14750	15540	3532	6293	1	1304	334	45	1	729	43167	
1984	535	14850	14737	3914	5457	1	1504	294	3	3	334	41418	
1983	455	11136	11158	3297	5087	27	248	347	4	1	25	29707	
1982	325	7751	11421	2770	2674	9	1	481	2	3	35	25473	
1981	270	7152	8157	3741	2721	23	1	342	18	1	18	22414	
1980	142	3876	6827	3846	1438	4	1	330	7	4	20	15117	
1979	108	3205	6908	2151	1514	13	4	354	5	1	18	14445	
1978	89	1430	5498	1878	1258	7	1	739	4	4	16	10908	
1977	77	1987	6818	1537	1737	2	1	590	14	1	22	11978	
1976	30	888	19948	983	1257	19	5	450	3	39	26	15148	
1975	79	1482	3200	568	1835	18	3	614	18		48	7857	
1974	29	1018	2942	579	1499	9	3	587	15	5	7	4824	
1973	14	1353	2833	353	1781	5	7	513	9	18	13	4181	
1972	30	4021	1964	242	1511	14	11	638	33	84	19	8587	
1971	24	2242	209	36	251	18		311	1945	28	18	5892	
1970	38	192	18	10	23	14		1	1567	271	32	2168	
1969	35	761	43	13	42	8	1		1141	2017	17	4079	
1968	1510	1292	368	194	935	7		4	29	54583	35	58877	
1967	989	1141	384	181	844	2			5	44	9	3461	
1966	902	1293	437	134	1059	2				8	29	3857	
1965	863	1248	429	142	1047	7		1	2	2	28	3739	
1964	744	934	274	139	698	6		1		3	4	2805	
1963	709	720	291	124	808	3	4		1	2	8	2672	
1962	734	1115	277	205	787	3			1	14	7	3143	
1961	811	1443	548	153	1329	5		1	4	2	4	4328	
1960	792	657	314	148	654	29			2	6	1	2594	
1950 TO 1959	4433	5941	2168	1152	2916	859	14	2	6	23	45	19778	
1940 TO 1949	4574	7231	4695	343	4917	8452	5	2	4	9	55	32387	
1930 TO 1939	11427	198	547	17	718	22	1	14	26	27	1263	14252	
1920 TO 1929	12	4	12	2	8	1				4	9	54	
PRIOR TO 1920	1	36	21	2	38	1	2	1	1	4	13	128	
UNKNOWN	80	349	32	25	334	6	24	1	9	57	3377	4274	
TOTAL	41534	635388	378162	103558	647588	9489	203695	13888	5487	57214	8435	2106544	

DATA THROUGH 12/31/96		BUREAU OF ALCOHOL, TOBACCO AND FIREARMS										RUN: 1/06/97 8:32	
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON													
YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	6667	OTHER	TOTAL	
1996	1253	96677	17197	6367	67769	1	60223	1202	21			230718	
1995	1125	99075	17329	8086	66522	2	37337	1487	28			225978	
1994	1273	104543	22796	7887	62351		35300	2860	2			237892	
1993	301	108226	27716	7850	67752		28116	406	11		14	240392	
1992	358	76127	24096	6577	66597	2	20363	290	60		19	177269	
1991	224	78229	21038	5423	42275	1	36783	262			22	186257	
1990	691	89257	22916	6841	54881	4	27496	289	66			129 203748	
1989	271	69559	23769	8106	31143	12	18128	281	69			94 151492	
1988	341	25123	39803	7714	8369	2	1473	403	68			445 83759	
1987	614	17183	34557	8331	9445	2	745	320	142			706 71765	
1986	939	70656	22988	5174	4946		527	381	178	1		731 106521	
1985	645	14832	15539	3537	6375	1	1306	333	45			718 43331	
1984	535	14852	14739	3919	5638	1	1507	294	3			336 41624	
1983	455	11157	11149	3208	3089	27	248	367	6			25 29789	
1982	326	7759	11424	2771	2676	9	1	481	2			34 25483	
1981	271	7131	8162	3741	2722	23	1	342	18			18 22421	
1980	162	3877	8826	3846	1638	6	1	338	7			28 15113	
1979	108	3285	6987	2151	1516	13	6	354	5			18 14443	
1978	88	1438	5501	1678	1258	7	1	738	4			15 18994	
1977	77	1988	6814	1538	1748	2	1	591	14	1		19 11985	
1976	38	888	18944	983	1758	19	5	458	3	34	26	15144	
1975	79	1482	3288	569	1835	18	3	613	18		48	7857	
1974	29	1818	2963	579	1698	9	5	589	15	5	7	6827	
1973	16	1354	2033	354	1788	5	7	513	9	18	12	6181	
1972	38	4821	1964	262	1513	14	11	639	33	85	18	8598	
1971	24	2263	289	36	252	18		312	1965	26	18	5895	
1970	39	192	18	18	23	16			1547	271	31	2167	
1969	36	761	43	13	62	8	1		1148	2853	17	4114	
1968	1511	1328	368	194	935	7			29	54585	35	58984	
1967	989	1141	386	181	844	2			5	66	9	3461	
1966	982	1293	437	136	1868	2				8	28	3858	
1965	863	1246	429	142	1848	7			2	2	28	3739	
1964	744	934	276	139	698	6				3	6	2884	
1963	789	728	291	126	888	3	4		1	2	8	2872	
1962	734	1115	277	285	787	3			1	14	7	3163	
1961	512	1464	548	154	1338	5			4	2	4	4323	
1960	792	657	314	148	656	28			2	6	1	2596	
1958 TO 1959	6638	5961	2165	1152	2917	859	18	2	6	23	45	19784	
1948 TO 1949	6575	7232	4697	364	4919	8456	6	2	4	18	54	32317	
1938 TO 1939	11449	199	546	17	718	22	1	14	27	27	1247	14259	
1928 TO 1929		4	6		1					3	5	19	
PRIOR TO 1928		11	8		4						5	28	
UNKNOWN	68	353	32	25	339	4	26	1	18	58	3872	4788	
TOTAL	42818	935587	395582	118814	515671	9612	244717	15864	5588	57223	8876	2348578	

Mr. Larson arranged the Form 4 data from 1992 to 1996 by and across single years to determine if the number of registrations changed over time. As shown in the following table, the total number of Form 4 registrations increased by 625 during 1992 to 1996, for registrations that occurred since 1934 by single years through 1996 and during unknown years (registrations for

years in and before 1968 have been combined). Mr. Larson reported these results in 1997 in Congressional testimony, as shown below.

Table 4

Form 4 (Tax-Paid) Transfers from 1934 to 1996, and During Unknown Years, as Reported by ATF During 1992 to 1996 in the National Firearms Registration and Transfer Record: Calculations Showing Results of Annual and Overall Changes Have Been Added

Year	1992	1993	Change	1994	Change	1995	Change	1996	Change	Change
	(1)	(2)	(2)-(1)=	(4)	(4)-(2)=	(6)	(6)-(4)=	(8)	(8)-(6)=	1992-96
1996								6,367	0	0
1995						8,059	0	8,086	+27	+27
1994				7,838	0	7,870	+32	7,887	+17	+49
1993		7,749	0	7,819	+70	7,837	+18	7,850	+13	+101
1992	6,527	6,556	+29	6,568	+12	6,573	+5	6,577	+4	+50
1991	5,390	5,400	+10	5,411	+11	5,420	+9	5,423	+3	+33
1990	6,807	6,821	+14	6,830	+9	6,835	+5	6,841	+6	+34
1989	8,165	8,176	+11	8,176	0	8,181	+5	8,186	+5	+21
1988	7,699	7,703	+4	7,707	+4	7,712	+5	7,714	+2	+15
1987	8,311	8,318	+7	8,321	+3	8,330	+9	8,331	+1	+20
1986	6,158	6,162	+4	6,172	+10	6,174	+2	6,174	0	+16
1985	3,524	3,526	+2	3,529	+3	3,532	+3	3,537	+5	+13
1984	3,911	3,913	+2	3,915	+2	3,916	+1	3,919	+3	+8
1983	3,203	3,204	+1	3,207	+3	3,207	0	3,208	+1	+5
1982	2,770	2,771	+1	2,770	-1	2,770	0	2,771	+1	+1
1981	3,734	3,735	+1	3,737	+2	3,741	+4	3,741	0	+7
1980	3,040	3,040	0	3,044	+4	3,046	+2	3,046	0	+6
1979	2,150	2,150	0	2,151	+1	2,151	0	2,151	0	+1
1978	1,879	1,878	-1	1,879	+1	1,878	-1	1,878	0	-1
1977	1,535	1,535	0	1,537	+2	1,537	0	1,538	+1	+3
1976	979	979	0	983	+4	983	0	983	0	+4
1975	567	567	0	567	0	568	+1	569	+1	+2
1974	579	579	0	579	0	579	0	579	0	0
1973	353	353	0	353	0	353	0	354	+1	+1
1972	261	261	0	261	0	262	+1	262	0	+1
1971	36	36	0	36	0	36	0	36	0	0
1970	10	10	0	10	0	10	0	10	0	0
1969	13	13	0	13	0	13	0	13	0	0
1968	192	193	+1	193	0	194	+1	194	0	+2
< 1968	2,780	2,785	+5	2,792	+7	2,791	-1	2,983	+192	+203
Unknown	22	23	+1	26	+3	25	-1	25	0	+3
<b>CHANGE</b>			<b>+92</b>		<b>+150</b>		<b>+100</b>		<b>+283</b>	<b>+625</b>
<b>Totals</b>		<b>79,573</b>	<b>87,413</b>		<b>95,338</b>		<b>103,558</b>		<b>110,014</b>	

Data source: Bureau of Alcohol, Tobacco and Firearms. All numbers shown in boldface type were calculated by Eric M. Larson.

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Mr. Larson's analysis used arithmetic calculations to determine if there are changes in NFRTR data, which could mean that registrations were being added after the fact, years after

<sup>44</sup> Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 71, available at <http://www.nfaa.org/documents/1997testimony.pdf>. Mr. Larson found similar patterns of apparent additions of registrations for Forms 1, 2, 3, 5, 4467, and "Letter" and "Other" categories.

ATF approved the original registration and concluded NFRTR reporting for a given year. For example, the number of registrations for 1992 changed from 6,527 to 6,556 in 1993, a difference of 29; similarly, the number of registrations for 1992 changed from 6,568 in 1994 to 6,573 in 1995, an increase of 12. Inspection of these Form 4 data disclose that the number of registrations in 1992 (6,527) increased to 6,577 in 1996. Put another way, ATF added 50 registrations during 1992 to 1996, for the year 1992, which gives the appearance that ATF could have added 50 Forms 4 to the NFRTR during that period. Using the same arithmetic calculations to analyze total Form 4 registrations for all years from 1992 to 1996, Mr. Larson determined that total registrations increased by 625; again, the implication is that ATF may have added 625 Forms 4 to the NFRTR after being unable to locate them in the NFRTR, and NFA firearms owners provided ATF with copies of their approved Forms 4. Note that 203 registrations were added for years in or before 1968.

In an effort to determine whether he may have made any errors of fact or omission, Mr. Larson asked NFA Branch officials if the increases in registrations resulted from ATF added copies of lost or destroyed NFA registrations back into the NFRTR, after obtaining them from firearms owners, or if there was another explanation. NFA Specialist Gary N. Schaible told Mr. Larson if an error was detected on a form and the form was misclassified, it would be reclassified as a Form 4, a Form 4467 or whatever form was correct, and that it would be re-entered in the NFRTR in the year that the registration occurred.<sup>45</sup> Mr. Schaible also stated "I assume that's happened," in response to Mr. Larson's question: "Has ATF ever added a firearm to the NFRTR, after a lawful owner produced a valid registration, because ATF had no record of the firearm in

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<sup>45</sup> Id. at 95.



the NFRTR?"<sup>46</sup> In addition to Mr. Schaible's comments, NFA Branch Chief Nereida W. Levine told Mr. Larson in a January 7, 1997, letter that correcting errors in entering data according to Form number or year of registration "may result in an adjustment to previously generated statistics."<sup>47</sup> NFA Branch Chief Levine concluded:

Finally, you asked whether a firearm would be added to the Registry if a person possessed a valid registration that was not in the Registry. The document that person possesses is his or her evidence of registration. It would be added to the National Firearms Registration and Transfer Record if the information was not already in the Record. 48

If no registrations were added to the NFRTR, explanations by NFA Branch representatives that changes in annual "NFA registration activity" could result from correcting errors in Form number and/or year of registration means such changes would be a "zero-sum" game, and represent classification errors. In other words, if the annual changes resulted from reclassified data, total registrations from all categories would not change.

To determine if the number of total registrations did not change, Mr. Larson analyzed total registrations (for all categories) for each year from 1992 to 1996 using the same arithmetic calculations he used to analyze Form 4 data. He found that total registrations increased each year and totaled 18,869 for the period from 1992 to 1996, and that registrations had been added to all NFRTR data categories for each year.

Mr. Larson concluded the discrepancies he observed in NFA registration activity, and statements by ATF representatives, required additional evidence to reliably determine the reason(s) for the increased number of reported registrations. While ATF personnel adding

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<sup>46</sup> Id. at 97. This question was asked and answered twice.

<sup>47</sup> Letter from Nereida W. Levine, Chief, NFA Branch, Bureau of Alcohol, Tobacco and Firearms, dated Jan. 7, 1997, to Eric M. Larson, bearing symbols E:RE:FN:GS. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 110-111, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

<sup>48</sup> Id. at 41.

registrations was one possible explanation, there was insufficient statistical and evidence upon which to reliably base such a conclusion. For example, there also could have been flaws in computer software, problems with reporting functions resulting from editing, inadequate internal quality controls or checks, and so forth, so Mr. Larson concluded that a formal investigation was needed, and did not present his findings as definitive. Because he was unable to conduct additional research according to standard social sciences practices, Mr. Larson asked appropriate Government officials to determine if ATF was adding registrations to the NFRTR.<sup>49</sup>

**Coverups in an internal ATF investigation, and audit of the NFRTR by the Treasury IG**

ATF and the Treasury IG conducted separate investigations in 1997 and 1998, respectively, of allegations by Mr. Larson that ATF had mismanaged the NFRTR, and there is valid and reliable evidence that each entity avoided determining whether ATF had added registrations. Each covered up facts and failed to diligently investigate Mr. Larson's complaint. All of Mr. Larson's allegations will not be reviewed in this motion, but it is instructive to note that the Treasury IG censored his most serious allegation. Although an audit Work Paper dated October 10, 1997, prepared Treasury IG auditor Diane Kentner, states the following:

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<sup>49</sup> Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848) and considered "tax return" information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to visit the NFA Branch to inspect NFRTR data or observe procedures involving NFA registration activities conducted by NFA Branch personnel.

Because the names and addresses of individual NFA firearms owners and SOTs are also protected from disclosure, it was not possible for Mr. Larson to conduct ordinary social science research, such as drawing representative random samples to try and contact or survey them to investigate what their experiences may have been regarding NFA paperwork for guns in their inventory for which they had valid registration documents, but for which ATF could find no record in the NFRTR. Similarly, Mr. Larson was legally prohibited from accessing the computerized NFRTR data base, and thus was unable to inspect these data, run tabulations and cross-tabulations, or conduct other analyses.

**(OIG Follow Up)**

- **Did ATF add additional firearms to the NFRTR that were originally registered on Form 1 or 4467 during 1934 to 1971, for which ATF lost or destroyed original records.**

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there is no evidence in either of its 1998 reports on the NFRTR, or in the 1998 audit Work Papers, that the Treasury IG fully investigated Mr. Larson's allegation.

Mr. Larson's original allegation, reproduced below, states:

**I. ATF employees have deliberately destroyed original firearm registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by ATF Special Agent Gary N. Schaible.<sup>50</sup> In analyses of data made public by ATF, I found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records.**<sup>51</sup>

The Treasury IG censored Mr. Larson's allegation in its October 1998 audit report, and is reproduced on the following page.

<sup>50</sup> Work Paper D-5, October 10, 1997 at 1, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_D.pdf](http://www.nfaoa.org/documents/Work_Papers_D.pdf).

<sup>51</sup> Letter to Valerie Lau, Inspector General, Office of Inspector General, Department of the Treasury, dated May 10, 1997, from Eric M. Larson. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 99, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

Form 1 ("Registration of Firearms") was used from 1934 to 1968 to register unregistered NFA firearms; after 1968 it was titled "Application to Make and Register a Firearm" because the Gun Control Act of 1968 prohibited the registration of unregistered NFA firearms after the 1968 amnesty period expired (a citizen can "make" and register an NFA firearm by paying a \$200 tax and first obtaining ATF's approval to do so). ATF created Form 4467 "Registration of Certain Firearms in November 1968" under § 207(b) of the 1968 Act to accept registrations of unregistered firearms, with immunity from prosecution, during the amnesty period from November 2, 1968, to December 1, 1968.

The year 1971 specified in Mr. Larson's complaint relates to a different allegation that ATF had improperly registered unregistered NFA firearms after the 1968 amnesty period expired. Such registrations would violate the NFA, because "[n]o firearm may be registered by a person unlawfully in possession of the firearm after December 1, 1968, except that the Director, after publication in the FEDERAL REGISTER of his intention to do so, may establish periods of amnesty, not to exceed ninety (90) days in the case of a single period with such immunity from prosecution as the Director determines will contribute to the purposes of " the NFA, as stated ATF's published regulations in the *Code of Federal Regulations*, 1969 edition at 93. See 26 C.F.R. 179.120(a)(3)(b), available at <http://blog.princelaw.com/assets/2008/7/7/1969-CFR-ATF-amnesty-regs.pdf>.

## **Allegation 1. Destruction of Documents**

**“ATF employees have deliberately destroyed original firearms registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by [an ATF Specialist].”**

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In the internal 1997 ATF investigation, which was completed before the Treasury IG started audit work to investigate Mr. Larson’s allegations, Mr. Schaible contradicted his testimony in *LeaSure* about NFA Branch employees destroying NFA documents in 1994 by stating under oath to ATF Special Agent and internal investigator Jeff Groh:

In response to Larson's first allegation regarding testimony in U.S. District Court, made reference to certain documents being destroyed at the NFA Branch. stated he made the comments in reference to thousands of Title II firearms manufactured by that were being exported to Various manufacturers were forwarding the paperwork for these firearms. However, not all of the paperwork was entered properly into the NFA system. It was suspected that some of the contract employees had destroyed some of the documents in an effort to reduce case load. admits that Larson may have construed from his testimony that ATF employees were destroying documents, but this was not the case. suggested that if there was an increase in any NFA firearm registrations, it may have resulted from the changes made to reflect different form numbers being located and entered or from the transposition of registration dates on the original form. Such changes would have been added to the NFRTR. 53

The October 1998 Treasury IG report stated that Mr. Schaible

... was referring to an incident in 1988 when NFA Branch management suspected that two contract employees were disposing of documents. These contract employees were

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<sup>52</sup> October 1998 Treasury IG Report, at 7, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>53</sup> “[REDACTED], et al.” Report of Investigation, by [REDACTED], Bureau of Alcohol, Tobacco and Firearms, September 8, 1997 at 90. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 102-103, available at <http://www.nfaoa.org/documents/1998testimony.pdf>.

Mr. Schaible’s reference to “Title II firearms” refers to Title II of the Gun Control Act of 1968 (Title II is also, but less commonly, known as the National Firearms Act of 1968); consequently, NFA firearms are also referred to as Title II firearms. Special Agent Groh, representing ATF Internal Investigations, contacted Mr. Larson and advised that he had been assigned to investigate his allegations, is the author of the foregoing Report of Investigation.

immediately removed from their assignment to the NFA Branch. The employees could not be hired or fired since they were employed by a contractor.<sup>54</sup>

In *LeaSurre*, Mr. Schaible testified under oath he was aware of “occasions . . . in the NFA Branch of clerks throwing away transmissions because they don’t want to fool with them” rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).<sup>55</sup> Under cross-examination, asked “that’s one of the things [NFA Branch clerks throwing away documents] that could happen to you?,” Mr. Schaible replied “Certainly.”<sup>56</sup> In response to a question whether “people have been transferred and fired as a result of that, haven’t they,” Mr. Schaible answered: “The only situation I can remember is, no, they weren’t transferred. No, they weren’t fired. They eventually quit, yes, but, no, nothing like transferred or fired.” When asked “Did [ATF] ever continue anybody in that particular job after they threw something away, threw an important transmission away or destroyed it or put it in the shredder or whatever they did? [ATF] continued them doing that kind of work?” Mr. Schaible said “With monitoring, yes.”<sup>57</sup>

Regarding Mr. Schaible’s contradictory statements, made under oath, the October 1998 Treasury IG audit report concluded:

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<sup>54</sup> October 1998 Treasury IG Report at 7, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>55</sup> *United States of America vs. John Daniel LeaSure* (1996) at 42-43, available at <http://www.nfaoa.org/documents/LeaSureTrial.pdf>.

<sup>56</sup> *Id.* at 42-43.

<sup>57</sup> *Id.* at 43.

**Our review of the allegations showed that:**

- 1. National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed.**

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The limited scope of the Treasury IG audit is troubling because Discovery sampling analysis disclosed a large number (176) of “critical errors”<sup>59</sup> which the Treasury IG failed to mention or publish in either of its 1998 audit reports, compared with 37 “discrepancies” it identified in its December 1998 report;<sup>60</sup> and despite finding large numbers of “critical errors,” there was no effort to reliably estimate the accuracy and completeness of the NFRTR.

The 1998 Treasury IG audit also raises reasonable doubt about the validity of Certificates of Nonexistence of a Record (CNR) that ATF provides to courts to certify that no record of registration for particular firearms can be located in the NFRTR. The reason is that the Treasury IG auditors formally declined to evaluate the accuracy of procedures ATF uses to search the NFRTR to legally justify issuing CNRs, which are also issued to attest that specific firearms are not registered to specific persons. NFRTR data are also routinely used for other law enforcement activities, including legal justifications for issuing search warrants.

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<sup>58</sup> October 1998 Treasury IG Report at 1, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>59</sup> Work Paper H-0, April 23, 1998, at 1.

<sup>60</sup> December 1998 Treasury IG Report, at 12, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>. The “discrepancies” identified in the December 1998 Treasury IG Report are identified as “critical errors” in audit Work Papers.

The “Objectives, Scope and Methodology” section of the December 1998 Treasury IG report states:

**Our scope did not include a review of the accuracy of ATF’s certifications in criminal prosecutions that no record of registration of a particular weapon could be found in the registry. We also did not evaluate the procedures that ATF personnel use to search the registry to enable them to provide an assurance to the court that no such registration exists in specific cases. Accordingly, this report does not provide an opinion as to the accuracy of the registry searches conducted by ATF.**

**Audit work was performed from October 1997 through May 1998. Our review generally covered ATF’s administration of the registry for the period October 1, 1996 through March 31, 1998.**

**Our work was conducted in accordance with Government Auditing Standards issued by the Comptroller of the United States, and included such audit tests as we determined necessary.**

According to the edition of *Government Auditing Standards* the Treasury IG used in its audit of the NFRTR, the Treasury IG auditors failed to comply with an applicable audit standard, “abuse,” as stated below:

Abuse is distinct from illegal acts and other noncompliance. When abuse occurs, no law, regulation, contract provision, or grant agreement is violated. **Rather, the conduct of a government program falls far short of societal expectations for prudent behavior.** Auditors should be alert to situations or transactions that could be indicative of abuse. **When information comes to the auditors’ attention (through audit procedures, tips, or other means) indicating that abuse may have occurred, auditors should consider whether the possible abuse could significantly affect the audit results. If it could, the auditors should extend the audit steps and procedures, as necessary, to determine if the abuse occurred and, if so, to determine its effect on the audit results [emphasis added].**<sup>62</sup>

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<sup>61</sup> Id. at 4.

<sup>62</sup> See Chapter 6, “Field Work Standards for Performance Audits.” *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 75.

There is no statement in the 1998 Treasury IG reports that the auditors (1) considered whether decreasing the “critical error” rate at the request of the audited party at interest (NFA Branch representatives) to achieve a desired result “could significantly affect the audit results,” or (2) attempted “to determine its effect on the audit results.” In a Work Paper documenting the 1998 audit procedures and activities, the Audit Manager attested that “abuse” was not an issue:

	Ref.	Initials	N/A	Remarks
2.12 Auditors have been alert to situations or transactions that could be indicative of illegal acts or abuse, and have extended audit steps as necessary (GAS 6.26, 6.32, 6.35). (Support is statement in audit guidelines to be alert to these situations or transactions, and any related work performed.)	A-1	RKB		Report deals with allegations of ATF mismanagement of its security

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The conduct of the Treasury IG auditors, who under *Government Auditing Standards* are required to be “independent,”<sup>64</sup> clearly “falls far short of societal expectations for prudent behavior.” The reasons are that the Treasury IG auditors (1) manipulated audit procedures at the request of NFA Branch representatives for the purpose of deliberately decreasing the “critical error” rate of the NFRTR because the 18.4 percent “critical error” rate the Treasury IG auditors found was “disappointing at best and could have serious consequences for ATF’s firearm

<sup>63</sup> Work Paper Bundle A, page 5. The initials RKB are those of Treasury IG auditor Robert K. Bronstrup, identified in Work Paper A-1 as the “Lead Auditor”; and as “Audit Manager” in the October 1998 Treasury IG report at 27, and December 1998 Treasury IG report at 49.

<sup>64</sup> *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 22. See Chapter 3, “General Standards,” which states: “In all matters relating to the audit work, the audit organization and the individual auditors, whether government or public, should be free from personal and external impairments to independence, should be organizationally independent, and should maintain an independent attitude and appearance.”



registry mission,” (2) left unanswered whether “critical errors” exist in other NFRTR categories, (3) failed to reliably estimate the “critical error” rate of the NFRTR, as required by Discovery sampling rules and procedures, by increasing the size of the sample and conducting additional analysis, (4) chose to avoid resolving reasonable doubts (created by their audit findings) about the accuracy and completeness of the NFRTR, and by extension the validity and reliability of ATF’s Certifications of Nonexistence of a Record (CNRs) that “provide an assurance to the court that no such registration [for an NFA firearm] exists in specific instances.”

**Congressional Hearings on the NFRTR from 1996 to 2001, and related issues**

Each year from 1996 to 2001, Mr. Larson and other concerned citizens provided testimony or statements to the Congress about the accuracy and completeness of the NFRTR.<sup>65</sup> The most important outcomes of these testimonies and statements were (1) the 1998 Treasury Department Inspector General audit of the NFRTR, and (2) appropriations language that allocated \$1 million to ATF, with instructions to use it to render the NFRTR accurate and complete. There is no evidence, however, that either of the foregoing outcomes rendered the NFRTR accurate and complete, or resulted in a valid and reliable estimate of the NFRTR error rate. Consequently, the accuracy of the NFRTR is still currently unknown.

The Treasury IG auditors did not follow GAGAS to reliably estimate the “critical error” rate of the NFRTR database, in part, because NFA Branch representatives inappropriately requested them to manipulate the definition of “critical error” to achieve a lower rate, but that is not the whole story. The reason is that the Treasury IG auditors requested an Assistant Director at the U.S. Government Accountability Office to advise them how to conduct Discovery

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<sup>65</sup> These Congressional testimonies and statements are listed in Mr. Larson’s VITA, which has been separately submitted to this Court, and include a variety of issues not relevant to *Friesen*; they are not listed or reviewed in this motion.

sampling in its 1998 audit,<sup>66</sup> and with knowledge of correct procedures for doing so declined to follow his advice. Consequently, the “critical error” rate for the NFRTR database was not estimated in the 1998 audit.

Mr. Larson’s requests to top Government officials with oversight responsibility over ATF to conduct meaningful oversight, particularly over ATF’s continuing mismanagement of the NFRTR, failed. For example, when Mr. Larson expressed concerns to Treasury Department Inspector General David C. Williams about the integrity of the 1998 audit based on the Treasury IG censoring his most serious allegation against ATF, and that the audit was conducted during a period that included the regime of the his corrupt predecessor (who resigned in 1998 following Senate hearings documenting her misconduct), Dennis S. Schindel, Assistant Inspector General for Audit, responded in a January 7, 1999, letter:

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<sup>66</sup> The Treasury IG auditors informally requested Barry Seltser, Assistant Director and Manager, Design, Methodology and Technical Assistance Group, U.S. Government Accountability Office (GAO), for advice in conducting sampling procedures and data analysis in its 1998 audit of the NFRTR. At a January 20, 1998, meeting at GAO Headquarters, which included Sidney Schwartz, Mathematical Statistician, GAO; Carol Burgan, Auditor [DELETED], Robert Bronstrup, Audit Manager, and Gary Wilk, Auditor:

**Mr. Seltser suggested that we use “discovery” sampling for the top three Forms that we were concerned about (Form 4467, Other, and Letter categories). In discovery sampling, about 60-70 items are selected from each category and tested for “critical” and “non-critical” errors. If no errors are found in this discovery sample, then we could make a statement about the category. If errors are found, then we must expand our sample based on a mathematical formula.**

Work Paper F-19, prepared by Carol Burgan, January 24, 1998 at 1.

The Treasury IG auditors did not follow Mr. Seltser’s recommendation to “expand our sample based on a mathematical formula” after discovering “critical errors” in the Discovery samples. Mr. Seltser’s advice was informal; representative of the kind of informal advice GAO typically and often renders to Executive Branch agencies upon request; and GAO was not involved in the Treasury IG’s 1998 audit of the NFRTR.

Dear Mr. Larson:

Mr. Williams has asked me to respond to your letter of November 5, 1998. In that letter you expressed concern that the previous Inspector General, Valerie Lau and others may have tried to compromise a congressionally directed audit of the firearm registration practices of the Bureau of Alcohol, Tobacco and Firearms (ATF). Since my office oversaw the work, I assured Mr. Williams and wish to assure you that no effort to influence the audit occurred.

<sup>67</sup>

In March 1999, Mr. Schindel told Mr. Larson the 1998 audit "determined there were errors in the [NFRTR] based on statistically valid sampling methodologies." He added that ATF "is operationally responsible for correcting the errors in the [NFRTR] data base," and it is "ATF's management responsibility to identify and correct all of the records that may be in error in the registry."<sup>68</sup>

Similarly, Mr. Larson expressed concerns to then-ATF Director John W. Magaw, who answered them in a November 19, 1999, letter:

Your allegations concerning my staff are totally without foundation. I have been advised of all your allegations concerning the Bureau of Alcohol, Tobacco and Firearms' (ATF) administration of the National Firearms Act (NFA), beginning with your attempts in 1987 to have certain firearms removed from the statute up through the recent issuance of the Office of the Inspector General (OIG) reports. I have reviewed the OIG reports and agree with my staff that most of your allegations are without merit.

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<sup>67</sup> Eric M. Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*. Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 36-37, available at <http://www.nfaoa.org/documents/Critiqueof1998IGreports.pdf>.

<sup>68</sup> Letter from Dennis S. Schindel, Assistant Inspector General for Audit, Office of Inspector General, Office of Inspector General, Department of the Treasury dated March 25, 1999, to Eric M. Larson.

We have carefully considered the recommendations made by the OIG and are working to ensure that the NFRTR continues to be an accurate and reliable database of firearms transactions.

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The foregoing statements by Assistant Inspector General for Audit Schindel and ATF Director Magaw, each of whom were key Government officials who had major and significant federal law enforcement responsibilities in 1999, are not worthy of belief.

Congress appropriated \$500,000 for fiscal year 2002 for ATF to use “with the aim of reducing processing times and ensuring the completeness and accuracy of the NFRTR.”<sup>70</sup> The appropriations hearing records included questions by the Subcommittee on Treasury, Postal Service and General Government about the NFRTR, including the need for “[a]n independent, annual audit of the [NFRTR] database covering registration to retrieval,” and when it would be “possible to confirm the completeness and accuracy of the NFRTR.”<sup>71</sup> Congress again appropriated \$500,000 for fiscal year 2003 for improving ATF’s licensing and regulatory operations, “including making significant progress in correcting remaining inaccuracies within the NFRTR database.”<sup>72</sup>

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<sup>69</sup> Letter from John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms dated November 19, 1999, to Eric M. Larson at 1 and 3, available at <http://www.nfaoa.org/documents/MagawLetter1999toLarson.pdf>.

<sup>70</sup> Report No. 107-152, to accompany H.R. 2590, Treasury, Postal Service, and General Government Appropriations Bill, 2002. 107th Cong., 1st Sess., House of Representatives (2001) at 20. These funds were approved in The Treasury and General Government Appropriations Act, 2002, P.L. 107-67, 115 Stat. 514 (2001).

<sup>71</sup> “Regulatory Processes and Resources,” *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 107th Congress, 1st Sess., Part 1 at 476-479.

<sup>72</sup> Report No. 107-575, to accompany H.R. 5120, Treasury, Postal Service and General Government Appropriations Bill, 2003. 107th Cong., 2d Sess., House of Representatives at 19 (2001). These funds were approved in Report No. 108-10, Conference Report to accompany H.J. Res. 2, 108th Cong., 1st Sess. at 1324-1325 (2003).

The Subcommittee was influenced by an independent statistical expert, Dr. Fritz J. Scheuren, who advised them in response to its request for his review of responses ATF provided to three questions asked by the Subcommittee.<sup>73</sup> Dr. Scheuren stated, in part:

**Technology question.** My reading of the OIG reports suggests that very serious problems were uncovered in ATF's recordkeeping systems. In fact, in my long experience, I cannot think of any instance where poorer results were obtained. I was greatly troubled, therefore, by ATF's comment that it "... found nothing in the OIG report to justify a statutory or administrative change...." The automation

**Conclusions.** I can only offer a qualified opinion on the ATF's answers but if their responses are to be taken at face value, two conclusions arise: (1) ATF has serious material weaknesses in its firearm registration system which it has yet to acknowledge and (2) the ATF steps taken to improve its recordkeeping clearly lack thoroughness and probably lack timeliness as well.

**Recommendations.** Let me offer three recommendations to the Committee for its consideration: (1) ATF should be asked to engage an outside audit organization to give a more complete assessment of the weaknesses in their existing firearms system. The scope of the OIG audit was too narrow. These audits should be annual, including a full test of the system from registration to retrieval. The Post Office has such audit practices and offers a model of the completeness needed. (2) ATF should be asked to conduct a thorough benchmarking effort looking at recordkeeping practices and how they are changing both within government and in organizations like insurance companies that have to keep files for long periods. This benchmarking will require another (separate) outside contractor experienced in conducting such studies. (3) The use of record linkage technologies to test and update the ATF firearms system to reduce its isolation are worth study. A match with the SSA decedent file is an example, but there are other government systems that might be looked at too. Possibly legislation would be needed but before seeking legislation ATF should engage one or more experts in record linkage techniques as consultants on the present "matchability" of the system and needs for its future "matchability."

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Dr. Scheuren's influence is evident in the following exchange between the Subcommittee and ATF, which subsequently occurred during ATF's appropriations hearing:

**Question:** An independent, annual audit of the database covering registration to retrieval?

**Answer:** We do not believe an independent audit of the database is needed. The ongoing efforts we are making to ensure the completeness and accuracy of the NFRTR by imaging and indexing the documents, performing database verification, and linking the retrieval system with the imaging system will result in strong internal controls for the NFRTR.

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<sup>73</sup> *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 107th Cong., 1st Sess., Part 3 at 23-25, available at <http://www.nfaoa.org/documents/2001statement.pdf>. (Hereafter Congressional Hearings, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*.) Fritz J. Scheuren, Ph.D., a past elected President of the American Statistical Association, is currently Vice President, Statistics, National Opinion Research Center (NORC), University of Chicago.

<sup>74</sup> Letter from Fritz J. Scheuren dated May 23, 2000, to the Honorable Jim Kolbe, Chairman, Subcommittee on Treasury, Postal Service, and General Government. *Id.* at 24-25.

There is currently no evidence that ATF has satisfactorily complied with Congressional instructions to render the NFRTR accurate and complete. The Treasury IG terminated another NFRTR audit in 2002 before it was completed, and a former staff member stated: "We found there were still serious problems with the NFRTR data that, to the best of my knowledge, are still uncorrected."<sup>76</sup>

In 2007, seven years after his Congressional statement, because private citizens expressed concerns to him about the accuracy and completeness of the NFRTR, Dr. Scheuren reanalyzed the NFRTR database situation. In a December 11, 2007, letter, to the Congress, Dr. Scheuren reiterated and expanded his concerns about the consequences of "serious material errors" in the NFRTR that ATF "has yet to acknowledge," and added: "In my considered professional judgment, these errors render the NFRTR questionable as a source of evidence in federal law enforcement."<sup>77</sup>

In or about 2006, possibly in response to the Justice IG's "review" of the NFRTR, ATF created a new form entitled "Firearms Inspection Worknote: NFA Inventory Discrepancies," a

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<sup>75</sup> Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 107th Cong., 1st Sess., Part 1 at 479, available at <http://www.nfaoa.org/documents/NFRTRdocpack.pdf>, at Tab 4.

In October 2008, Mr. Larson filed a FOIA request to ATF for (1) documents pertinent to this "imaging system" and how it may help render the NFRTR accurate and complete by "imaging and indexing the documents," including any evaluation of the accuracy and completeness of the "imaging system"; that is, whether complete documentation is available for firearms for original registration and each subsequent transfer; (2) documents that describe the search procedures ATF uses to provide assurances to the Court that no record of a firearm registration can be located in the NFRTR, and (3) a copy of the current NFRTR procedures manual. ATF has not provided any documents in response to any of the foregoing FOIA requests to date.

<sup>76</sup> For additional information, see Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 572-573.

<sup>77</sup> Letter to the Honorable Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives dated December 11, 2007, by Fritz J. Scheuren, Vice President, Statistics, National Opinion Research Center, University of Chicago, at 1, available at [http://www.nfaoa.org/documents/Scheuren\\_Committee\\_Chair\\_Letter.pdf](http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf).

copy of which Mr. Larson obtained by a FOIA request.<sup>78</sup> A copy of this form is reproduced as received by Mr. Larson from ATF on the following page.

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<sup>78</sup> Letter to Averill P. Graham, Chief, Disclosure Division, Bureau of Alcohol, Tobacco, Firearms and Explosives dated January 24, 2007, by Eric M. Larson, *available at* <http://www.nfaa.org/documents/FOIA-FRTRJan2007.pdf>.

### NFA Inventory Discrepancies

PURPOSE: To reconcile discrepancies disclosed between the licensee's inventory/records

SOURCE/SCOPE: [Redacted]

NOTE: [Redacted]

Licensee Name: [Redacted] UI Number: 0

#	Manufacturer/Importer	Model	Type	Caliber/ Gauge	Serial Number	Date Transferred or Received	Transferred to or Received From:	Nature of the discrepancy	In Inventory Yes/No

Prepared By:

0

Date:

01/00/00

1

1 of 1

NFA Inventory



In his January 2007 FOIA request, Mr. Larson also requested ATF to provide

- 2) **Written or audio instructions to ATF personnel which provide guidance and/or definitions of what constitutes an “error” or “discrepancy” in the NFRTR. These would include classroom training materials, flash cards, a manual or similar guide, instructions imparted via DVD, videotape or similar mediums of communication. These instructions would most likely be given to ATF Inspectors, but may also be given to Legal Document Examiners, ATF Special Agents, and others.**

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ATF stated that a search failed to locate such documents responsive to Mr. Larson’s FOIA request, and he appealed. In a letter dated October 2, 2007, Janice Galli McLeod, Associate Director, Office of Information and Privacy, Department of Justice, stated:

After carefully considering your appeal, I am affirming ATF's action on your request. ATF conducted a search for records responsive to your request and was unable to locate any records pertaining to the National Firearms Registration and Transfer Record documentation you referred to in your request. I have determined ATF's response was correct.<sup>80</sup>

Associate Director McLeod’s statement may be valid and reliable evidence that ATF and the Department of Justice have improperly denied a FOIA request. It is hard to believe that a form ATF inspectors are supposed use to record “discrepancies” in the NFRTR database after encountering them during compliance inspections of SOTs would not have been given instructions regarding and procedures to follow in to reliably identify and report suspected “discrepancies,” when the stated “purpose” of the form is to “reconcile discrepancies” in the NFRTR. It is not reasonable to believe ATF has not defined the term “discrepancy,” because otherwise there would be no reason for the new form to exist.

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<sup>79</sup> Id. at 1.

<sup>80</sup> Letter to Eric M. Larson from Janice Gail McLeod, Associate Director, Office of Information and Policy, U.S. Department of Justice dated October 2, 2007, bearing identifiers RE: Appeal No. 07-1961, Request No. 07-458, BE:REG, available at <http://www.nfaoa.org/documents/McLeodDOJletter2007.pdf>.

According to SOTs who have been inspected in or after 2006, ATF personnel who encounter a discrepancy in NFRTR data are required to assign each discrepancy a “control number” and forward the information to the National Firearms Act Branch for resolution. Are there not tabulations, analyses, and other performance measures used to evaluate the accuracy and completeness of the NFRTR? Are there no records of the type and number of discrepancies? Associate Director McLeod’s statement that no documents responsive to Mr. Larson’s FOIA request can be found at National Firearms Act Branch is unworthy of belief.

**Giambro: A 2007 federal court case involving the NFRTR**

In 2008, the United States Court of Appeals for the First Circuit upheld the validity of NFRTR data, including its use in twice creating a Certificate of Nonexistence of a Record, in affirming a conviction for Possession of Unregistered Firearm.<sup>81</sup> The Court of Appeals based its decision mainly on *Rith*, testimony on the NFRTR’s reliability by ATF Specialist Gary N. Schaible, and stated “[a]lthough both the *Rith* court and the district court here acknowledged past

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<sup>81</sup> *United States of America vs. Dario Giambro*, United States Court of Appeals for the First Circuit, No. 08-1044, October 2, 2008, available at <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=08-1044P.01A>. Hereafter Court of Appeals, *United States of America vs. Dario Giambro* (2008).

The Court of Appeals decision was based on *United States vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings, before the Honorable George Singal, U.S. District Judge, Sept. 25, 2007, available at <http://www.nfaoa.org/documents/GiambroTrial1.pdf>; rest of transcript continued at <http://www.nfaoa.org/documents/GiambroTrial2.pdf>. Hereafter *United States of America vs. Dario Giambro* (2007).

The firearm, a Model 1908 Marble’s Game Getter Gun, is a low-powered small-game over-and-under combination gun (has .22 long rifle/.44 Game Getter barrels 12” in length) with a folding shoulder stock, and was designed mainly for trappers, hunters and outdoorsmen. The Model 1908 Game Getter is classified as “Any Other Weapon” under the NFA (26 U.S.C. § 5845(a)(5)), was last manufactured in 1914. In excellent condition, accompanied by the original box, a 12” barrel Model 1908 Game Getter is valued at \$2,500 or more. Ned Schwing, “Marble’s Game Getter Gun NFA, Curio or Relic,” *2005 Standard Catalog of Firearms: The Collector’s Price & Reference Guide*. 15th Edition. Iola, Wisconsin: KP Books, 2004 at 728.

problems with the NFRTR, both emphasized that the ATF has addressed problems with the database and improved its reliability.”

The Court of Appeals did not state that it specifically reviewed either of the 1998 Treasury IG audit reports, or the 2007 Justice IG report (all were introduced in *Giambro*), in its opinion and went on at length to affirm the District Court decision to exclude Mr. Larson as an Expert Witness. In particular, the Court of Appeals cited the District Court finding that Mr. Larson’s motion in limine testimony<sup>82</sup> was not “based upon sufficient facts or data,” not “the product of reliable principles and methods,” and that Mr. Larson had not “applied the principles and methods reliably to the facts of the case.”<sup>83</sup> The Court of Appeals stated that “suppositions . . . and conjecture abound[ed]” in Mr. Larson’s testimony, and the District Court “was well within its discretion” to “conclude that . . . the data on which Larson based his analysis was ‘purely anecdotal.’”<sup>84</sup>

The Court of Appeals decision was criticized the same day it was published.<sup>85</sup>

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<sup>82</sup> *United States of America vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings before the Honorable George Z. Singal, United States District Judge, Sept. 24, 2007, available at <http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf>. Hereafter Larson testimony, *United States of America vs. Dario Giambro* (2007).

An enhanced version of Mr. Larson’s testimony, with insertions of the Exhibits to which he referred has been created for ease of reference to said Exhibits, is available at <http://www.nfaoa.org/documents/GiambroLarsonMotionInLimineTestimonyWithExhibits.pdf>.

<sup>83</sup> Court of Appeals, *United States of America vs. Dario Giambro* (2008).

<sup>84</sup> *Id.*

<sup>85</sup> See “CA1: First Bends to Help Government Prove Negative in Antique Gun Registration Case,” Oct. 2, 2008. The critique states: “*US v. Giambro*, No. 08-1044 affirms a conviction for possessing an antique gun. (He was acquitted of a number of state charges.) The least interesting issue is under 26 U.S.C. 5861(d), where the court holds that the defendant need not have specific knowledge of the registration requirement, but just knowledge of the statutory elements of the guns subject to the registration requirements. More interesting is the admission of the ATF’s ‘Certificates of Nonexistence’ of a registration record. The maker of the certificate testified. The First’s analysis isn’t that satisfactory. It basically says ‘other circuits have upheld their use’ even though there used to be problems. Finally, and without much analysis, the First says that it was fine for the District Court to exclude the testimony of an expert witness that had done some statistical analysis on the reliability of the ATF’s system of gun registration. Because the First speaks in broad, general terms (and throws around words like ‘Daubert’), it doesn’t

Mr. Larson's motion in limine testimony was based upon, and is not materially different from, most of the evidence presented in this motion. It was not until his motion in limine testimony in *Giambro* that Mr. Larson concluded ATF had been adding firearm registrations to the NFRTR after being confronted with NFA firearms owners with their copies of the registrations, based on the 2007 Justice IG report, and that is what he stated.<sup>86</sup> For more than a decade, Mr. Larson qualified his concerns that, e.g., ATF "may have" added registrations to the NFRTR after losing their copies or records of them, because Mr. Larson did not believe the evidence he cited was sufficiently conclusive.<sup>87</sup> It was only after the Justice IG report reported in 2007 that ATF had added registration documents to the NFRTR that he concluded otherwise (the Treasury IG confirmed his allegation that "National Firearms Act (NFA) documents had been destroyed").<sup>88</sup>

*Giambro* differs from *Friesen* because (1) Mr. Giambro never contended the NFRTR was inaccurate with respect to him, and told one of his attorneys he had not registered the firearm,<sup>89</sup>

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seem like it was taking this issue seriously." Available at <http://appellate.typepad.com/appellate/2008/10/ca1-first-bends.html>.

<sup>86</sup> Larson testimony, *United States of America vs. Dario Giambro* (2007) at 67-68.

<sup>87</sup> It would have been inappropriate for Mr. Larson to attempt to estimate or publish (such as in a professional, refereed journal) a "critical error" rate of, e.g., ATF adding firearm registrations it had lost or destroyed to the NFRTR, because any such estimate would not have been based on valid and reliable evidence.

Results of Discovery sampling analysis by Treasury IG auditors in 1998 provided valid and reliable evidence of "critical errors" in the NFRTR database, but the auditors failed to extend the audit as GAGAS required and estimate the "critical error" rate, or explain the effect of these "critical errors" upon the audit. Because the NFA (26 U.S.C.A. § 5848) and the tax code (26 U.S.C. § 6103) each prohibit Mr. Larson from accessing these data, he was unable to estimate the "critical error" rate for NFRTR data.

<sup>88</sup> October 1998 Treasury IG Report at 1, available at <http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf>.

<sup>89</sup> An unexplored aspect of *Giambro* is whether his late father — from whom Mr. Giambro inherited the Game Getter and 203 other firearms, and who instructed him to always keep an accompanying "certificate" in the original wooden box provided by the manufacturer along with the gun — had registered the Game Getter or acquired it through a lawful transfer approved by ATF, and ATF withheld the registration record to enable a prosecution after Mr. Giambro was acquitted in state court of an unrelated firearm wounding charge on grounds of self-defense. This

(2) that attorney misunderstood the NFA and attempted to register the firearm on Mr. Giambro's behalf, and (3) both attorneys petitioned the District Judge to exclude Mr. Giambro's statements and the attempt by one attorney to register the firearm, because the NFA prohibits using information resulting from an attempt to register an NFA firearm in criminal prosecutions,<sup>90</sup> which could have predisposed the District Judge to fail to adequately consider evidence at trial that the NFRTR is inaccurate and incomplete.

**In Friesen, this Court questioned the reliability of NFRTR data**

On September 17, 2008, this Court expressed concerns about the validity and reliability of NFRTR data in *Friesen*, in part because the "government has relied almost exclusively" upon NFRTR data in "many of its exhibits."<sup>91</sup> In further explaining the reasons that "persuade[d] me to allow the testimony [of Dr. Scheuren] and overrule the motion" by the Government to exclude him as an Expert Witness, the Court stated:

One is, of course, the duplicate records of Exhibit 100, and then the government's record of the same firearms, which both appear — I've never heard satisfactorily explained why there were two of those records. Secondly, the other relationship to the issue over the accountability of the other guns that are on the government's chart. And thirdly, the issue,

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unexplored aspect is significant because (1) there are no independent checks on whether ATF personnel are truthful about their inability to locate a registration document, (2) as the evidence in this motion has reliably documented and contends, there is reasonable doubt regarding ATF's integrity in characterizing the accuracy and completeness of NFRTR data, (3) there has been no publicly known independent evaluation of the adequacy of the search procedures ATF uses to certify to a court that a particular firearm is not registered, and (4) it is not uncommon for persons who inherit registered NFA firearms to be unaware of the need to apply to have ownership of the firearm transferred to them. In such cases, as long as the firearm remains in the chain of inheritance, ATF does not typically initiate criminal action and allows a reasonable time for the firearm to be transferred to the lawful heir. Based on Mr. Giambro's statement, he did not register the Game Getter. It is unclear whether (1) the Game Getter was registered to Mr. Giambro's father (ATF attested that it was not), and (2) Mr. Giambro was aware of the legal requirement for a registered NFA firearm to be transferred to a lawful heir after the death of the registered owner. Because Mr. Giambro may have been suffering from mental illness to some extent, which could have further complicated his legal situation, he did not fully participate in his own defense. Mr. Giambro, whose assets include a \$3.5 million passbook savings account, chose to remain in jail for 5 months until trial because he believed the Government would make corrupt use of the bail money he would have had to post to be released.

<sup>90</sup> *United States of America vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Motion in Limine re: Evidence of Disclosure of Information During Compliance Attempt (26 U.S.C. 5989), July 24, 2007, available at <http://www.nfoa.org/documents/GiambroPart6.pdf>.

<sup>91</sup> *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI at 1012.

the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR].<sup>92</sup>

Regarding this Court's first concern, NFRTR Custodian Denise Brown's failure to satisfactorily explain the existence in NFRTR records why there are two approved Forms 2 bearing different dates and the same serial number (E683) as that of the STEN machine gun that ATF acknowledges it lawfully transferred to Mr. Friesen in 1996, indicates a lack of knowledge of the NFRTR database and, possibly, of procedures NFA Branch personnel use to file or retrieve firearm registration documents (or records of them).<sup>93</sup>

Relevant to this Court's second concern was "the other relationship to the issue over the accountability of the other guns" the Government introduced into evidence to try and explain the characteristics of the STEN machine gun at issue in *Friesen*. ATF's characterization of "weapon description" of the STEN machine gun as a Mark II,<sup>94</sup> a point this motion will further

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<sup>92</sup> *Id.*, Vol. VI at 1011-1012.

<sup>93</sup> Defense counsel asked NFRTR Custodian Denise Brown to explain the significance of a Form 2 dated April 20, 1986, entered as Defense Exhibit 100, bearing serial number E683, provided to the defense under Discovery. The Government said the NFRTR contains a record that a STEN machine gun bearing serial number E683 is registered to Mr. Friesen (Vol. 1, *Id.* at 15). Custodian Brown testified that the firearm ATF approved for transfer to Mr. Friesen was "E683, STEN Mark II . . . approved February 22, 1996" (*Id.* at 48-49), and that the "birthing document" for that E683 STEN Mark II is a certified Form 2 dated May 14, 1986, submitted to ATF by manufacturer Charles Erb (*Id.* at 68).

<sup>94</sup> At issue in *Friesen* is whether the STEN machine gun bearing serial number E683 manufactured by Mr. Erb is the same one he manufactured, or if another STEN machine gun bearing serial number E683 was substituted in its place. Consequently, also at issue is the accuracy of the STEN "weapon description" based on (1) data from the NFRTR, and documentation in the custody of ATF, and (2) examinations of the STEN seized by ATF, by ATF officials, by Mr. Erb, by transferees who previously owned the STEN, and by a defense Expert Witness. The Government contends the STEN that ATF lawfully transferred to Mr. Friesen is a Mark II, based on the description on the Form 2 submitted by Mr. Erb (*Id.* at 15) and by previous transferees who were available to testify, all of whom denied that the STEN in *Friesen* was the STEN they had previously owned, and by others as described below. Because one previous transferee is deceased (Vol. IV at 674-675), descriptions by other previous transferees are not described in this motion.

After examining the firearm at trial in *Friesen*, Mr. Erb testified it was not the gun he manufactured "as E683" (Vol. IV at 590); was "made to resemble a STEN Mark III" (*Id.* at 574); and that the gun "is a MARK III" (*Id.* at 579). Len Savage, an Expert Witness for the defense who examined the STEN testified: "It appears to be a Sten Mark II-S tube that was completed with Sten Mark III components." Vol. VII at 1349. Mr. Erb testified: "The barrel is the same on a Mark III and a Mark II. They are the same length." Vol. IV at 589.

develop, is relevant to the Court's second concern. Defense counsel agrees that ATF approved the lawful transfer of a STEN machine gun bearing serial number E683 to Doug Friesen in 1996, and disagrees with the Government's characterization of that STEN as a Mark II. Defense counsel notes that to validate the its description of the STEN machine gun bearing serial number E683 as a Mark II, the Government sought "confirmatory" information that the Mark II description was valid and reliable. The Government sought this "confirmatory" information because Dr. Scheuren testified: "I find the existing [NFRTR] records are quite useful in an exploratory setting, but they are not accurate enough by themselves to be used in a confirmatory way," including "for purposes of prosecution."<sup>95</sup>

The Government asked Dr. Scheuren if NFRTR data could be reliably verified each time the firearm was transferred by independently obtaining such data from each transferee, he would consider the NFRTR data to be accurate for that firearm. Dr. Scheuren replied in the affirmative. On redirect, defense counsel asked ". . . although you didn't come here to testify about this, if there is a break in the link, for example, one of these witnesses didn't testify, would that cause you a concern?" Dr. Scheuren answered: "[I]f there was gap in the evidence, yes. If there was a chain of custody break, yes." The significance of Dr. Scheuren's answer is that "one of these witnesses" is a deceased transferee,<sup>96</sup> which breaks the chain of evidence.

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Also at issue is whether the STEN machine gun manufactured by Mr. Erb was (1) an unfinished tube, not a finished receiver, (2) finished by Mr. Erb as a STEN Mark II, (3) finished by someone other than Mr. Erb in as a STEN Mark II, Mark II-3, or Mark III, or (4) whether Mr. Erb registered air on one or both of the Forms 2 he submitted to ATF; that is, that Mr. Erb had not physically manufactured a STEN Mark II or a finished or unfinished receiver.

The issue of who manufactured or finished the STEN machine gun in *Friesen* has not been resolved.

<sup>95</sup> Id., Vol. VI at 1024.

<sup>96</sup> Id., Vol. IV at 674-675.

This Court's third concern about *Friesen* — “the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR]”<sup>97</sup> — is justified for three major reasons.

First, the “critical error” rate of the NFRTR is currently unknown, and efforts to discern or estimate it even informally are compromised because (1) ATF officials changed the definition of a “Significant Error” in 1995 by renaming it an “Error,” and (2) Treasury IG auditors manipulated the definitions of “critical error” in 1998 at the request of NFA Branch representatives, to subjectively lower the “critical error” rate of the NFRTR. Dr. Scheuren testified that “in fact, their reworking of the original 1998 data is data fishing. And you cannot make a statement about the reliability, the probability of your being right with that data fishing, that exercise. So they should have done another audit sample.”<sup>98</sup>

Second, relevant to *Friesen*, there is no law or regulation that requires ATF to physically inspect an NFA firearm at the time of its original manufacture (or as a condition of or during any subsequent transfer), and ATF has not presented any evidence that it has done so. Because one transferee who possessed the STEN machine gun bearing serial number E683 is deceased, the chain of evidence has been broken and it is not possible to reliably confirm even by sworn statements of all living previous transferees that ATF's contention that STEN is a Mark II is correct. Even if all living transferees so testified, there is no logical reason for any of them to testify to a “weapon description” with which the Government disagrees, because doing so would put the onus of alleged illegal manufacture of the STEN upon that previous transferee and subject him to the hazards of prosecution.

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<sup>97</sup> Id., Vol. VI at 1012.

<sup>98</sup> Id., Vol. VI at 1030.



Third, although ATF has identified “weapon description” as a “critical” data field,<sup>99</sup> that is not the most critical problem with the NFRTR data ATF uses and the concern stated by this Court in *Friesen* about “the issue, the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR].”<sup>100</sup> The reason is that based on ATF’s inability to physically locate original documents that literally are NFRTR data, there is reasonable doubt whether Exhibits based on NFRTR data that the Government entered into evidence in *Friesen* are based on valid and reliable evidence. During the 1998 audit ATF was unable to provide original documentation to validate computerized data routinely generated by the NFRTR. ATF’s inability to locate original documents to reliably validate computerized NFRTR data is an audit finding in the December 1998 Treasury IG report as follows:

ATF provided copies of other records to clarify the [37] discrepancies [reported in our audit results]. These other records, for example, included microfiche records and other registry database reports. We examined these records but we could not fully determine if the records sufficiently resolved the discrepancies.<sup>101</sup>

ATF’s inability to locate original documents, and the Treasury IG auditors’ inability to reliably validate computerized NFRTR data, is further discussed in an audit Work Paper that was not reviewed and signed by Audit Manager Robert K. Bronstrop until December 18, 1998, the

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<sup>99</sup> Treasury IG auditor Carol Burgan stated that “error definitions for critical data fields” include “weapon description.” Work Paper F-25, Feb. 19, 1998, at 1. During a January 21, 1998, meeting at ATF Headquarters that included ATF participants (“[redacted], Chief, Firearms and Explosives Division,” and [redacted]), Carol Burgan, Auditor [redacted], and Gary Wilk, Auditor, agreed that

**Critical errors would include: serial number of the weapon, name of weapon owner, address of owner, date of application (if applicable), date of birth, and weapon description. Address of owner is important however, owners do not have to report intrastate moves (only interstate).**

Work Paper F-22, January 26, 1998, prepared by Carol Burgan, at 1. Both Work Papers in this footnote *available at* [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf).

<sup>100</sup> *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI, at 1012.

<sup>101</sup> December 1998 Treasury IG Report, at 12, *available at* <http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf>.

same day the December 1998 Treasury IG report was published, suggesting there was the most extreme of concerns about this audit finding. In fact, less than 3 weeks before the report was issued, Treasury IG auditor Gary Wilk determined and stated the following conclusion:

**Conclusion:** Examination of the ATF of the photo copied records did not permit this auditor to fully determine whether the discrepancies continued to exist within the computerized NFRTR database. The materials did not clearly demonstrate that the computer system, typically in use, provides reliable and valid data when a search is performed. ATF did demonstrate that they have the capacity to generate various information from various sources but the original documentation remains missing and the accuracy of the documentation provided cannot be assured.

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At the outset of *Friesen* on Sept. 17, 2008, this Court stated: “the evidence that I exclude . . . is [if] it’s not relevant to this case, or secondly, it’s not reliable evidence.”<sup>103</sup> The conclusion of Treasury IG auditor Gary Wilk constitutes reasonable doubt that computerized NFRTR data are valid and reliable. To the extent any Exhibits introduced by the Government in *Friesen* are based upon computerized NFRTR data, such exhibits may not be “reliable evidence” and should be excluded by this Court as evidence in a criminal trial unless the validity and reliability of the NFRTR data upon which such Exhibits are based can be independently and reliably validated.

In addition to other evidence presented in this motion that NFRTR data are inaccurate, incomplete and, therefore unreliable, there is also valid and reliable evidence that statements by ATF inspectors (including statements of ATF inspectors involved in *Friesen*), which are based on NFRTR data may not be reliable. The reason is that the 2007 “review” of the NFRTR by the Justice IG concluded:

. . . continuing management and technical deficiencies contribute to inaccuracies in the NFRTR database. For example, NFA Branch staff do not process applications or enter

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<sup>102</sup> Work Paper F-52, November 30, 1998, prepared by Gary Wilk, at 1, available at [http://www.nfaoa.org/documents/Work\\_Papers\\_F.pdf](http://www.nfaoa.org/documents/Work_Papers_F.pdf).

<sup>103</sup> *United States of America vs. Douglas Larry Friesen* (2008), Vol. I, at 5.

data into the NFRTR in a consistent manner, which leads to errors in records and inconsistent decisions on NFA weapons applications. In addition, the NFA Branch has a backlog of record discrepancies between the NFRTR and inventories of federal firearms licensees that were identified during ATF compliance inspections. Further, the NFRTR's software programming is flawed and causes technical problems for those working in the database. **The lack of consistency in procedures and the backlog in reconciling discrepancies, combined with the technical issues, result in errors in the records, reports, and queries produced from the NFRTR. These errors affect the NFRTR's reliability as a regulatory tool when it is used during compliance inspections of federal firearms licensees.**<sup>104</sup> [emphasis added]

The Justice IG evaluators did not define the terms "error" or "discrepancy" in the 2007 report, and their "review" did not include determining the extent to which NFRTR data are accurate and complete. The 2007 Justice IG report acknowledges lack of an NFRTR procedures manual and inadequate training of staff.<sup>105</sup> "Supervisors' inadequate training led to variations in their direction and inconsistent decisions about approving or disapproving NFA weapons registration and transfer applications."<sup>106</sup>

**NFRTR data that cannot be independently and reliably validated should be excluded from a criminal trial**

The totality of evidence presented and documented in this motion establishes that federal law enforcement officials, and representatives of the Treasury Department, have willfully engaged in systematic efforts to cover up the fact that the NFRTR contains serious material errors, and that its error rate is currently unknown, among other issues relevant to *Friesen*. The Treasury Department's successor, the Department of Justice, has also declined to consider valid and reliable evidence that the NFRTR is inaccurate, incomplete and, therefore, unreliable.

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<sup>104</sup> June 2007 Justice IG Report at iii, available at <http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf>.

<sup>105</sup> "The NFA Branch does not provide staff with a comprehensive standard operating procedures manual," and NFA Branch staff stated that they did not have adequate written direction on how to enter data such as abbreviations in the NFRTR . . . and who has responsibility for correcting errors in the NFRTR." Id. at v.

<sup>106</sup> Id. at v-vi.

Attestations or testimonies about NFRTR data by ATF and other Government officials are, as demonstrated in this motion, not worthy of belief.

The totality of the breadth, depth and diversity of reliably documented evidence presented in this motion justifies this Court prohibiting the Government from using any NFRTR data that cannot be independently and reliably validated in prosecuting Doug Friesen in a criminal trial.

Reasonable doubt about the accuracy and completeness of the NFRTR has been reliably established by a variety of documented evidence published by a diverse array of Government entities that include (1) the Executive Branch (Justice IG, Treasury IG, ATF, Audit Services Division of the Treasury Department); (2) the Legislative Branch (Congressional Research Service, the Congress in the *Congressional Record*, Congressional Hearings in 1979 and during 1996 to 2001; and “report language” in reports on appropriations bills; and (3) the Judicial Branch (the sworn testimony of and official documents presented by ATF officials in *Friesen*).

Also regarding the Judicial Branch, in 2007 the Government implied Mr. Larson’s research was not customary or diligent when he was asked by an Assistant United States Attorney during a federal court hearing to confirm that he “ . . . never had personal or direct access to any ATF documents internally? And you’ve never had personal or direct access to the NFRTR?”<sup>107</sup> Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848), and are also considered “tax return” information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to obtain “personal or direct access” to the NFRTR and related documents under the NFA; moreover, neither could any other person, with the limited exception discussed below.

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<sup>107</sup> Larson Testimony, *United States of America vs. Dario Giambro* (2007) at 79, available at <http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf>.

To any extent ATF may claim that NFRTR documents, data or records of them are protected “tax return” information that cannot be disclosed and decline to provide that information to defense counsel under any Discovery motion, ATF cannot decline to disclose that information to this Court. The reason is that after reviewing pertinent statutes, ATF determined in 1978:

**the return submitted by the transferor. Except for section 6103(o)(1) which authorizes the disclosure of subtitle E (i.e., Chapters 51-53) tax information to Federal employees whose official duties require such information, the only disclosure subsection regarding Chapter 53 returns and return information is section 6103(d) governing disclosure to State tax officials, That section does not**

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Since this Court is constituted by a Federal employee “whose official duties require such information,” there is no legal basis for ATF to refuse to disclose “tax return” information if it is relevant and required, including potentially exculpatory evidence under *Brady*. Accordingly, to the extent this Court believes it could be better informed about the accuracy and completeness, and validity and reliability, of NFRTR data by obtaining documents or information that may constitute “tax return” information, Doug Friesen respectfully requests this Court to consider compelling ATF to disclose such information for review by this Court for these proceedings.

### Conclusion

For the reasons set forth above, Defendant requests this Honorable Court grant a hearing on this motion and, thereafter to exclude, under F.R.E. 803(10), any evidence

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<sup>108</sup> Memorandum to Director, ATF, from ATF Chief Counsel regarding Freedom of Information Act Appeal of [redacted] dated August 18, 1980, bearing symbols CC-18,778 RMT, at 14, available at <http://www.nfaoa.org/documents/ATFmemoTaxInfo6103.pdf>.

derived from a search of the NFRTR that has not been independently and reliably validated.

Respectfully Submitted.

S/ Kendall A. Sykes

Mack K. Martin, OB. # 5738

Kendall A. Sykes, OB.#21837

125 Park Avenue, Fifth Floor

Oklahoma City, Oklahoma 73102

Telephone (405) 236-8888

Facsimile (405) 236-8844

Email: [Mack@Martinlawoffice.net](mailto:Mack@Martinlawoffice.net)

[Kendall@Martinlawoffice.net](mailto:Kendall@Martinlawoffice.net)

Attorneys for Defendant

Larry Douglas Friesen

**CERTIFICATE OF SERVICE**

I hereby certify that on Thursday, March 19, 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Mr. Edward J. Kumiega, Assistant United States Attorney.

S/ Kendall A. Sykes

# **Exhibit**

**28**



## POLITICO

### Attorney General Eric Holder held in contempt of Congress

By: [John Bresnahan and Seung Min Kim](#)  
June 28, 2012 04:43 PM EST

The House has voted to hold Attorney General [Eric Holder](#) in contempt of Congress over his failure to turn over documents related to the [Fast and Furious](#) scandal, the first time Congress has taken such a dramatic move against a sitting Cabinet official.

The vote was 255-67, with 17 Democrats voting in support of a criminal contempt resolution, which authorizes Republican leaders to seek criminal charges against Holder. This Democratic support came despite a round of behind-the-scenes lobbying by senior White House and Justice officials - as well as pressure from party leaders - to support Holder.

Two Republicans, Reps. Steve LaTourette (Ohio) and Scott Rigell (Va.), voted against the contempt resolution.

Another civil contempt resolution, giving the green light for the House Oversight and Government Reform Committee to sue the Justice Department to get the Fast and Furious documents, passed by a 258-95 margin. Twenty-one Democrats voted for that measure.

But dozens of other Democrats marched off the floor in protest during the vote, adding even more drama to a tumultuous moment in the House chamber.

The heated House floor fight over Holder capped a historic day in Washington, coming just hours after the Supreme Court, just across the street from the Capitol, issued its landmark ruling upholding most of Barack Obama's health care law. The passions of the day were evident inside the Capitol, where Democrats accused Republicans of ginning up the contempt vote for political purposes while Republicans continued to charge the Justice Department with a cover up on the Fast and Furious scandal.

The fight over the Holder contempt resolution also drew intense interest from outside groups ranging from the NAACP to the National Rifle Association.

In a statement released by his office, Holder blasted the contempt votes as "politically motivated" and "misguided," and he singled out Rep. Darrell Issa (Calif.), chairman of the Oversight and Government Reform Committee and lead Republican on the Fast and Furious probe, for special criticism.

"Today's vote is the regrettable culmination of what became a misguided - and politically motivated - investigation during an election year," Holder said in his statement. "By advancing it over the past year and a half, Congressman Issa and others have focused on politics over public safety. Instead of trying to correct the problems that led to a series of flawed law enforcement operations, and instead of helping us find ways to better protect the brave law enforcement officers, like Agent Brian Terry, who keep us safe - they have led us to this unnecessary and unwarranted outcome."



Holder added: "Today's vote may make for good political theater in the minds of some, but it is – at base – both a crass effort and a grave disservice to the American people. They expect – and deserve – far better."

White House officials also slammed House Republicans for the unprecedented contempt vote. White House Communications Director Dan Pfeiffer said GOP congressional leaders "pushed for political theater rather than legitimate congressional oversight. Over the past fourteen months, the Justice Department accommodated congressional investigators, producing 7,600 pages of documents, and testifying at eleven congressional hearings... But unfortunately, a politically-motivated agenda prevailed and instead of engaging with the President in efforts to create jobs and grow the economy, today we saw the House of Representatives perform a transparently political stunt.

However, Speaker John Boehner (R-Ohio), in a brief interview with POLITICO, blamed Holder for the standoff. Boehner said the Justice Department wanted to turn over some Fast and Furious documents - but not all - if the House agreed to drop the contempt resolution, a deal that neither Boehner nor Issa was prepared to make.

"The idea that we're going to turn over some documents, and whatever we turn over is all you're gonna get and you have to guarantee that you're never going to seek contempt, no deal," Boehner said.

Boehner added that Holder never sought a personal meeting with him to resolve the fight, despite suggestions from some Obama administration officials that Holder asked to do so.

[\(Also on POLITICO: Report: Holder said no 'BS' on guns\)](#)

Issa also said the House had to take such a move in order to get to the bottom of the Fast and Furious scandal.

"Throughout this process, I have reiterated my desire to reach a settlement that would allow us to cancel today's vote," Issa said. "Our purpose has never been to hold the Attorney General in contempt. Our purpose has always been to get the information that the Committee needs to complete its work, and to which it is entitled."

Issa also pointed out that then Speaker Nancy Pelosi (D-Calif.) backed a call for a contempt resolution against the Bush White House over the firing of U.S. attorneys back in 2008, which he raised to counter Democratic charges of partisanship.

The practical, immediate impact of the contempt votes will be minimal. Holder remains as attorney general with strong backing from Obama, and any criminal referral after the contempt vote is unlikely to go far.

In a floor speech before the vote, Boehner stressed that Holder and the Justice Department needed to be held accountable for not providing sufficient answers to Congress about what happened during Fast and Furious.

"Now, I don't take this matter lightly. I frankly hoped it would never come to this," Boehner said. "But no Justice Department is above the law and no Justice Department is above the Constitution, which each of us has sworn to uphold."

[\(Also on POLITICO: Brown: Eric Holder should resign\)](#)

But the GOP-led move infuriated other Democrats, especially minority lawmakers, who see racism and unbridled partisanship in the Republican drive to sanction the first African-American to hold the attorney general post in U.S. history.

The Democratic walkout was led by the Congressional Black Caucus, many of whom gathered outside the Capitol while their GOP colleagues moved against Holder.

Rep. Elijah Cummings (Md.), the top Democrat on the Oversight and Government Reform, charged that Republicans, led by Issa, had been unfairly targeting Holder for months.

"They are finally about to get the prize they have been seeking for more than a year – holding the attorney general of the United States in contempt," Cummings said. "In reality, it is a sad failure. A failure of leadership, a failure of our constitutional obligations and failure of our responsibilities to the American people."

Rep. Gerald Connolly (D-Va.), who serves on the Oversight panel, called the vote "a craven, crass partisan move that brings dishonor to this body."

A procedural motion by Rep. John Dingell (D-Mich.), calling for further investigation before any contempt vote, was defeated by Republicans.

During the floor debate, a group of nine black lawmakers, led by Rep. Sheila Jackson Lee (D-Texas), raised a question of the privileges of the House, accusing Issa of interfering with the investigation and withholding critical information from Democrats. The motion disapproved of Issa for "interfering with ongoing criminal investigations, insisting on a personal attack against the attorney general of the United States and for calling the attorney general of the United States a liar on national television," which "discredit[ed] ... the integrity of the House." The motion was not allowed to proceed.

For his part, Issa insisted that the House must act in order to get to the bottom of what happened in the botched Fast and Furious program.

During this under cover operation, federal agents tracked the sale of roughly 2,000 weapons to straw buyers working for Mexican drug cartels. The sting operation failed, and weapons related to the Fast and Furious program were found at the shooting scene when a Border Patrol agent was killed in Dec. 2010.

Relying on what they said was inaccurate information supplied by the Bureau of Alcohol, Tobacco, Firearms and Explosives - which comes under DOJ - senior Justice officials told lawmakers in Feb. 2011 that no guns were allowed to "walk" to Mexico. That letter was later withdrawn by the Justice Department as inaccurate.

Issa has been investigating what happened during Fast and Furious for 16 months, and he subpoenaed the Justice Department last October. Since that time, his panel has been squabbling over what documents will be turned over. Justice officials note that 7,600 pages of Fast and Furious material has already been given to Issa, but the California Republican has demanded more.

Obama asserted executive privilege on some of the documents Issa is seeking shortly before the Oversight and Government voted on party lines to approve a contempt resolution against Holder.

Despite a face-to-face session between Issa and Holder recently, the two men never reached a compromise to end the standoff.

Since the Justice Department would have to seek an indictment of Holder - a department he oversees as attorney general - no criminal charges will be brought against him. Previous administrations, including the Bush administration in 2008, refused to seek criminal charges against White House officials when a Democratic-run House passed a criminal contempt resolution over the firing of U.S. attorneys.

Boehner's office, though, is expected to submit a criminal referral to the U.S. attorney for the District of Columbia, Ronald Machen, in the next few days, according to a Republican official.

Issa's aides have already begun discussions with the House General Counsel's office over the anticipated lawsuit against DOJ, but it is not clear when that the legal challenge will be filed.

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# **Exhibit**

**29**



November 20, 2013, 12:18 pm

## Feds consider new gun regs



The Obama administration is working on new gun control regulations that would target stolen and missing weapons.

Police have a hard time tracking firearms that disappear from gun shops, which "just feeds the sort of already large and existing secondary market on guns," said Sam Hoover, a staff attorney with the Law Center to Prevent Gun Violence.

It is unclear precisely what the draft regulations, drawn up by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and under review at the White House's regulations office, would do.

The ATF would not comment on the draft rule, since it has not yet been released to the public, but a description provided by the White House asserts that it would target cases where guns go missing "in transit."

Currently, gun dealers with a federal license are required to tell federal agents after they discover a firearm has gone missing, but they aren't required to do routine checks.

"They can discover a gun missing today and have no idea when it went missing, which really makes that information useless to law enforcement," said Chelsea Parsons, associate director of crime and firearms policy at the Center for American Progress.

The White House office has 90 days to review the proposed rule before releasing it to the public and allowing them to comment.

The draft rule was sent to the White House five months after the ATF completed a **report** that found that more than 190,000 firearms were estimated to have been lost or stolen last year. The report was one of 23 executive actions President Obama announced in January to reduce gun violence in the wake of last year's shooting in Newtown, Conn.

That report helped to shine light on an often unseen corner of the gun market, supporters of stricter gun laws say.

"I think that in the area of guns and gun violence and gun commerce, we have had a complete lack of data and a lack of information," said Parsons.

She wants the ATF to be able to take stronger action to monitor and track guns that go missing.

Since 2004, an appropriations rider has prevented the ATF from requiring gun dealers to do periodic checks. Gun rights advocates say that the measure protects innocent victims of crimes from punishment by the government.

*— After this story was posted, the ATF contacted The Hill to clarify that the pending proposal would not affect the longstanding law preventing the agency from requiring gun dealers to check their inventories.*

**TAGS: Bureau of Alcohol, Tobacco, Firearms and Explosives, Gun control**

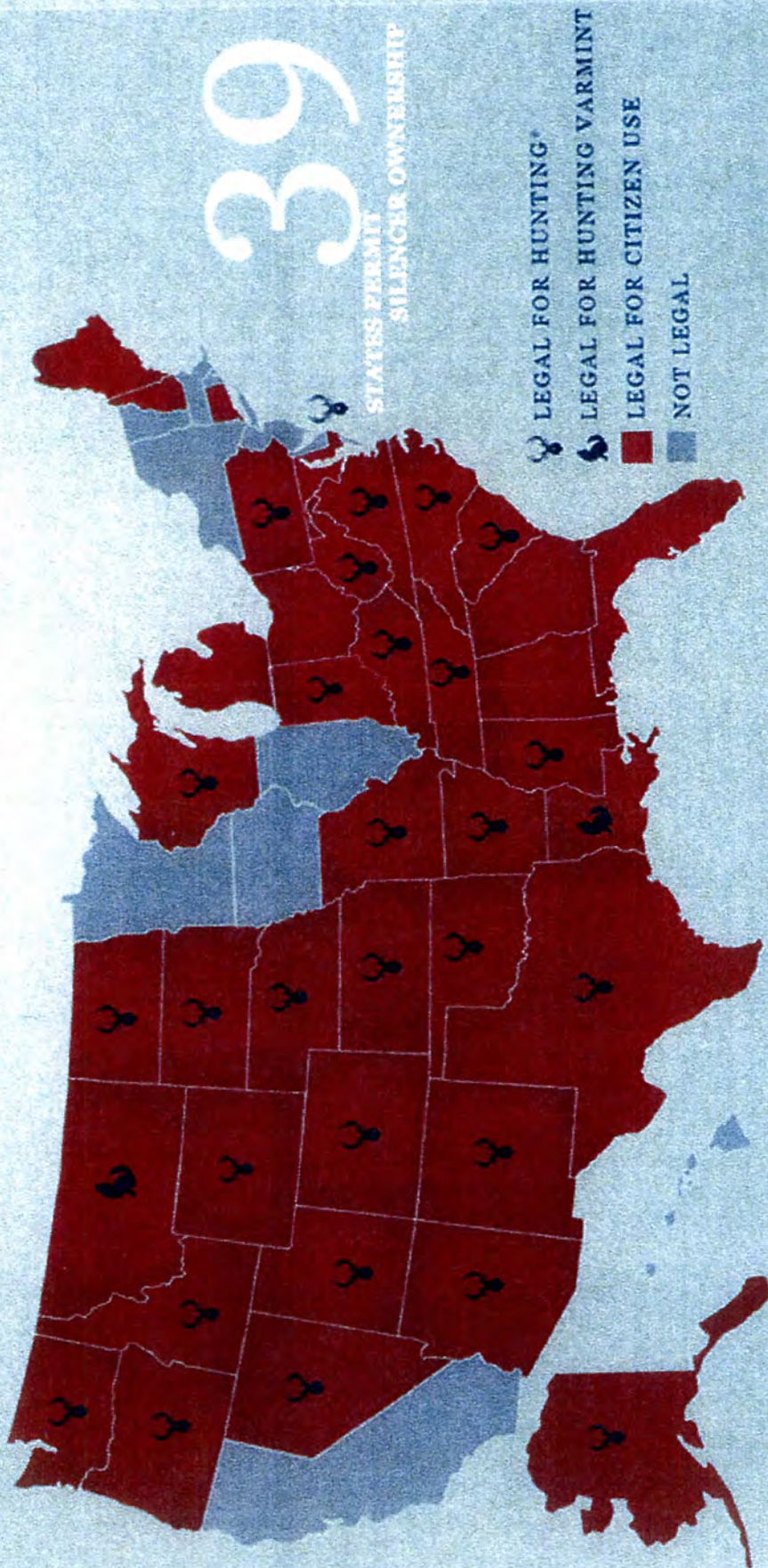
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# **Exhibit**

**30**

REFERENCE THE MAP BELOW FOR INFORMATION ON

## SILENCER LEGALITY & OWNERSHIP



\*Silencer laws are subject to frequent change and interpretation. This map does not constitute legal advice. To ensure full compliance, consult a local attorney for an accurate interpretation prior to usage.

# **Exhibit**

**31**



## VERIFIED STATEMENT OF JAY J. QUILLIGAN, M.D.

My name is Dr. Jay J. Quilligan. I am a physician as well as the founder and owner of Quicksilver Manufacturing LLC of Shoshone, Idaho.

### **A. Background**

#### 1. *Medical Background and Experience with Hearing Loss*

I was graduated from the University of Southern California School of Medicine and am certified by the American Board of Otolaryngology/Head and Neck Surgery. I am a medical doctor and I specialize in ear, nose, and throat issues. I served as a physician in the U.S. Army from 1977 to 1986 and, in that capacity, evaluated soldiers to determine the extent of hearing loss and rated the extent of their disability.

#### 2. *Background in Suppressor Evaluation and Design*

I am also the founder and owner of Quicksilver Manufacturing LLC of Shoshone, Idaho. We are a verified Veteran Owned Small Business. The original business was established in 1998, as a partnership with another practicing ear, nose, and throat specialist, my brother Chris Quilligan, and has undergone changes in ownership structure and geographical location. From the start we registered as a Federal Firearms Licensee ("FFL") and devoted ourselves to producing innovative and superior designs of so-called "silencers", more properly termed noise suppressors.

The effectiveness of our designs has drawn media attention and praise. Favorable press coverage and published independent reviews include: Leroy Thompson, "Tactical Use of Rifle Suppressors," *SWAT Magazine* (Oct. 2009) (Exhibit A), Al Poulson, "Quicksilver Titanium Ultralight Silencers," *Small Arms Review* (Nov. 2004) (Exhibit B), and Al Poulson, "QSMS .223 Suppressor," *Guns & Weapons for Law Enforcement* (Jan. 2003) (Exhibit C).

Since 2006, we received an offer from Mad Bull Airsoft to replicate our .223 silencer for international airsoft sales. We were invited by the U.S. Army to send a .223 silencer for testing against two other major manufacturers' models. We were invited to do prototype magnum silencers for CheyTac LLC designed for use on the CheyTac .408. I am attaching a 2007 Army Task Force Evaluation letter we received recently as Exhibit D. It concluded: "Of all the suppressors we evaluated, the QSM Suppressor performed the best." Although we may be a small business, we are innovators on the cutting edge of suppressor design.

Let me emphasize that much of our business involves supplying the military and law enforcement. No more than ten percent of our transfers involve civilians using legal entities to acquire suppressors.

**B. Summary of Issues Raised by ATF's Rulemaking**

I am familiar with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Notice of Proposed Rulemaking ("NPR") published on September 9, 2013, in volume 78 of the *Federal Register* at pages 55014 through 55029. Among the items defined as "firearms" and regulated by ATF as such under the National Firearms Act ("NFA") are "silencers" or noise suppressors.

As ATF acknowledges many trusts and other legal entities were formed as a consequence of its regulations that provided effective veto power to chief law enforcement officers ("CLEOs") over the making or acquisition of NFA firearms. Although ATF required such certification for applications submitted by individuals, never in the more than seventy years of NFA regulation had ATF even proposed that such certification should be required with respect to the responsible persons associated with trusts, corporations, LLCs, and other legal entities. Now that ATF proposes to do so -- as well as place other new burdens on responsible persons including

fingerprints and photographs -- it is evident that if the proposed rule is adopted many fewer individuals will have access to suppressors for their use.

With fewer people having access to suppressors, it is inevitable that both the incidence and severity of hearing loss will increase. Given the size of the population that use suppressors under ATF's current regulations the costs from such hearing loss will be staggering. Hearing aids alone cost between \$2,000 and \$4,000 each, with many individuals needing one for each ear. That expense is in addition to the cost of medical visits and diagnostic tests which would easily amount to \$1,000. On top of such obvious direct costs, there are many indirect costs that must be considered as permanent partial disability. Together, the direct and indirect costs of hearing loss due to a reduced availability of suppressors would likely exceed \$100 million per year. ATF omitted any consideration of these substantial costs in its NPR.

As Exhibits A through D illustrate, suppressors -- including those of our design -- are used by the U.S. military and are in common usage in law enforcement, especially with respect to certain specialized units. Additional evidence of that fact comes in the form of testimonials we have received over the years, several of which are attached as Exhibits E and F.

### **C. Analysis**

#### *1. General Superiority of Suppressors to Other Forms of Hearing Protection*

Suppressors are legal in most States. In many foreign countries they are not only unregulated but use is encouraged to protect against hearing loss as well as to reduce noise pollution more generally.

In a civilian setting, the most important aspect of suppressor use is hearing protection at the source of the noise. My background as an ear, nose and throat physician has given me significant knowledge and exposure to both the causes and effects of noise exposure with

attendant permanent hearing loss. During my tenure in the U.S. Army, one of the most frequent problems that we faced was high frequency hearing loss secondary to noise exposure. While many of these individuals sustained their hearing loss in actual battle, others were only exposed in training situations. Even though supposedly adequate hearing protection was provided, these individuals still had hearing loss over time.

Research has shown that individuals regularly exposed to small arms fire in training situations are over ten times more likely to sustain noise induced hearing loss than individuals not so exposed. This is despite regular use of protective ear devices, which are supposed to reduce noise levels to below damaging thresholds. The cause for this phenomenon is most likely due to bone conduction of the noise directly into the middle and inner ears. While bone conduction hearing is certainly less sensitive than conduction through the normal ear canal, nonetheless the noise levels produced by repeated gunshots are certainly great enough to cause hearing loss over time.

Use of a properly designed sound suppressor on a firearm is no different than putting a muffler on your car. A silencer on, for example, a 223 rifle can reduce the noise level from over 160 dB, which is quite harmful, to under 140 dB, which is the OSHA limit for exposure to a single impulsive or impact noise. *See* 29 C.F.R. §1910.95 & Appx. G. This cuts off the noise at the source and eliminates dependence on ear protection devices, which are prone to failure. It also eliminates the risk of bone conduction hearing loss from excessive noise. These conclusions are based on the available medical literature as well as my personal experience.

Research by Matthew Parker Branch, M.D., published by the American Academy of Otolaryngology in 2011 reported tests demonstrating the superiority of suppressors:

All suppressors offered significantly greater noise reduction than ear-level protection, usually greater than 50% better. Noise

reduction of all ear-level protectors is unable to reduce the impulse pressure below 140 dB for certain common firearms, an international standard for prevention of sensorineural hearing loss.

A copy of the article by Dr. Branch is attached as Exhibit G. As Dr. Branch further explained:

The National Institute of Occupational Safety and Health (NIOSH) recommends that earmuffs be considered to have 25% less [noise reduction ratio ("NRR")] than stated and formable earplugs 50% less. The most common commercially available ear protection has an advertised NRR of 19 to 25 dB. The highest rated NRR are 31 dB and are less common. The Occupational Safety and Health Administration sets 140 dB as the safe threshold for single-impulse sound exposure. Using the adjusted NRR levels, most hearing protection (NRR 19-25 dB) is unable to make hearing safe a firearm producing an impulse sound louder than 149.5 to 154 dB. The best available ear-level protection ( earmuffs, NRR 31dB) is unable to make hearing safe any firearm louder than 163 dB under the best of conditions. According to Berger et al, even these adjusted figures are likely unrealistic. This review of 20 published studies demonstrated far worse performance than the corrected NRR suggests: the laboratory NRRs consistently overestimated the real-world NRRs by 140% to 2000%.

## 2. *Specific Settings Where Suppressors Are Superior*

Even in a civilian setting there are circumstances that call for immediate action where an individual does not have the time to don protective ear devices. Virtually any self-defense or home-defense situation falls into that category. Moreover, in close confines where such situations typically arise, the need for hearing protection is even greater due to the sound and pressure waves returning from nearby walls, floors, and ceilings.<sup>1</sup> As a practical matter, the only hearing protection likely to be available in such a situation is a suppressor previously mounted on a firearm.

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<sup>1</sup> "Increasing the duration of firearm noise by shooting in an enclosed, reverberant environment increases auditory risk." Michael Stewart, et. al., "Risks Faced by Recreational Firearm Users," *Audiology Today* 38, 40 (Mar.-Apr. 2011) (attached as Exhibit H).

There are also situations in a civilian setting that require heightened situational awareness where protective ear devices cannot be employed as a realistic matter. The self- and home-defense setting again provides an example. Even if a homeowner had the time to don protective ear devices before engaging an intruder, it would be more important to hear the sounds of the intruder to determine his location and whether he was alone. So too, the ability to hear family members in the household would be critical to prudent decision-making. As more States permit the use of suppressors while hunting a similar situation exists. To be effective, the hunter needs the ability to hear the sounds that indicate the approach of his intended target. And for the hunter's safety and the safety of other hunters, they each need to be able to hear one another.<sup>2</sup> Even at shooting ranges, both indoor and outdoor, for the safety of everyone involved it is important that shooters be able to hear commands of range officials.

In such settings as these, suppressors are the clearly superior -- if not only viable -- option for protection against hearing loss.

### 3. *"Second-Hand" Noise Pollution*

Another reason why suppressors are a superior means to mitigate hearing loss is that the impact of the noise upon discharge is not limited to the shooter. People who live near shooting ranges and hunting grounds benefit from the use of suppressors in much the same way everyone who lives anywhere near a road (particularly a heavily-travelled road) benefits from laws requiring motorists to use mufflers on their vehicles. Long before noise rises to the level of producing hearing loss, it imposes other costs such as lost productivity due to interrupted

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<sup>2</sup> These considerations may explain the findings that hunters consistently used hearing protection less than 5% of the time during hunting activities but were more likely to wear hearing protection while target shooting. Gregory A. Flamme, et al., "Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise," 22 *J. Am. Acad. Audiology* 93 (2011) (attached as Exhibit I).

concentration and disrupted sleep. Such concerns explain night-time noise ordinances. Those concerns also explain why advertising campaigns for automobiles tout a "quiet ride" and marketing of household appliances such as dishwashers and air conditioners also emphasize how "quiet" they are relative to competing brands. While unlikely to produce permanent hearing loss, exposure to such sound levels impose very real costs.

Of greater concern with respect to hearing loss, however, are individuals in closer proximity to the discharge. In the personal- or home-defense setting family members may be in close proximity. Even if the armed member of the family had taken the time to don ear protectors and managed to overcome the limitations on situational awareness, when actually firing the gun the other family members in proximity would be exposed to the full impact of the sound wave. In hunting parties, anyone making the decision to prefer safety and situational awareness would lack protection from the discharge of a firearm by another hunter in close proximity. Perhaps the most obvious situation where people other than the shooter benefit from the use of suppressors is at firing ranges. In that setting, individuals are likely to be in close proximity on a firing line. Anyone present who is using inferior hearing protection devices benefits from the fact that one or more neighboring shooters on the firing line is using a suppressor.

#### 4. *Diminished Ability to Share Suppressors*

Under current law, suppressors registered to a trust, corporation, or other legal entity may be used by multiple "responsible persons" without the cost and nearly-year-long delay associated with the Form 4 approval process. As a result, it is possible to share a single suppressor among two or more responsible persons who may go hunting or target shooting on different days. And a firearm intended for home-defense with an attached suppressor could be used by any number of

adults in the home who were designated as responsible persons without presenting the dilemma of choosing between letting an intruder proceed in his design and the threat he poses, on the one hand, and facing potential criminal liability for unlawful possession (or even "constructive possession") of an item regulated by the NFA, on the other hand.

ATF's proposed rule is directed at precisely those legal entities that facilitate such shared usage of a suppressor. To the extent the added regulatory burdens limit the ability of responsible persons to use such legal entities more than a single individual may be exposed to greater risk of hearing loss for each suppressor the legal entity is no longer able to obtain.

#### 5. *Durability of Suppressors*

Many commercially-available suppressors are not designed to permit cleaning and other maintenance. In essence, these models are disposable, with lifespans substantially shorter than the firearms with which they are likely to be used.

Innovations in sound-reduction technology have produced some superior suppressors that can be maintained by the gun-owner but these generally newer and more-expensive models are among the latest designs. As a result, a significant percentage of suppressors currently in use by civilians will need to be replaced in the coming years as the efficacy of "dirty" suppressors is degraded by usage. With increased regulatory obstacles, a shrinking portion of the population that should be using them will have access to suppressors.

The durability of suppressors also varies with respect to the firearm with which they are used. When CheyTac LLC invited us to produce a prototype magnum silencer for the CheyTac .408, they warned us that they'd tried five different steel silencers from various manufacturers and all had failed by 150 rounds.



Based on my knowledge of the industry, I would estimate that 5% or so of existing suppressors currently in civilian use should be replaced each year for at least the next ten years.

6. *The Myth of "Silencers"*

Dr. Branch reported that test firing a 9mm pistol produced average unsuppressed sound levels at the ear of the shooter of 157.7 dB, in excess of the OSHA safety standard. Using a suppressor produced an average sound level of 126.9 dB, safely below the OSHA standard. While effective for hearing protection, these results illustrate that 80% of the noise of the discharge remains. Results for a 45 ACP pistol were an average unsuppressed sound level of 162.5 dB and an average suppressed sound level of 128.5 dB, leaving 79% of the sound.

Results with rifles were not dramatically different. The average unsuppressed sound level for a 223 caliber semiautomatic rifle at the shooter's ear was 155 dB and with suppression the level dropped to 134.2 dB, effective for safety purposes but still leaving more than 86% of the sound. With a bolt action 308 caliber rifle the average unsuppressed sound level at the shooter's ear was 157.2 dB and the average suppressed sound level was 131.2 dB, leaving more than 83% of the sound.

The lowest average suppressed sound level reported from any of those four tests was 126.9 dB. By way of comparison, the American Hearing Research Foundation produces the following table of common sounds and their intensity:

<u>Approximate Decibel Level</u>	<u>Examples</u>
90 dB	lawnmower, shop tools, truck traffic
100 dB	chainsaw, pneumatic drill, snowmobile
115 dB	sandblasting, loud rock concert, auto horn
140 dB	gun muzzle blast, jet engine

That source is attached as Exhibit J.

As these test results and comparisons indicate, suppressors do not render the discharge of a firearm "silent." That perception is a myth created by film and television. As a result, there is little, if any, public safety issue associated with the availability of suppressors to owners of legal firearms.

7. *Scope of Exposure*

As the results Dr. Branch reported illustrates, the benefits of silencers are not limited to some small subset of firearms. As Dr. Michael Stewart, Professor of Audiology, has observed, "[a]lmost all firearms create noise that is over the 140-dB level" and even a "small .22-caliber rifle can produce noise around 140 dB." Stewart, *supra* note 1, at 40; *see also* Exhibit K.

Professor Stewart confirms that individuals who fail to employ appropriate "hearing protection while shooting can suffer a severe hearing loss with as little as one shot, if the conditions are right." *See* Exhibit K. He also acknowledges that audiologists see many cases of hearing loss attributable to the sound of the discharge of firearms "especially during hunting season when hunters and bystanders may be exposed to rapid fire from big-bore rifles, shotguns, or pistols."

Professor Stewart also acknowledges that the surveys indicate that fewer than half of hunters "wear hearing protection because they say they cannot hear approaching game or other noises." As explained above, in such setting suppressors provide the superior technology to address the situation.

8. *Incidence and Severity of Hearing Loss and Disability*

Accepting figures ATF has previously published of more than 250 million privately owned firearms in the United States and ATF processing 39,471 transfers of suppressors in just

one calendar year, 2012, it would seem evident that placing additional regulatory burdens on the acquisition of suppressors has the potential for wide-spread hearing loss.

One study shows that more than one-fourth of military officers under the age of 30 already experienced measurable hearing loss and that "[t]he degree of age-corrected hearing loss, especially at low frequencies, correlated highly significantly with exposure." An abstract of that report, available through NIH, is attached as Exhibit L. The authors further observed: "Twenty-four (3.4%) of 699 officers needed sound amplification in noisy environments."

A study by the National Shooting Sports Foundation concluded that in 2011 there were 14,630,000 paid hunting licensing holders. Total recreational shooters exceed 30 million. In addition to shooters, bystanders are at risk for hearing loss with many firearms generating noise that exceeds the maximum safe level for exposure to even a single discharge. See Gregory A. Flamme, *supra* note 2, at 99-101. As a result, significantly more than 30 million individuals are exposed each year to noise levels capable of producing hearing loss. If even 1 in every 10,000 individuals so exposed were to suffer sufficient hearing loss to require medical care, testing, and hearing aids, at a cost of \$5,000, the result would be a cost of \$15 million without even considering the cost of permanent disability. Moreover, because hearing loss is cumulative with exposure, that first group of 3,000 shooters would continue to have additional direct medical costs thereafter on top of the \$15 million cost for the newly hearing-impaired. Based on my experience, those assumptions are on the conservative side and total annual costs due to hearing loss, including partial disability, are likely to exceed \$100 million. Quite simply, the costs of ATF's proposed rule are staggering.

#### **D. Recommendations**

For all the foregoing reasons ATF should not go forward with its proposed rule until considering its full economic impact, including the increased incidence and severity of hearing loss that alone exceeds more than \$100 million annually.

Instead, ATF should be minimizing regulatory burdens with respect to the making and acquisition of suppressors. ATF should completely eliminate the requirement of CLEO certification for suppressors for *individual* applicants. Moreover, given the importance of suppressors as a means to mitigate hearing loss, ATF should give priority to processing applications for suppressors regardless of whether the applicant is an individual or a legal entity.

ATF should also seek congressional action to reduce the level of legislatively-mandated obstacles with respect to the making and acquisition of suppressors. Suppressors are more properly regulated as Title I firearms, not NFA firearms. The backlog and resulting delay in processing applications for suppressors could be eliminated by subjecting suppressors to the same system used to regulate handguns. Such a change would permit ATF to allocate resources toward making a dent in the backlog of applications for other types of NFA firearms. If NFA were to oppose removing suppressors from coverage by the NFA, at least ATF should advocate reducing the transfer tax upon suppressors. There is already a differential under the NFA with the "any other weapon" category carrying only a \$5 tax as opposed to a \$200 tax on suppressors and all other NFA firearms. Given the *positive benefits* that suppressors provide, they clearly belong on the \$5 side of that line, particularly considering the tax as a percentage of the overall cost of acquiring a given NFA firearm. The marginal increase in the cost of a suppressor as measured by the percentage of the cost attributable to the tax and other regulatory burdens

simply places these useful safety devices beyond the financial means of many law-abiding gun owners.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 5, 2013.

  
\_\_\_\_\_  
Jay J. Quilligan, M.D.

## LIST OF EXHIBITS

- Exhibit A -- Leroy Thompson, "Tactical Use of Rifle Suppressors," *SWAT Magazine* (Oct. 2009).
- Exhibit B -- Al Poulson, "Quicksilver Titanium Ultralight Silencers," *Small Arms Review* (Nov. 2004),
- Exhibit C -- Al Poulson, "QSMS .223 Suppressor," *Guns & Weapons for Law Enforcement* (Jan. 2003).
- Exhibit D -- Army Evaluation Task Force, QSM Suppressor Evaluation Memorandum (July 24, 2007).
- Exhibit E -- Letter from Officer Dan Swanson, Rochester (Minn.) Police Department (Aug. 30, 2008).
- Exhibit F -- Letter from Sgt. Chad S. Horton, U.S. Army (2006)
- Exhibit G -- Article by Matthew Parker Branch, M.D.
- Exhibit H -- Michael Stewart, et. al., "Risks Faced by Recreational Firearm Users," *Audiology Today* 38 (Mar.-Apr. 2011).
- Exhibit I -- Gregory A. Flamme, et al., "Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise, " 22 *J. Am. Acad. Audiology* 93 (2011)
- Exhibit J -- American Hearing Research Foundation  
<http://american-hearing.org/disorders/noise-induced-hearing-loss/#frequency>
- Exhibit K -- Article by Michael Stewart, Ph.D.  
<http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/>
- Exhibit L -- M.E. Ylikoski & J.S. Ylikoski, "Hearing Loss and Handicap of Professional Soldiers Exposed to Gunfire Noise," 20 *Scand. J. Work Environ. Health* 93 (Apr. 1994). <http://www.ncbi.nlm.nih.gov/pubmed/8079140>

# **Exhibit**

**A**

**TAKE  
AMERICA BACK!**

**BULLETPROOF MIND**

# SWAT

WEAPONS, TACTICS AND TRAINING FOR THE REAL WORLD

## ULTIMATE RIFLEMAN'S PACKAGE

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## TACTICAL USE OF RIFLE SUPPRESSORS

» BY LEROY THOMPSON

▲ Colt Commando with Quicksilver suppressor deployed for engagement of trailing vehicle through rear hatch/window of SUV.

**The image most people have of a suppressed weapon is probably an MP5SD in the hands of military special operators.**

**S**ome may also have an image of a suppressed pistol being used for silent threat elimination. Those examples presuppose someone with firearms knowledge. Many others probably picture a “hit man” screwing a suppressor onto a revolver in some unrealistic action film. Occasionally, a film will also show a sniper using a suppressed rifle while carrying out an assassination mission. And that image raises some interesting points, since there are quite a few tactical niches for the suppressed rifle.

A particularly useful mission for the suppressed rifle applies to both tactical law enforcement units and military special operations units. When carrying out a raid—whether on a crack house or an enemy command center—having

the ability to quietly and precisely eliminate lights, surveillance cameras, motion detectors, infrared detectors, etc. can be very useful.

Although the suppressed .22 pistol has been used for these missions, as have suppressed centerfire pistols or the MP5SD, a scoped bolt-action suppressed .22 rifle is particularly efficient. At relatively close range, a suppressed .22 pistol may suffice to take out lights, but often a stealth approach has to start relatively far away, and the lights, cameras, etc. need to be dealt with before the entry team gets too close to the building.

Various suppressors are available for .22 rifles. The one with which I’ve had very good results is the Elite Iron integrally suppressed Ruger 77/22. This

suppressed rifle is very quiet, accurate to 100 yards or more depending on how the scope is zeroed, and since it is a bolt-action does not have the sound of a bolt cycling as would a semi-auto.

Some readers may be thinking that the same rifle could be used to take out attack dogs, but really an MP5SD is a far better choice for that. Military special ops teams raiding an installation need to get in and out and often must eliminate dogs quickly and quietly. For police tactical teams, I recommend eliminating dogs only when absolutely necessary. I have a long list of reasons, but that is another article.

Primarily for military special operators, but also for some close protection/security teams, there is a mission for the suppressed assault rifle or carbine. For

the special ops team, suppressed carbines may be used when springing an ambush to make it a little harder to instantly identify the direction of fire, since muzzle flash will be cut.

Use of suppressed weapons will also make it less likely that supporting troops some distance away will hear the firefight and respond. In certain types of raids, too, where the mission is limited to a fairly small area of a large installation—knocking out a radar site, snatching a ranking officer, taking out an electronic warfare installation, rescuing hostages held in a cellblock, etc.—suppressed rifles or carbines will likely increase response time for troops on other parts of the base and may even mean they will not be alerted until the mission objectives are complete and the operators have been extracted.

Suppressed carbines or rifles may be useful as well for helicopter-borne marksmen who will support maritime or other anti-terrorist missions. The weapon can be fired from within the chopper with less distraction for the pilot or other flight personnel and also with an increase



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in difficulty for those being targeted to quickly locate the shooters.

For security teams who may have to engage approaching vehicles, passing vehicles, or shooters along the route, the suppressed carbine is invaluable, as it allows the driver to concentrate on his job—which may include evasive action—and it also allows communication within the vehicle and with other vehicles with far less degradation of hearing.

Additionally, the suppressor dampens recoil enough that on full-auto, the operator can hold the carbine on target more effectively. This is invaluable when attempting to engage from a moving vehicle, which is extremely difficult in the best of circumstances.

I've done a reasonable amount of shooting with a 5.56x45mm Colt Commando fitted with a Quicksilver Titanium suppressor and found the combo of the

*Quality.*

 A detailed view of an ATI rifle with a suppressor, resting on a rocky surface. The rifle is silver and black.
 

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handy carbine and this suppressor excellent for use from within a vehicle. This suppressor is only 6.2 inches long and weighs only 9.5 ounces. On the Com-mando, it keeps overall length very close to that of a standard M4 and allows the carbine to remain very handy.

The suppressor also has a valid mission when used on the sniper rifle. Suppressors for powerful centerfire rifle cartridges can be surprisingly effective. I understand, in fact, that all USMC M40A3 rifles are—or will be—suppressed. The Quicksilver suppressor for the .300 Win. Mag., for example, keeps sound level close to that of a suppressed .22 rifle firing high velocity ammo. A .338 Lapua sniper rifle equipped with a Quicksilver suppressor isn't much louder. Because most sniping rifles—other than some specialized ones such as the Russian VSS, which is a purpose-built subsonic sniping rifle—fire a supersonic round, complete suppression is obviously not possible.

The sound suppressor on a sniping rifle does dampen sound and muzzle flash. As a result, it is much more difficult to locate the sniper for counter battery fire. Experi-

ments have shown that troops attempting to identify the location of a sniper firing a suppressed weapon will normally be off by a factor of 60 degrees or more. The suppressor is also an aid to accuracy, as it cuts recoil substantially. Groups with suppressed sniper rifles will normally tighten markedly. Larger .50 BMG sniping rifles are significantly easier to shoot when suppressed and, hence, long-range accuracy often increases dramatically.

A note on suppressed sniping rifles for law enforcement tactical marksmen:

Often raids will be carried out in neighborhoods that are not law enforcement friendly. As a result, if suppressed .308 sniping rifles are used, it will be more difficult to locate the tactical marksman, and a shot or shots will be less likely to attract potentially hostile crowds from the surrounding area. The same argument can be made for other suppressed weapons used on urban raids.

This has been a quick overview of some of the more likely uses for suppressed rifles in military or law enforcement tactical operations. Units may well find that the suppressed rifle can also be

used in other missions. On military deep-penetration missions where resupply is difficult, for example, it is possible that a suppressed rifle might be used to take small game. For some missions, the suppressed SMG may well perform many of the same missions as the suppressed rifle.

The simplest way to sum up the tactical applications of suppressed rifles is that for most tactical missions, stealth is better, and suppressed weapons aid stealth! ●

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## Quicksilver Titanium Ultralight .223 Remington/.22 Rimfire Silencer

by Al Paulson

One of the most common questions asked by newcomers to the mysteries of sound suppression is, "Can I use my .223 suppressor on my .22 rimfire rifle and pistol?" The short answer is "Yes." The long answer is "Yes, but why would you want to put a 1 to 2 pound .223 can on a rimfire arm, when you can use a much lighter suppressor dedicated to rimfire use?" Of course there are compelling reasons such as limited budgets or a fascination with

owning a centerfire and rimfire system with a shared suppressor. Nevertheless, I never had much use for this approach until Dr. Jay Quilligan of Quicksilver Manufacturing developed, what I believe to be, the

lightest AR-15/M16 silencer in the marketplace: the all titanium QSMS 5.56mm sound suppressor. Weighing an astonishingly light 9.5 ounces (that's just 7.3 ounces more than the flashhider it re-

**Lead photo, above:** While Quicksilver's ultralight 9.5 ounce .223 suppressor provided yeoman service on an AR-15/M16, it was also small enough and light enough to provide graceful service on a .22 rimfire pistol.

**Right:** Titanium QSMS mounted on a Smith & Wesson Model 2213 pistol.





**Left:** While the Quicksilver titanium .223 suppressor evaluated in this study was polished bright, the suppressor is also available in a nonreflective bead-blasted natural finish (a dull gray), or a nonreflective black chemical finish.

places), this little titanium can not only provides yeoman performance with the 5.56x45mm round, but it is also small and light enough to provide user-friendly service when mounted on a .22 pistol. This is no small achievement.

Before conducting a hands-on evaluation of the titanium QSMS on both a .22 LR pistol and a .223 Remington (5.56x45mm) carbine, it would be useful to take a look at the suppressor's design. The 5.56mm QSMS sound suppressor is

fabricated from a proprietary grade of titanium that is vastly superior to the G2 titanium commonly used in the suppressor industry. I said "commonly" because titanium suppressors are actually quite unusual, and they tend to be rather expensive: as much as three or four times the price of a stainless steel silencer.

The QSMS suppressor evaluated in this study is 6.0 inches long and 1.30 inches in diameter, tipping the scales at 9.5 ounces. Tubing thickness is 65 thousandths

ish. The end-caps are screwed into place and bonded with a high-temperature (2,000+ degrees Fahrenheit) ceramic cement rather than welded, making this a very handsome suppressor but one that should not be subjected to sustained full-auto fire, in my opinion, since threads are the weakest link in the system. The only thing I would do differently, if I were building this silencer, would be to weld unthreaded end-caps into place. That said, this design has proven throughout the eight months of this study to be sufficiently durable for its intended missions (principally used by law-enforcement entry teams), including limited full-auto fire.

The internal design of the titanium silencer is based upon the proven K-baffle with slanted sidewall. Do not make the mistake, however, of thinking that this design is legacy technology. It is quite the contrary. Besides using superior metallurgy in the titanium sound suppressor, Quilligan's internal design takes K-baffle technology to a whole new level in terms of how he is able to work the gases very hard in a very small space in a way that is both novel and effective. Complex and quite innovative porting, venting and cross-jetting strategies are based on very sound physics. The blast baffle is asymmetric in an original way. Yet the silencer delivers very good accuracy despite the asymmetry, which is remarkable. The blast baffle is designed to be slightly less than one 5.56mm bullet length from the muzzle

**Table 1. Performance of 5.56mm titanium QSMS sound suppressor from Quicksilver Manufacturing on Smith & Wesson Model 2213 pistol with Remington .22 rimfire ammunition.**

Parameter	HV	SVT	SS
SPL, unsuppressed	157 dB	156 dB	154 dB
SPL, suppressed	116 dB	116 dB	114 dB
Net sound reduction	41 dB	40 dB	40 dB
First-round pop	+6.4 dB	+4.5 dB	+6.3 dB
Muzzle velocity Unsuppressed	936 fps	760 fps	761 fps
Muzzle velocity, suppressed	944 fps	778 fps	767 fps
Freebore boost	8 fps	18 fps	6 fps

Sound pressure levels (SPLs) of the pistol with and without the suppressor are compared to the net sound reductions provided by the suppressor, measured 1 meter to left of muzzle or front of suppressor. Sound data are reported as decibels (dB). Ammunition included Remington high velocity (HV), standard velocity target (SVT) and subsonic (SS). Temperature was 52 degrees Fahrenheit.

based upon advanced muzzle break theory. This greatly reduces first-round pop with standard 5.56x45mm duty ammunition and improves the overall efficiency of the can. It is one of the key design features that enable the titanium silencer to be so effective. Porting and venting create a major frequency shift upward so that the frequency mix of the suppressed centerfire gunshot noise matches the frequency mix of bullet flight noise. This seems to make bullet flight noise (i.e., the ballistic crack or sonic boom) of 5.56x45mm ammunition disappear within the CQB environment.

### Shooting Impressions

The first thing I noticed when shooting the titanium QSMS on a 5.56x45mm M4 carbine was that the sound suppressor made shooting very comfortable without hearing protection. The suppressor virtually disappeared during rapid-action drills. Then I began to notice the weapon's extremely eerie sound signature and the apparent absence of bullet flight noise from the shooter's perspective. When I had someone shoot past me at a range of 30 yards while I was 10 yards from the bullet flight path, the frequency masking effect was still quite effective. Only if I concentrated with all my might and with no distractions, could I detect the slightest Doppler shift of a bullet going past me.

When the titanium QSMS was mounted on a Smith & Wesson Model 2213 pistol with 3-inch barrel, I was pleasantly surprised at how well the system handled. Balance was wonderful and the low barrel position permitted using the pistols' sight's to see over the 1.3-inch diameter sound suppressor. Quicksilver has a small number of specially modified S&W Model 2213 pistols for use with sound suppressors at the time of this writing. The pistols can only be purchased with a titanium QSMS 5.56mm sound suppressor. This makes a nifty package.

The small amount of additional weight added by the Quicksilver can was simply not a factor in my performance. I did notice, however, that the Ultralight suppressor heats much more rapidly than the typical suppressor in this caliber that has two to four times as much mass. This does become an issue when shooting with 5.56mm ammunition, but there is an easy fix: Rocksett high-temperature, engineering

Table 2. Performance of 5.56mm titanium QSMS sound suppressor from Quicksilver Manufacturing on Bushmaster M4 rifle with 14.5 inch barrel with 1:9 twist rate.

Parameter	BH 62 gr. FMJ	EBR 63 gr. SP Ultra Stealth
SPL, unsuppressed	164 dB	154 dB
SPL, suppressed	137 dB	122 dB
Net sound reduction	27 dB	32 dB
First-round pop	+0.1 dB	+7.5 dB
Muzzle velocity Unsuppressed	2,740 fps	1,008 fps
Muzzle velocity, suppressed	2,758 fps	1,018 fps
Freebore boost	18 fps	10 fps

Sound pressure levels (SPLs) of the rifle with and without the suppressor are compared to the net sound reductions provided by the suppressor, measured 1 meter to left of muzzle or front of suppressor. Sound data are reported as decibels (dB). Ammunition included Black Hills 62 grain FMJ match (BH 62 gr.), and Engel Ballistic Research 63 grain Soft Point Ultra Stealth Subsonic Match ammunition (EBR 63 gr. SP Ultra Stealth). Temperature was 85 degrees Fahrenheit.

adhesive.

Made by the Flexbar Machine Corporation, Rocksett is actually a ceramic cement that is used widely to lock, bond and seal nuts, screws, splines, pipes, and other structural materials. Rocksett is noteworthy because of its stability over an unusually wide range of temperatures (from -35 to +2,015 degrees Fahrenheit). Rocksett also withstands oils, fuels, acids, and alkalis.

When Rocksett is used for the temporary bonding of a Quicksilver suppressor to a barrel, an unusual installation proto-

col must be strictly adhered to. This will allow the operator to remove the silencer - when desired - by hand. Failure to follow this regimen will permanently bond the suppressor to the barrel. Place one or two drops (maximum) on the rearmost barrel threads near the shoulder at the rear of the threaded portion of the barrel. Screw the suppressor tightly against the shoulder behind the threads to ensure proper alignment with the bore. Allow to dry according to manufacturer's instructions (I usually allow to dry overnight). The suppressor has never loosened during sustained

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semiautomatic firing and limited firing of short bursts. The suppressor could always be removed by hand when desired and then re-installed using Rocksett and the aforementioned installation regimen once again.

Once this study was completed, firing a 30-round magazine in one continuous full-auto burst tested the durability of this minimalist use of Rocksett. A second 30-round magazine immediately followed that. The Rocksett-secured titanium bantamweight suppressor continued performing like a champ, leading me to have confidence in dumping one full magazine at once should the unlikely requirement present itself.

When used on the S&W Model 2213 pistol, an o-ring is used to ensure that the suppressor does not loosen from the .22 rimfire barrel. I was concerned about maintaining proper barrel alignment using this approach, but alignment never became an issue throughout the testing with the .22 rimfire pistol. While subjective shooting impressions were positive, there is no substitute for obtaining objective standards of performance as well. Both subjective and objective analyses are needed to make a truly informed decision on a product.

#### Quicksilver Performance

Performance of unsuppressed and suppressed firearms were compared using the testing regimen and equipment used by Paulson (1996) as amended by Paulson, Parker, and Kokalis (2002). Test data using the titanium Quicksilver QSMS 5.56mm sound suppressor on the S&W Model 2213 pistol with Remington .22 rimfire ammunition appear in Table 1. Test data evaluating the same titanium suppressor on a Bushmaster M4 carbine with 14.5-inch barrel using 5.56x45mm ammunition, appear in Table 2.

Putting a 5.56mm sound suppressor on a .22 rimfire rifle or pistol will generally provide adequate to good sound reduction, but the titanium QSMS delivers a most impressive 40-41 decibels of net sound reduction. Even with high velocity ammunition, mean (average) sound signatures remain well below pellet gun noise levels, using the Crossman American Classic Model 1377 .177 caliber pellet pistol as the benchmark. The Crossman produces sound signatures of 120-123 dB, depending upon the number of pumps. Only the first round of the day fired through the QSMS, using high velocity or standard

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velocity ammunition, overlaps the noise levels of the Crossman air gun. The bantamweight Quicksilver delivers a sound signature of 116 dB with high velocity and standard velocity fodder and 114 dB with subsonic ammunition. That's significantly quieter than the Crossman air gun when you remember that the decibel scale is logarithmic, not linear.

The little titanium bantamweight is no slouch when fired with 5.56x45mm ammunition, either. The QSMS delivered a net sound reduction of 27 dB with standard duty ammunition (Black Hills 62-grain FMJ match) and 32 dB with the 63-grain Soft Point Ultra Stealth Subsonic Match ammunition from Engel Ballistic Research. Jay Quilligan specifically designed this suppressor to have minimal first-round pop with standard 5.56mm duty ammunition. First-round pop measured just one-tenth of a decibel more. Quilligan seems to really understand the arcane art of sound suppressor design.

#### Final Thoughts

The 9.5-ounce titanium QSMS 5.56x45mm sound suppressor from Quicksilver Manufacturing offers a compelling mix of performance characteristics. When used as a .22-rimfire suppressor, it delivers a most impressive 40-41 decibels of sound reduction, depending upon ammunition. I have evaluated major-league .22 rimfire suppressors that weighed more than the QSMS suppressor and did not deliver this much sound reduction when shot dry. When using 5.56x45mm ammunition, I have evaluated AR-15/M16 suppressors that were several times larger and heavier that weren't as quiet.

Clearly, quieter sound suppressors are available in the marketplace. Furthermore, there are better choices if a lot of full-auto fire is a mission requirement. But for law-enforcement use on an entry or auxiliary weapon, for use by qualified civilians for home defense, to safeguard the hearing of both shooters and observers, or to target practice without offending the neighbors down the road, the bantamweight titanium QSMS provides a compelling mix of performance characteristics. It even seems to make the ballistic crack disappear at the distances most 5.56mm shooting seems to occur, which is a very eerie experience for even the most jaded suppressor cognoscenti.

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player, providing yeoman performance on both .22 rimfire and 5.56x45mm platforms. This is the first 5.56mm sound suppressor that actually seems truly at home as either a rimfire or centerfire silencer. Best of all, the QSMS from Quicksilver Manufacturing does so at the improbably light price of \$650. Jay Quilligan at Quicksilver Manufacturing should be justifiable proud of his achievement because it merits a place in the history books. It also merits serious consideration by the law-enforcement professional as well as both the budget conscious and the advanced collector.

*Author's note:* Subsequent to this article being written, medical problems forced Quilligan out of the machine shop and he has sold the business to Don Ellis, who is also known as "The Glock Guy". I've enjoyed working with Ellis in the past. Quilligan will continue to provide R&D support to Quicksilver, so there should be a very smooth transition, and we should look for more good things from Quicksilver Manufacturing.

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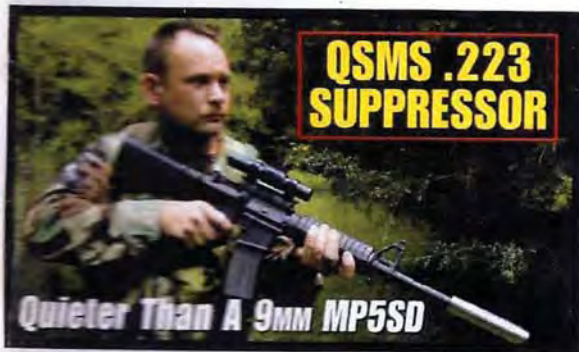
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- ▶ S&W M337PD .38SPL ▶ DRC Ruger Mini-14 .223 ▶ FN A4 .308
- ▶ Advantage Arms LE 17-22 .22LR ▶ Springfield Armory M-25 .308

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GUN TEST



# BUSHMASTER M-4A 5.56MM



(Main photo)  
The all-titanium  
QSMS sound suppressor  
from Quicksilver Manufacturing  
adds just 7.3 ounces to a  
weapon's net weight. (Inset) The  
titanium sound suppressor is so  
light that the operator is com-  
pletely unaware of its  
presence when conduct-  
ing rapid action  
drills.

By Al Paulson

# W//QUICKSILVER

**All-titanium 9.5-ounce  
M16 silencer is  
world's lightest!**

# QSMS



**Several years ago,** a major manufacturer of sound suppressors claimed that his new .30 caliber silencer eliminated the ballistic crack of a sniper rifle. This clearly defied the laws of physics, since there's no way to strip the bow wave from the bullet as it travels through the air using a sound suppressor. Admittedly, there are ways to design a supersonic projectile that will not create a ballistic crack. Such a projectile will not, however, look much like a conventional bullet. I remained polite because he had earned my deep respect over the years, but I silently viewed his claim as suspect, since it was outside my personal experience and it seemed to be based on junk science. I have only seen a sound suppressor eliminate the ballistic crack when the target was within a few meters of the suppressor and there simply wasn't enough distance to generate a sonic boom. The years passed and I never expected to revisit that issue again. You can imagine my surprise, as some months ago when I began evaluating the world's lightest M16 silencer from Quicksilver Manufacturing, it appeared to eliminate the ballistic crack of the 5.56x45mm bullet. This was just one of several surprises I encountered when evaluating the ultralight, 9.5-ounce all-titanium QSMS 5.56mm sound suppressor. Nine-and-a-half ounces? That's just 7.3 ounces more than the flash hider it replaces, the equivalent of seven empty pop cans!

## SUPPRESSOR DETAILS

Designed by Jay Quilligan for Quicksilver Manufacturing of Twin Falls, Idaho, the titanium QSMS 5.56mm sound suppressor weighs one-quarter as much as some mainstream 5.56mm silencers and

one-half as much as some subcompact 5.56mm silencers. It's eerie just how light it is. There simply is no perceived weight during target acquisition. The sound signature of an M4 carbine equipped with the QSMS is quite eerie as well, thanks to a rather unusual approach to baffle design that not only lowers the noise produced by the weapon significantly, but also changes a significant portion of the weapon's sound signature to match the frequency mix of the projectile's flight noise. Furthermore, the little bantamweight retards the exit of the combustion gases so that the can generates an unusually long sigh that continues well after the bullet leaves the can. The overall effect is decidedly un-M16-like.

The 5.56mm QSMS sound suppressor is fabricated from a proprietary grade of titanium that's vastly superior to the G2 titanium "commonly" used in the suppressor industry. I said "commonly" because titanium suppressors

are actually quite unusual and tend to be rather costly, up to three or four times the price of a stainless steel silencer. For those who came in late, the use of life-cycle costing combined with improved machining technologies have made end-users in many disciplines conclude that titanium is actually economical for many applications. The key to the cost-effective use of titanium is to incorporate its unique properties into the initial design of a product rather than to merely substitute titanium for another metal. Titanium's most salient properties are an excellent strength-to-weight ratio, high heat transfer efficiency, superior erosion resistance, and excellent corrosion resistance. Common titanium alloys weigh about half as much as stainless steel but have twice the strength. In terms of heat transfer efficiency,



## BUSHMASTER M-4A

titanium is very similar to stainless steel.

Titanium also provides superior resistance to erosion, cavitation or impingement attack compared to many metal alloys, including aluminum. Titanium resists erosion at least twenty times better than copper nickel alloys, for example. These qualities reduce the erosion potential of complex internal surfaces by hot combustion gases, and the sandblasting effect created by powder residue traveling at high velocity.

Corrosion resistance is not only an issue for military personnel who conduct amphibious operations with suppressed weapons, it is also an issue to other users because powder residue combines with atmospheric moisture and water vapor produced by powder combustion to form acids that accumulate in every nook and cranny inside a suppressor. Not only is titanium immune from attack by saltwater or marine atmospheres, titanium also exhibits exceptional resistance to a broad range of acids, alkalis, natural waters and industrial chemicals.

All of the aforementioned qualities help make titanium suppressors durable. The highly unusual titanium alloy used by Quicksilver Manufacturing has particularly valuable characteristics at very high tem-

TABLE 1

## P E R F O R M A N C E

### 14.5" BUSHMASTER M4A1 W/QUICKSILVER QSMS

Load	BH 62 FMJ	EBR 63 SP Ultra Stealth
SPL, unsuppressed	164	154
SPL, suppressed	137	122
Net sound reduction	27	32
First-round pop	+0.1	+7.5
Muzzle velocity unsuppressed	2,740	1,008
Muzzle velocity suppressed	2,758	1,018



*Bushmaster M4A1 rifle with 14.5-inch barrel with 1:9 twist rate. Sound pressure levels (SPLs) of the rifle with and without the suppressor are compared to the net sound reductions provided by the suppressor, measured 1 meter to left of muzzle or front of suppressor. Bullet weight measured in grains. Sound data are reported as decibels (dB) and velocity in feet per second (fps). Ammunition included Black Hills 62 FMJ match (BH 62), and Engel Ballistic Research 63 Soft Point Ultra Stealth Subsonic Match ammunition (EBR 63 SP Ultra Stealth). Temperature was 85 degrees Fahrenheit.*

peratures, making it exceptionally well suited for suppressors of rifle caliber on select-fire weapons.

The QSMS suppressor evaluated in this study is six inches long and 1.3 inches in diameter, tipping the scales at 9.5 ounces. Tubing thickness is 65-thou-

sandths of an inch. While the specimen evaluated in this study was polished bright, the suppressor is also available in a non-reflective bead-blasted natural finish (a dull gray) or a non-reflective black chemical finish. The end-caps are screwed into place and bonded with a high-temperature

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firearm system both quiet and accurate. Considering that both companies were based in Alabama and were competing for a piece of the same pie, this was remarkably gracious of White to share so many hard-won and intimate trade secrets, and trust Quilligan to take the principles behind White's designs and not the designs themselves. It says much

(2,000+ degrees Fahrenheit) ceramic cement rather than welded, making this a very handsome suppressor. However, in my opinion, it should not be subjected to sustained full-auto fire since threads are the weakest link in the system. The only thing I'd do differently if I were building this silencer would be to weld unthreaded end-caps into place. That said, this design has proven throughout the four months of this study to be plenty durable for its intended missions, including limited full-auto fire.

Dr. Jay Quilligan has been designing sound suppressors for Quicksilver Manufacturing since 1997. An interesting twist to this story is that Quilligan credits suppressor guru Mark White of Sound Technology with providing invaluable help during the startup phase of Quicksilver. White devoted a great deal of time and energy showing Quilligan how he builds suppressors, including many of the technical details of how to make a suppressed

about Quilligan's character that he went to great lengths to develop a product line using very different baffle designs incorporating a wealth of his own innovative features.

Sound Technology is well known and respected internationally, catering to national as well as local markets. Quicksilver initially focused on the local niche market within Alabama until Jay's partner and brother Christopher moved to California. Jay took over the business completely and moved the operation to Idaho in December 1999. Since then, he has steadily expanded his product line to include robust and handsome pen guns, 9x19mm, .40 S&W and .45 ACP pistol suppressors, and the titanium 5.56mm silencer being evaluated here.

While the internal design is based upon the proven K-baffle with slanted sidewall, this design is by no means legacy technology. Quite the contrary. Besides using superior metallurgy in the titanium sound suppressor, Dr. Quilligan's internal design

TABLE 2

## PERFORMANCE

### 10.5" BUSHMASTER M4A1 W/QUICKSILVER QSMS

Load	BH 62 FMJ	EBR 63 SP Ultra Stealth
SPL, unsuppressed	165	156
SPL, suppressed	139	124
Net sound reduction	26	32
First-round pop	+1.4	+3.4
Muzzle velocity unsuppressed	2,528	915
Muzzle velocity suppressed	2,524	912



Bushmaster M4A1 rifle with 10.5 inch barrel with 1:9 twist rate. Sound pressure levels (SPLs) of the rifle with and without the suppressor are compared to the net sound reductions provided by the suppressor, measured 1 meter to left of muzzle or front of suppressor. Bullet weight measured in grains. Sound data are reported as decibels (dB) and velocity in feet per second (fps). Ammunition included Black Hills 62 FMJ match (BH 62), and Engel Ballistic Research 63 Soft Point Ultra Stealth Subsonic Match ammunition (EBR 63 SP Ultra Stealth). Temperature was 85 degrees Fahrenheit.

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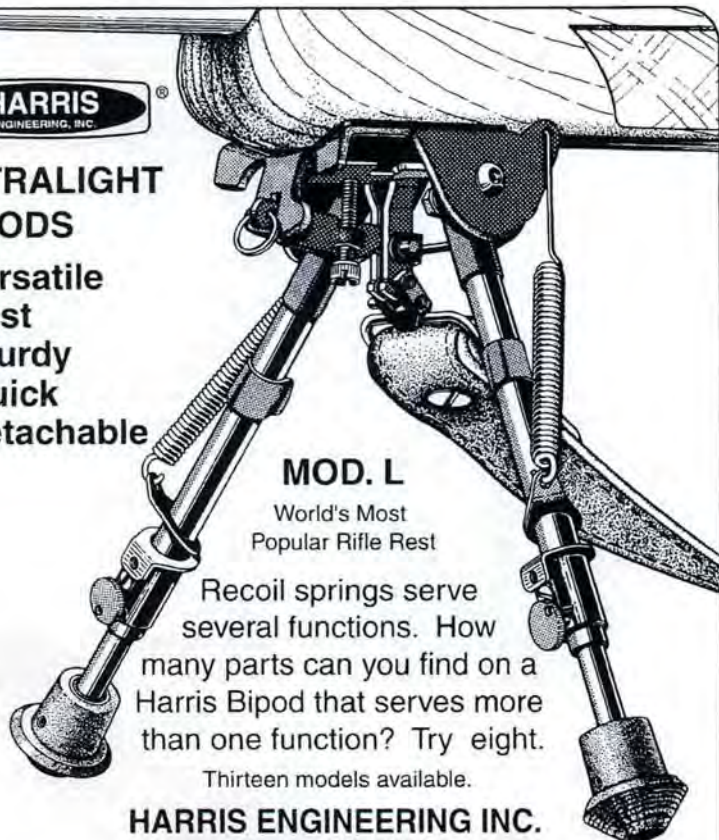
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## BUSHMASTER M-4A

takes K-baffle technology to a whole new level in terms of how he is able to work the gases very hard in a very small space in a way that's both novel and effective. Complex porting, venting and cross-jetting strategies are quite innovative and are based on very sound physics. The blast baffle is asymmetric in an original way. Yet the silencer delivers very good accuracy despite the asymmetry, which is remarkable. The blast baffle is designed to be slightly less than one bullet length from the muzzle based upon advanced muzzle brake theory. This greatly reduces first-round pop with standard duty ammunition and improves the overall efficiency of the can. It is one of the key design features that makes the titanium silencer so effective. Porting and venting create a major frequency shift upward so that the frequency mix of the suppressed gunshot noise matches the frequency mix of bullet flight noise. This seems to make bullet flight noise (i.e., the ballistic crack or sonic boom) disappear within the CQB environment. This is so eerie to behold it seems like voodoo.

Quicksilver's suppressor technology has come a long way since Jay and Christopher Quilligan began to make .22 rimfire and integrally silenced Colt submachine guns back in the 1990s. Since Jay has been on his own, he has reached a critical mass in his design skills, going

### For more information:

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from initial concept for the ultra-light titanium QSMS, to the final design and his first production run in just three weeks. In my experience, when an idea comes together so gracefully and quickly, it tends to be a very good idea indeed.

### HOW IT SHOOTS

To test that hypothesis, I evaluated the titanium 5.56mm QSMS (QuickSilver Muzzle Silencer) on a Bushmaster M4A1 upper with a 14.5-inch barrel and 1-in-9-inch twist rate. The Bushmaster M4A1, in my experience, delivers better accuracy than a Colt M4A1 upper with standard duty loads as well as subsonic rounds of conventional weight. The sound testing was

repeated with a 10.5-inch barrel. The results appear in Tables 1 and 2.

I tested the performance of titanium QSMS suppressor from Quicksilver Manufacturing using several kinds of ammunition: Black Hills 62-grain FMJ (this accurate round has been my reference standard for years, and many departments use it as their standard duty round); and Engel Ballistics Research (EBR) 63-grain SP Ultra Stealth subsonic. If Black Hills ammunition is not available through a local dealer, individuals or agencies may purchase this outstanding ammo in case lots directly from Black Hills. Subsonic ammunition must be ordered directly from EBR.

The first thing one notices from Tables 1 and 2 is that the QSMS drops the muzzle

While the Quicksilver suppressor used in this study was polished bright, a non-reflective natural (gray) finish, and a matte black chemical finish are also available.

blast of the test weapons to well below bullet flight noise (150+ decibels at one meter), which renders the shooter invisible to hostiles downrange when combined with good fieldcraft. The QSMS also drops the muzzle blast of the test

weapons to below the pain threshold from impulse noise of 141 decibels (dB), making even the M16 with a 10.5-inch barrel comfortable to shoot without hearing protection. The QSMS also drops the muzzle blast to below the European Risk Limit for hearing loss from impulse noise (140 dB). This is more than sufficient sound reduction to protect the operator and nearby observers from short-term and long-term hearing loss, and more than sufficient suppression to maintain the ability to be verbal during an operation.

Note that the inspired design of the primary expansion chamber and blast baffle reduce first-round pop in an M4-length barrel (14.5 inches) to just 0.1 of a decibel using supersonic ammunition, virtually eliminating first-round pop. Even with the 7.5 dB first-round (Please turn to page 72)

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## BUSHMASTER M-4A

Continued from page 23

pop exhibited with subsonic fodder, the cold shot is quieter than the cold shot of HK's impressive 9x19mm MP5SD integrally silenced submachine gun. Subsequent shots are as quiet as a pellet pistol, which makes it very easy to hide the fact that a shot has been fired under most real-world situations. The EBR subsonic round is both quiet and accurate in 1:9-inch twist rate barrels.

QSMS performance on the 14.5-inch barrel works out to a very respectable 27 dB net sound reduction with supersonic ammunition and a 32 dB reduction with subsonic match. Even going to the shorter and louder 10.5-inch barrel, the little QSMS delivers a 26 dB reduction with supersonic ammo, and it still delivers a 32 dB reduction with subsonic rounds. This is impressive performance in such a diminutive and lightweight package, beating 5.56mm suppressors I've tested with more than three times the mass and volume.

In terms of velocity, the QSMS suppressor exhibits freebore boost, increasing the muzzle velocity of projectiles, when mounted on a 14.5-inch barrel. This phenomenon is not, however, observed with the 10.5-inch barrel.

### SECURING THE SUPPRESSOR

While the ultralight Quicksilver titanium silencer delivers plenty of sound suppression, there is no free lunch. The minimal mass of the can means that the silencer heats at a much more rapid rate than alternative models weighing two to four times as much. This means that the metal expands more rapidly, so the suppressor tends to loosen from the barrel threads after relatively few rounds if it is simply screwed onto the barrel hand-tight. Fortunately, there is an easy fix for this problem: Rocksett high-temperature, engineering adhesive.

Made by the Flexbar Machine Corporation, Rocksett is actually a ceramic cement that is used widely to lock, bond and seal nuts, screws, splines, pipes, and other structural materials. Rocksett is noteworthy because of its stability over an unusually wide range of temperatures (from -35 to +2,015 degrees Fahrenheit). Rocksett also withstands oils, fuels, acids, and alkalis.

When Rocksett is used for the temporary bonding of a Quicksilver suppressor to a barrel, an unusual installation protocol must be strictly adhered to in order to allow the operator to remove the silencer, when desired, by hand. Failure to follow this regimen will permanently bond the suppressor to the barrel. Place one or two drops (max-


imum) on the rearmost barrel threads near the shoulder at the rear of the threaded portion of the barrel. Screw the suppressor tightly against the shoulder behind the threads to ensure proper alignment with the bore. Allow it to dry according to manufacturer's instructions (I usually allow to dry overnight). The suppressor has never loosened during sustained semi-automatic firing and limited firing of short bursts. The suppressor could always be removed by hand when desired and then re-installed using Rocksett and the aforementioned installation regimen once again.

Once this study was completed, the durability of this minimalist use of Rocksett was tested by firing a 30-round magazine in one continuous full-auto burst. That was immediately followed by a second 30-round magazine. The Rocksett-secured titanium bantamweight suppressor continued performing like a champ, leading me to have confidence in dumping one full magazine at once should the unlikely requirement present itself.

Wow. I really like this ultralight can. Please note, however, that the use of Rocksett as described is mandatory in my opinion to ensure proper alignment, since the 9.5-ounce suppressor heats rapidly during semi-automatic or full-auto firing.

### FINAL THOUGHTS

What's not to love about the 9.5-ounce titanium QSMS sound suppressor from Quicksilver Manufacturing? I have evaluated major-league .22 rimfire suppressors that weigh more than the QSMS 5.56x45mm suppressor. I have evaluated 5.56mm suppressors that were several times larger and heavier that weren't as quiet. Yes, there are certainly quieter sound suppressors available. And there are better choices should full-auto fire be a mission requirement. But for law-enforcement use on an entry or auxiliary weapon, for use by qualified civilians for home defense, to safeguard the hearing of both shooters and observers, or to target practice without offending the neighbors down the road, the bantamweight titanium QSMS provides a compelling mix of performance characteristics. It even seems to make the ballistic crack disappear at the distances most shooting seems to occur, which is a very eerie experience for even the most jaded suppressor cognoscenti.

The bottom line is that Quicksilver's titanium QSMS sound suppressor is not only the lightest 5.56mm suppressor in the marketplace, it is a titanium suppressor of advanced design which delivers impressive performance in such an improbably light package that it disappears during target acquisition. Best of all, the QSMS from Quicksilver Manufacturing does so at the improbably light price of \$650. 



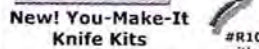
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# **Exhibit**

**D**



DEPARTMENT OF THE ARMY  
HEADQUARTERS, 5<sup>th</sup> BRIGADE COMBAT TEAM  
ARMY EVALUATION TASK FORCE  
FORT BLISS, TEXAS 79916



ATZC-AETF-SAMG

24 JULY 2007

**MEMORANDUM FOR RECORD**

**SUBJECT: EVALUATION OF THE QSM SUPPRESSOR**

The QSM Suppressor the Army Evaluation Task Force tested, was very effective at suppressing the sound and reducing the muzzle flash of the M4 rifle. Due to these facts, the suppressor would greatly enhance both MOUT and Tactical operations. After examining the capabilities of the QSM Suppressor, we have determined that the personnel that would most benefit from this equipment would be dismounted Scouts.

First, the suppressors only weigh 9.5oz., which makes this a very easily stowed and carried piece of equipment. Although a Soldier's full combat load can be heavy, the suppressor's size and weight will not add to the Soldier's burden. It can easily be stowed in a carrying case and attached to either the Body Armor, or Assault Ruck. Since the suppressor can be detached from the weapon, it will not hinder movement in or out of Bradley Fighting Vehicles or HMMWV's.

The suppressor effectively reduced the amount of noise emitted from the M4. This is crucial during room clearing when gunfire can easily drown out the communication between team members. While inside hallways and rooms, the noise from an un-suppressed M4 can make giving commands extremely difficult, which could cost the lives of individual team members. If suppressors are used during room clearing operations, ear plugs are virtually unneeded. This means that yelling could be reduced and stealth maintained for a longer period of time. Maintaining the element of "surprise", which is crucial during room clearing operations, could be maintained for a much longer period as well.

**PROS:**

- Easily mounted to the weapon
- Light weight
- Maintained a tight group at 50 meters
- This suppressor cooled quickly
- This suppressor was quieter than the other suppressors we evaluated
- Muzzle flash reflected the lowest signature using thermal imagery

**CONS:**

- You have to remove the birdcage
- You must use the barrel locktight in order for the suppressor not to rotate

**CONCLUSION:**

Of all the suppressors we evaluated, the QSM Suppressor performed the best. The accuracy of the round fired through the suppressor held a tighter, more accurate shot group than the other suppressors at greater ranges. It was also quieter to the human ear than the other demos. The suppressor cooled much quicker than the others as well, which will reduce the risk of burning equipment, and operators. The only negative things noted regarding this suppressor was that the birdcage had to be removed, which doesn't allow you to quickly add or remove the suppressor. Also, the locktight must be used in order to keep the suppressor from rotating off the end of the barrel. This was noted as only single fired shots were used. Automatic fire rotated the suppressor even quicker. The recommendation being made to the Army is to equip the Scouts with the suppressors. This will increase their

lethality, and reduce their vulnerability. Their job is to have eyes on the objective, without being detected. If they are compromised, they may be able to eliminate an immediate threat, and possibly still remain undetected. The Scouts will not need to take the suppressors off and on, they can keep them affixed to the weapons. Therefore, the locktight can be used without worry.

**Testimonials:**

“This suppressor is the solution to reducing the risk of detection by suppressing the sound, as well as the muzzle flash of the weapon. I would deploy with this piece of equipment in a heartbeat.”

-SFC REAGAN OIF/OEF COMBAT INFANTRY VETERAN

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# **Exhibit**

**E**



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Dear Quicksilver Manufacturing,

I am a Rochester Police Officer and member of your Tactical Response team. Over the course of this year I was given the opportunity to test your .223 suppressor. I was researching your suppressor against our current model from another company.

Your Suppressor was tested on our current issued carbine, a Rock River Arms M4 with a 10.5 inch barrel. I found that the suppressor mounted easily after I removed the birdcage flash hider. I used a small amount of Rockset to keep the suppressor from rotating off the barrel per instructions from your Staff member Dr. Jay Quilligan. I had no problems with the suppressor moving after that simple process.

I noticed a significant difference in handling the M4 with the Quicksilver Suppressor and our current model. The barrel weight was much less and easier to maneuver. Our current weapons are fairly heavy compared the basic M4, the addition weight of a Steel suppressor to the end of our carbine is noticeable. I next compared the sound differences with our current model suppressor. I found that there was little difference between the two. I did not use sound measuring devices, just my own ears (without hearing protection). Both suppressors performed very well, the Quicksilver suppressor performed no differently than our current model. I also found no difference in the accuracy. When my team started researching suppressors several years ago it was shown to us that groups we shoot got smaller with our current model, there was no difference with Quicksilver suppressor.

After completing my test, I noticed that the Quicksilver suppressor cooled off a little quicker than the steel bodied one.

In conclusion, I was very happy with your suppressor and it performed very well. I was most impressed with the change in barrel weight with the Quicksilver suppressor.

In my opinion Quicksilver produces an excellent product.

Thank you for providing me with the opportunity to test the Quicksilver .223 suppressor.

Sincerely,

Officer Dan Swanson


# **Exhibit**

**F**

# Quicksilver Manufacturing

OIF III & IV, Scout PLT.

I brought my suppressor with me to Iraq knowing there could be many situations it would be very useful. My PLT Leader knew it was a useful tool and requested suppressors to be issued, but no luck. An M4 fired inside a building is very defening! With a suppressor you can still communicate after a weapon is fired. Though I never used my suppressor to engage the enemy we did lots of recon missions and set up lots of OPs. In Iraq there are so many ~~we~~ dogs and they can easily give your position away. Thats where my suppressor came in very handy. I am very impressed with Quick silver Man. Suppressors and how tough they are, I also mounted it on a M249 Squad Automatic Weapon and was simply amazed with the results. Thanks Quick silver.

Sincerely,  
Sgt. Chad S. Horton  


# **Exhibit**

**G**

# Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use

Matthew Parker Branch, MD<sup>1</sup>

No sponsorships or competing interests have been disclosed for this article.

## Abstract

**Objective.** To compare noise reduction of commercially available ear-level hearing protection (muffs/inserts) to that of firearm muzzle suppressors.

**Setting.** Experimental sound measurements under consistent environmental conditions.

**Subjects.** None.

**Study Design and Methods.** Muzzle suppressors for 2 pistol and 2 rifle calibers were tested using the Bruel & Kjaer 2209 sound meter and Bruel & Kjaer 4136 microphone calibrated with the Bruel & Kjaer Pistonphone using Military-Standard 1474D placement protocol. Five shots were recorded unsuppressed and 10 shots suppressed under consistent environmental conditions. Sound reduction was then compared with the real-world noise reduction rate of the best available ear-level protectors.

**Results.** All suppressors offered significantly greater noise reduction than ear-level protection, usually greater than 50% better. Noise reduction of all ear-level protectors is unable to reduce the impulse pressure below 140 dB for certain common firearms, an international standard for prevention of sensorineural hearing loss.

**Conclusion.** Modern muzzle-level suppression is vastly superior to ear-level protection and the only available form of suppression capable of making certain sporting arms safe for hearing. The inadequacy of standard hearing protectors with certain common firearms is not recognized by most hearing professionals or their patients and should affect the way hearing professionals counsel patients and the public.

## Keywords

tinnitus, sensorineural hearing loss, noise-induced hearing loss, firearm suppression, hearing protection

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Noise-induced inner ear injury is a substantial cause of preventable disability in the United States. Approximately 15% of Americans between the ages of 20 and 69 years—or 26 million Americans—have hearing loss that may have been caused in part by exposure to loud sounds or noise at work or in leisure activities.<sup>1</sup> Subjective tinnitus affects approximately 50 million Americans (12%-15% of the adult population)<sup>2-4</sup> and often accompanies sensorineural hearing loss in patients with a history of loud noise exposure.<sup>5-9</sup>

Recreational use of firearms is a significant cause of noise and related ear injury in America.<sup>10</sup> There are approximately more than 250 million privately owned firearms in the United States,<sup>11,12</sup> and the number increases about 4.5 million per year.<sup>13</sup> This rate of increase rose by 14% for 2007-2008.<sup>14</sup> Unlike industrial exposure, hearing protection during recreational firearm use is not regulated or enforced. This represents one of the largest neglected areas of advocacy for prevention of ear injury.

Ear-level hearing protection is poorly understood by patients and hearing specialists alike. Far from being a panacea, ear-level protection rarely, if ever, confers the level of protection or noise reduction ratio (NRR) advertised. NRRs are determined using laboratory tests in continuous noise (not impulse sounds such as gunfire) and are not useful for determining the actual level of protection achieved by a given individual in a particular environment.<sup>15</sup>

How much protection is afforded by ear-level protection? The National Institute of Occupational Safety and Health (NIOSH) recommends that earmuffs be considered to have 25% less NRR than stated and formable earplugs 50% less.<sup>16</sup> The most common commercially available ear protection has an advertised NRR of 19 to 25 dB. The highest rated NRR are 31 dB and are less common. The Occupational Safety and Health Administration sets 140 dB

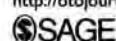
<sup>1</sup>Private practice in otolaryngology, Corsicana, Texas, USA

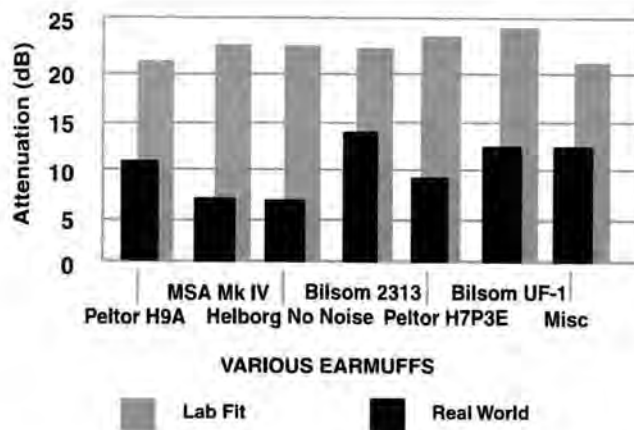
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## Corresponding Author:

Matthew Parker Branch, MD, 400 Hospital Drive, Suite 115, Corsicana, TX 75110

Email: parkerbranch@yahoo.com

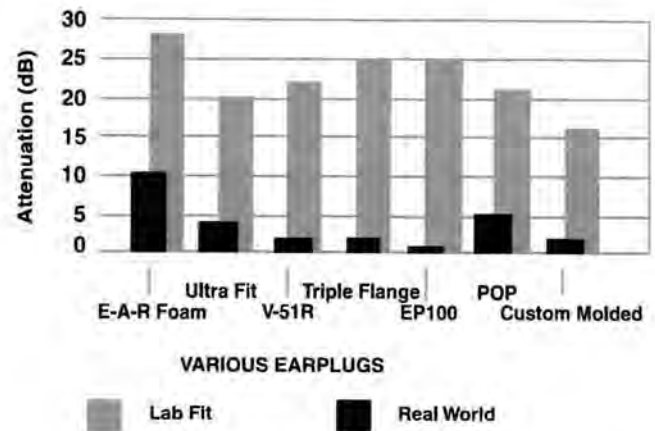




**Figure 1.** Noise reduction ratio (NRR) hearing protection provides in the real world: earmuffs.

as the safe threshold for single-impulse sound exposure. Using the adjusted NRR levels, most hearing protection (NRR 19-25 dB) is unable to make hearing safe a firearm producing an impulse sound louder than 149.5 to 154 dB. The best available ear-level protection (earmuffs, NRR 31 dB) is unable to make hearing safe any firearm louder than 163 dB under the best of conditions. According to Berger et al,<sup>16</sup> even these adjusted figures are likely unrealistic. This review of 20 published studies demonstrated far worse performance than the corrected NRR suggests: the laboratory NRRs consistently overestimated the real-world NRRs by 140% to 2000% (Figures 1 and 2).<sup>16</sup> It is unlikely, however, that most consumers of hearing protection have any idea what the NRR is of the products they purchase or what level of protection is necessary to make their particular firearm safe for hearing.

Hiram Maxim first introduced and marketed muzzle suppressors in the 1920s in the United States. These devices either attach to the muzzle (by way of threading the barrel or by proprietary quick attachment mechanisms) or are integrated into the barrel. Muzzle suppressors allow the heated gases from the barrel to expand into a series of chambers or baffles, cooling and slowing the gas's exit from the barrel. The result is a shorter, quieter sound signature. The basic design of suppressors has changed little over the years, but modern design and manufacturing have improved their sound reduction effectiveness. Unlike ear-level protection, muzzle suppressors are relatively easy to use in a consistent, repeatable fashion. They confer protection for the shooter and bystanders alike and allow interpersonal conversation and situational awareness of sounds not afforded by ear-level devices. They are also legal in most states, although their ownership and transfer are regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF&E) and requires a \$200 tax and somewhat lengthy process for registration, delaying use of the device for weeks or months from the time of purchase. Importantly, it is relatively simple to demonstrate their actual noise reduction capability compared with ear-level devices.



**Figure 2.** Noise reduction ratio (NRR) hearing protection provides in the real world: earplugs.

### Study Design

We hypothesized that modern muzzle suppression has a demonstrable superiority to ear-level protection due to the unpredictable protection of ear devices and improbability of one-size-fits-all products. We tested common pistol and rifle calibers with and without muzzle suppression using strict military/industrial standard sound measurement for impulse noise. We recorded the impulse noise in decibels and compared the sound levels with and without suppression. We then compared the average noise reduction of the suppressors to likely NRR levels of ear-level products.

### Methods

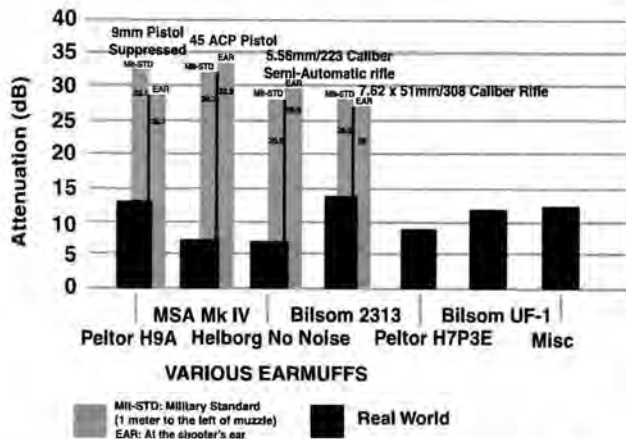
The tests were conducted using the Bruel & Kjaer (B&K) 2209 sound meter with a B&K 4136 microphone calibrated with the B&K 4220 Pistonphone. Calibration was checked after the tests to verify there were no shifts in calibration during the tests. All equipment has been certified and tested so that it can be traced back to the National Institute of Standards and Technology's standards. The meter and weapon are also placed in accordance with Military-Standard 1474D protocol. Five shots were fired to establish the unsuppressed level, and then 10 shots were fired with the suppressor attached.<sup>17</sup>

For the pistol tests, we used 9 mm and 45 ACP semiautomatic pistols (Table 1). These are very popular sporting rounds as well as common military standard calibers. The rifle tests were performed with a semiautomatic 5.56 mm/223 caliber round, as is used in the AR-15 style civilian rifle and the NATO military M16/M4 carbine rifle, and a bolt-action 7.62 × 51 mm/308 caliber rifle, also a common sporting round and NATO military standard round.

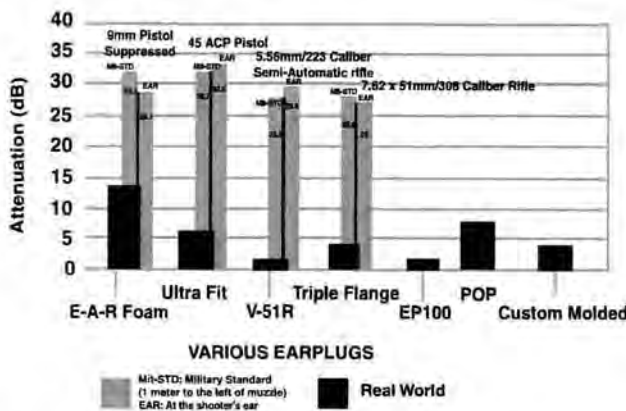
The suppressors used are commercially available and legally obtained by way of the standard BATF&E registration process for civilian ownership. No institutional review or ethics committee approval was deemed necessary or sought for this study.

**Table 1.** Firearms (Caliber, Manufacturer), Ammunition, and Suppressors Used

	Caliber	Manufacturer	Ammunition	Suppressor
Pistol	9 mm	Sig Sauer P226, Exeter, NH	Remington UMC 147 gr ball, Lonoke, AK	Advanced Armament Ti-Rant, Norcross, GA
	45 ACP	Glock 21, Smyrna, GA	Remington UMC 230 gr ball, Lonoke, AK	HTG Cycle-2, Boise, ID
Rifle	5.56 mm/223	Colt M4 16 inch barrel, Hartford, CT	M855 NATO 62 gr steel core penetrator, Independence, MO	Gemtech G5, Eagle, ID
	7.62 × 51 mm/308	Remington Model 700, Madison, NC	Remington 168 gr BTHP MK, Lonoke, AK	HTG M-30, Boise, ID



**Figure 3.** Firearm/suppressor attenuation compared with real-world earmuff attenuation. EAR indicates at the shooter's ear; MLT-STD, military-standard.



**Figure 4.** Firearm/suppressor attenuation compared with real-world earplug attenuation. EAR indicates at the shooter's ear; MLT-STD, military-standard.

**Results**

The average unsuppressed sound levels for the 9 mm pistol at military standard recording distance (1 m to the left of the muzzle) was 160.5 dB and 157.7 dB at the ear of the shooter. The average suppressed levels were 127.4 dB and 129.6 dB, respectively (difference of 33.1 dB and 28.1 dB).

The average unsuppressed sound levels for the 45 ACP pistol at military standard recording distance and the shooter's ear was 162.5 dB. The average suppressed levels were 131.8 dB and 128.5 dB, respectively (difference of 30.7 dB and 33.9 dB, respectively). The suppressor for the 45 ACP is also designed to function wet (filled with 10 mL of water for additional noise reduction). The average wet suppressed level was 121 dB (difference of 41.5 dB).

The average unsuppressed sound levels for the 5.56 mm/223 caliber semiautomatic rifle at the military standard recording distance was 164 dB and 155 dB at the shooter's ear. The average suppressed levels were 137.4 dB and 134.2 dB, respectively (difference of 26.6 dB and 29.8 dB, respectively).

The average unsuppressed sound levels for the bolt-action 7.62 × 51 mm/308 caliber rifle at the military standard recording distance was 165.7 dB and 157.2 dB at the ear. The average suppressed sound levels were 138.9 dB and 131.2 dB, respectively (difference of 26.8 dB and 26 dB, respectively). See **Figures 3** and **4**.

**Discussion**

The consistency of hearing protection use with recreational firearms is dismal.<sup>18</sup> We know that hearing compliance programs in industry rely on routine, supervised use of ear-level devices and periodic audiometric screening to assess effectiveness. No such programs exist for the recreational shooter. As the NIOSH Web site explains, the best hearing protection is the one the worker will wear.<sup>16</sup> But how do we motivate shooters to be compliant, especially in light of the data regarding the poor effectiveness of ear-level devices? Even compliant use of dual ear protection (plugs and muffs) over time leads to degradation of hearing.<sup>19</sup> Practical limitations of ear-level devices are myriad. Poor fit, migration of device due to activity or sweat, incorrect use, pain, heat, and loss of communication top the list.

Because of their use at the source of noise production, muzzle suppressors are much more effective at reducing noise. This facilitates communication and situational awareness, which can improve safety when operating firearms. Suppressors can easily and reliably be removed and transferred between multiple weapons of like caliber and reattached in a way that ensures proper fit and function. With suppression levels from 26 dB to 41 dB that are reliable and reduce impulse noise below 140 dB, all of the devices in

our study are "hearing safe." However, weapon-suppressor combinations producing sound levels 130 dB or less (9 mm and 45 ACP wet) are much more comfortable to shoot without any hearing protection at all. In fact, the sound level of the 9 mm pistol's slide closing without any shot fired measured 124 dB. To our knowledge, this is the first time the efficiency of muzzle suppressors has been properly tested and compared with ear-level protection in any medical journal.

## Conclusion

The muzzle-level suppressors studied on these weapons and calibers reduced sound levels well below the likely noise reduction of either earplugs or earmuffs.

## Acknowledgments

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## Author Contributions

**Matthew Parker Branch**, original concept, experimental design and execution, research, writing, editing entire text, final approval.

## Disclosures

**Competing interests:** None.

**Sponsorships:** None.

**Funding source:** None.

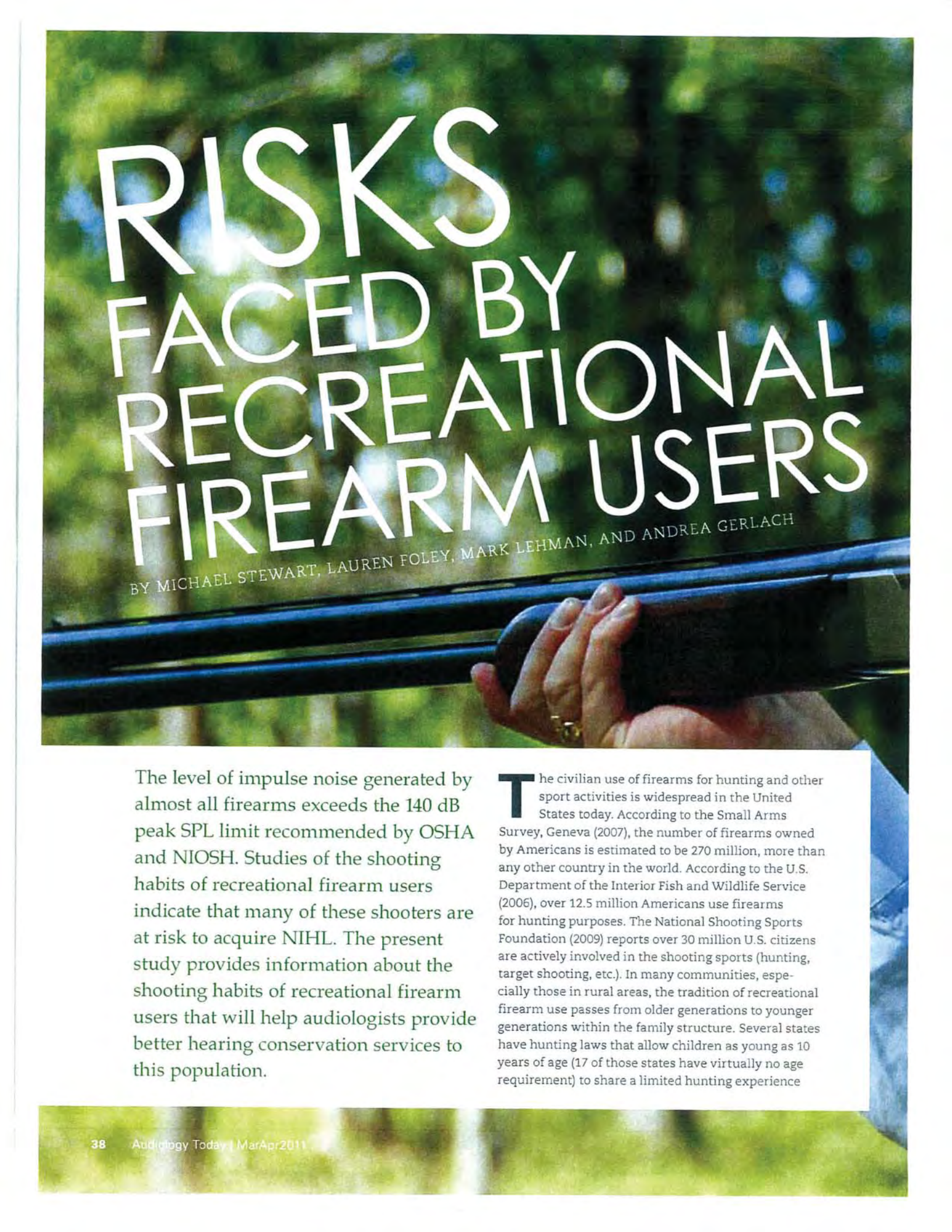
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# **Exhibit**

**H**

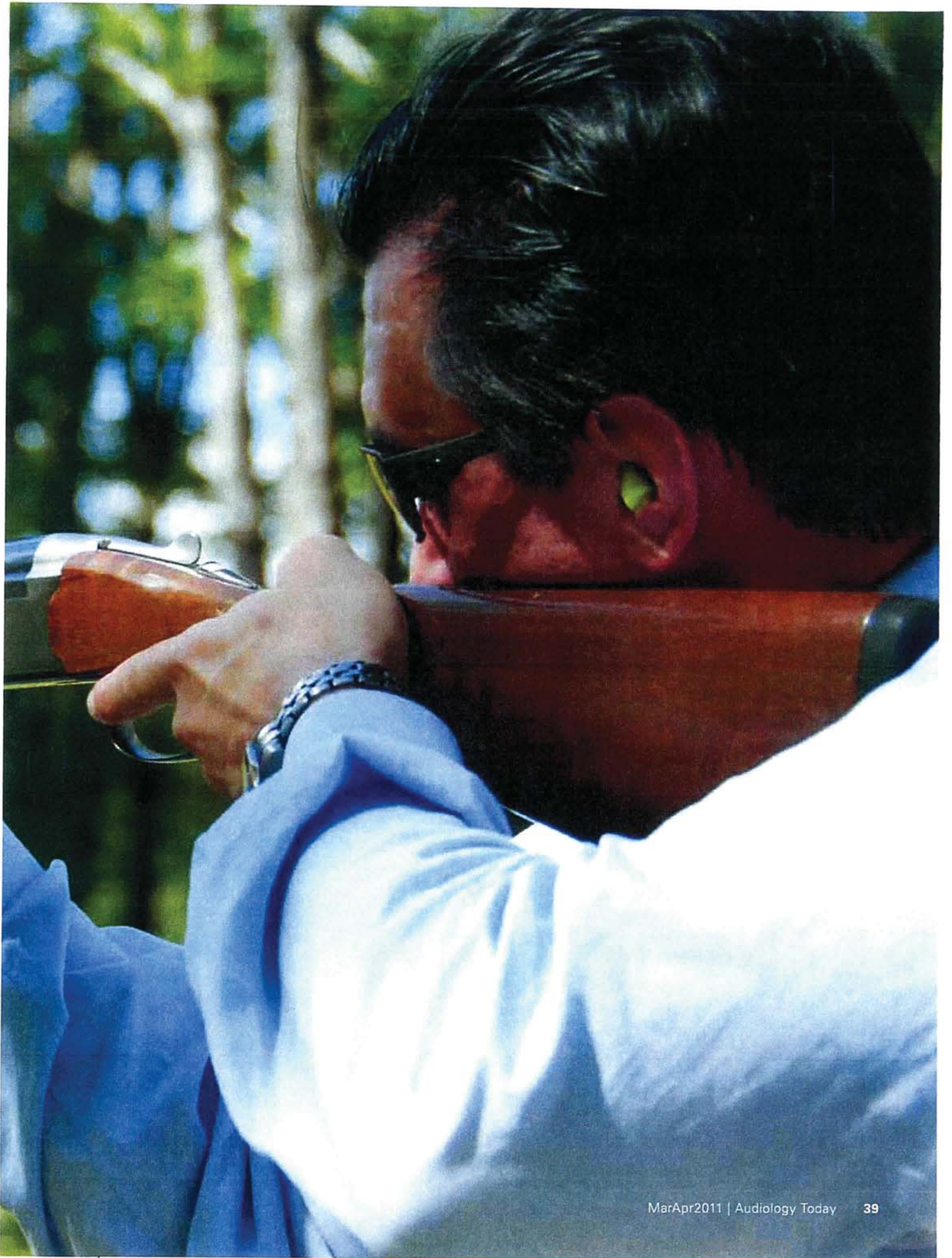


# RISKS FACED BY RECREATIONAL FIREARM USERS

BY MICHAEL STEWART, LAUREN FOLEY, MARK LEHMAN, AND ANDREA GERLACH

The level of impulse noise generated by almost all firearms exceeds the 140 dB peak SPL limit recommended by OSHA and NIOSH. Studies of the shooting habits of recreational firearm users indicate that many of these shooters are at risk to acquire NIHL. The present study provides information about the shooting habits of recreational firearm users that will help audiologists provide better hearing conservation services to this population.

**T**he civilian use of firearms for hunting and other sport activities is widespread in the United States today. According to the Small Arms Survey, Geneva (2007), the number of firearms owned by Americans is estimated to be 270 million, more than any other country in the world. According to the U.S. Department of the Interior Fish and Wildlife Service (2006), over 12.5 million Americans use firearms for hunting purposes. The National Shooting Sports Foundation (2009) reports over 30 million U.S. citizens are actively involved in the shooting sports (hunting, target shooting, etc.). In many communities, especially those in rural areas, the tradition of recreational firearm use passes from older generations to younger generations within the family structure. Several states have hunting laws that allow children as young as 10 years of age (17 of those states have virtually no age requirement) to share a limited hunting experience



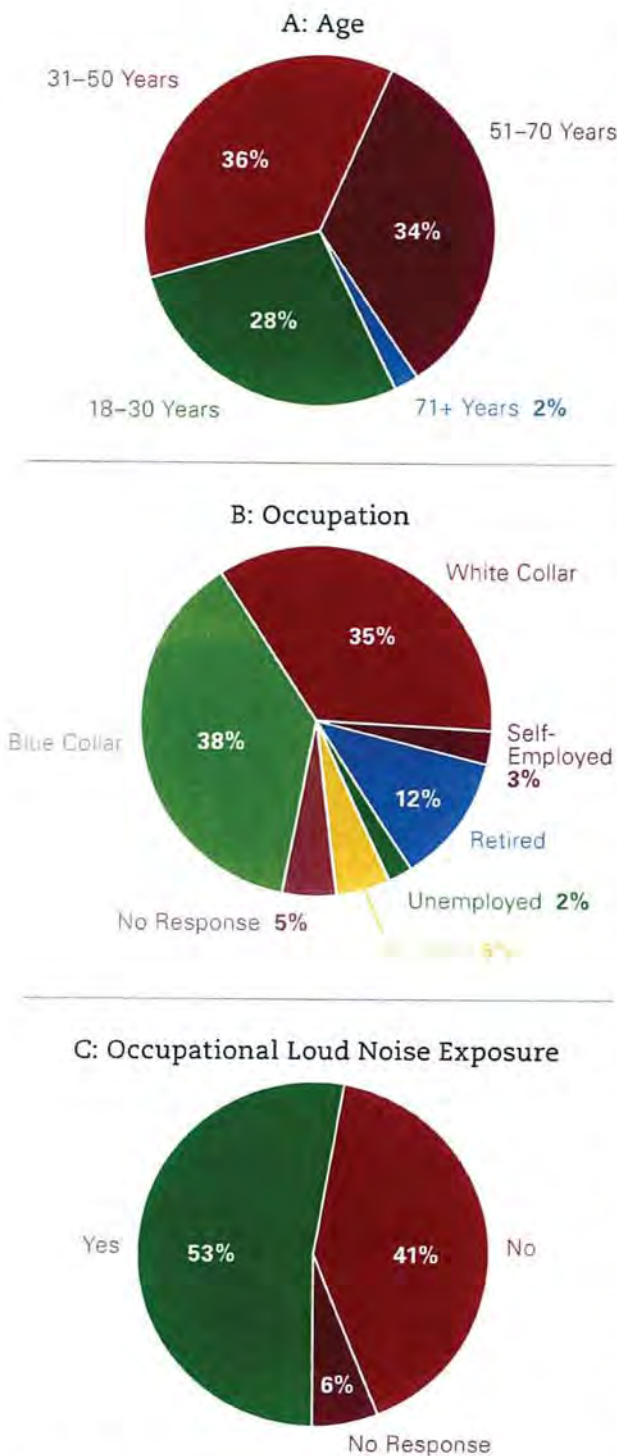


FIGURE 1. Demographic data of subjects: age (A), occupation (B), and occupational loud noise exposure (C).

when mentored by an adult family member (National Shooting Sports Foundation, 2010).

Although recreational firearm activities can provide individuals and families with leisure-time opportunities, participation in those activities can also be hazardous to hearing. The level of impulse noise generated by almost all firearms exceeds the 140 dB peak SPL limit recommended by the Occupational Health and Safety Administration (OSHA) and the National Institute of Safety and Health (NIOSH) (Coles et al, 1967; Odess, 1972; Ylikoski, 1989; Ylikoski and Ylikoski, 1994; Kardous et al, 2003; Murphy and Tubbs, 2007; Flamme et al, 2009). Exposure to impulse noise levels in excess of 140 dB SPL can lead to noise-induced hearing loss (NIHL) (Patterson and Hamernick, 1992; Chan et al, 2001). Increasing the duration of firearm noise by shooting in an enclosed, reverberant environment increases auditory risk (CHABA, 1968; Weissler and Kobal, 1974; Smoorenburg, 2003).

Because of the widespread use of firearms for recreational pursuits and the dangerously high peak SPLs generated by most firearms, it is not surprising that recreational firearm noise exposure is one of the leading causes of NIHL in America today (Clark, 1991). Several studies have found recreational firearm use can result in high frequency NIHL (Prosser et al, 1988; Dancer et al, 1991; Kryter, 1991; Cox and Ford, 1995; Stewart et al, 2001; Stewart et al, 2002). Nondahl et al (2000) estimated an increase of seven percent incidence of high frequency hearing loss for every five years of hunting activity. Audiometric configurations of NIHL caused by firearm noise exposure are often characterized by normal or near normal hearing in the lower frequencies, with a precipitous drop-off in the higher frequencies for both ears. Individuals with this type of hearing loss often minimize the communication difficulties and may not always receive adequate benefit from hearing aids.

An important factor in the incidence rate of NIHL secondary to firearm noise exposure may be the shooting habits of many recreational firearm users. Wagner et al (2006) surveyed 297 recreational firearm users and found more than 80 percent of the subjects reported never using hearing protective devices (HPDs) while engaging in hunting activities. Only 39 percent of the subjects reported consistently using HPDs during target practice. The majority of subjects in the Wagner et al study were males. However, Nakayama et al (2008) found a similar trend of sporadic HPD use in a survey of 153 female shooters. A study by Stewart et al (2009) found waterfowl hunters reported inconsistent use of HPDs during both hunting (only five percent reported 100 percent use) and

target practice (only 40 percent reported 100 percent use) while many hunters reported being exposed to over 100 unprotected shots in a single hunting season. Approximately 90 percent of the waterfowl hunters reported using the 12 gauge shotgun (which is one of the loudest shotguns available), and over half of subjects in this study reported routinely shooting in a reverberant environment (hunting blind) when hunting waterfowl. Collectively, these studies of the shooting habits of recreational firearm users indicate many of these shooters are at risk to acquire NIHL.

The purpose of the present study was to collect more information about the shooting habits of recreational firearm users including their use of conventional HPDs, their use and knowledge of commercially available HPDs designed specifically for the shooting sports, the types of commonly used firearms, use of enclosed hunting blinds, the estimated number of unprotected exposures, and their self-assessed auditory status. This information is necessary to increase understanding about how and under what conditions firearms are being used in recreational shooting activities so that better hearing conservation services can be provided to this population.

## Methods

### Subjects

The subjects in this study were 573 recreational firearm users and were solicited while they shopped at a central Michigan sporting goods store during the first week of deer season (November 2009).

### Materials

A 25-item survey was used to collect information from participants regarding demographic information and their recreational firearm use (see Appendix A). Five items requested demographic information, including age, sex, county of residence, occupation, and exposure to occupational noise; five items requested information regarding use of HPDs during target practice and while hunting; ten questions focused on shooting habits during target practice and while hunting; and five items inquired about self-perceived hearing ability, hearing aid use, and tinnitus.

### Procedures

A proposal of this project was submitted and approved by the institutional review board of Central Michigan University. It was concluded no risk would exist to participants of this project.

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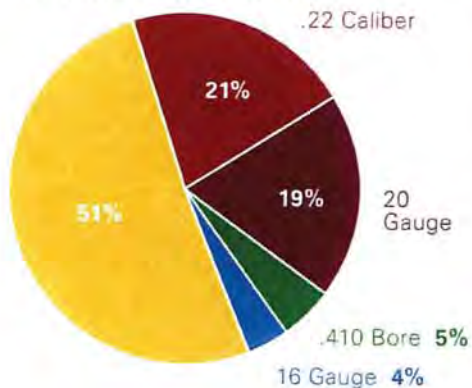
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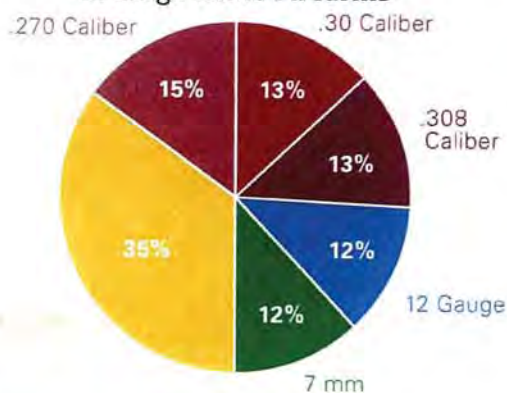


FIGURE 2. Firearms typically used by subjects in this study to hunt small game (A, N = 533) and large game (B, N = 549) as a function of reported usage.

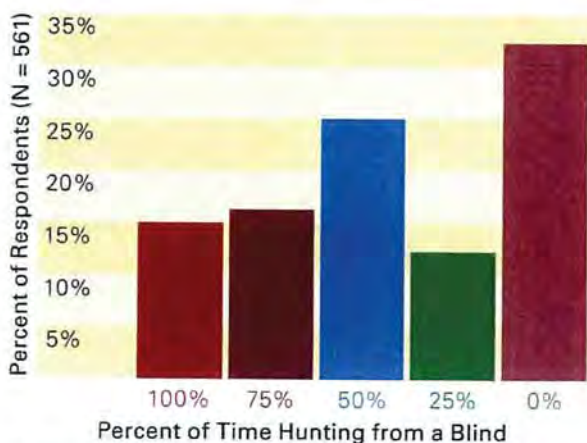


FIGURE 3. Number of subjects who reported hunting large game from a blind (N = 561).

A display was set up in the lobby of the central Michigan sporting goods store, and customers were invited to complete the survey to assist in data collection for the project. The survey took approximately 10 minutes to complete, and subjects were given a pair of hearing protection devices for participating. Data analysis was completed using Microsoft Excel, and descriptive statistics were derived from the raw data.

## Results

### Demographics

Of the 573 participants—90 percent were male and 10 percent female. Participants ranged in age from 18 to 82 years with a mean age of 42.6 years. See FIGURE 1 for additional data regarding age, occupation, and loud noise exposure.

### Shooting Habits

Shooting habits of participants were assessed through multiple questions on the survey, including years of firearm use, types of firearms used (size of bore and type of action), hunting environments, and estimated shots taken both during target practice and hunting.

The majority of recreational firearm users in this study (62 percent) reported shooting firearms for more than 21 years. Approximately 17 percent reported shooting 10 years or less, while 21 percent reported shooting for 11 to 20 years. The average age of subjects in this study, in addition to the average number of years of reported recreational firearm use, would likely increase the risk of acquiring an NIHL for many of these subjects.

The firearms most commonly used for large and small game hunting by these subjects are shown in FIGURE 2. A majority (70 percent) of small game hunters reported that their guns were equipped with either semiautomatic (36 percent) or pump (34 percent) actions, which allow several shots to be fired in a short period of time. The most commonly used actions reported by the large game hunters were either a bolt (54 percent) or semiautomatic (17 percent). Both of these actions allow the hunter to fire several shots in a short period of time. Thus, both large and small game hunters reported using large-bore guns that are loud and can be fired in a rapid manner. Both the 30.06 rifle and 12 gauge shotgun are capable of generating peak impulses over 160 dB SPL (Flamme et al, 2009). Noise levels of this intensity may physically damage the inner ear resulting in temporary or permanent hearing loss (Ylikoski et al, 1987; Patterson and Hamernick, 1992; Chan et al, 2001).

Another important variable in the analysis of risk for NIHL is acoustic environment in which shots are fired.

Peak SPL and duration values can be significantly higher if the shots are fired in a small enclosure like a hunting blind. Higher peaks and longer durations of firearm noise impulses increase auditory risk (CHABA, 1968; Weessler and Kobal, 1974; Smoorenburg, 2003). FIGURE 3 shows the

majority (70 percent) of respondents reportedly hunt large game from an enclosed blind at least part of the time. The use of an enclosed blind, especially in cold weather climates during later hunting seasons, is a common hunting practice that serves to protect the hunter

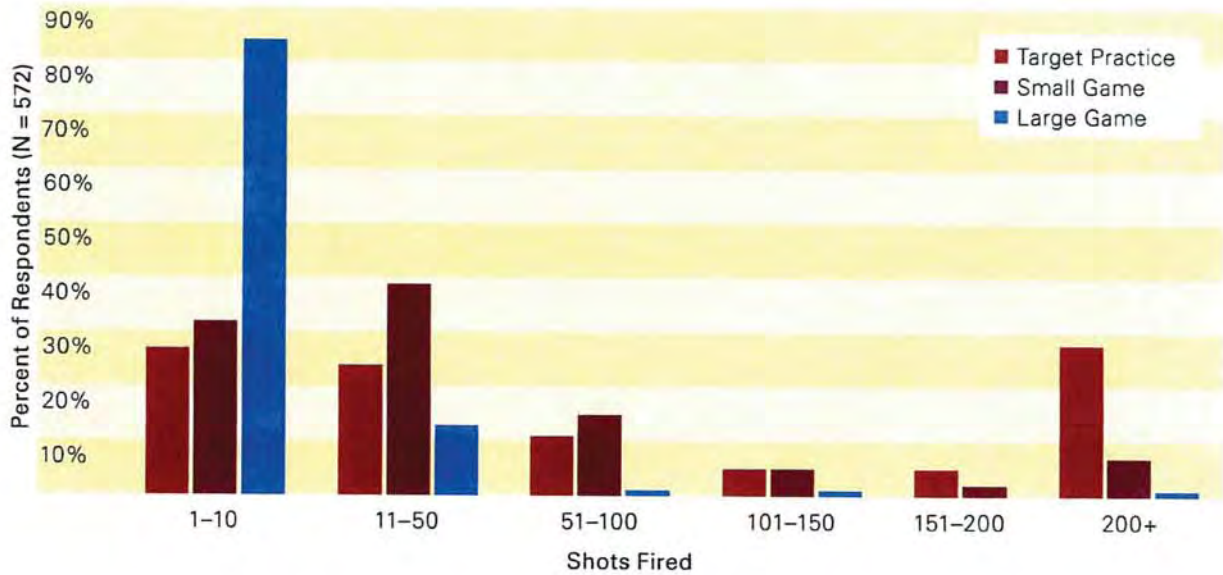


FIGURE 4. Number of shots fired during target practice and during hunting (N = 572).

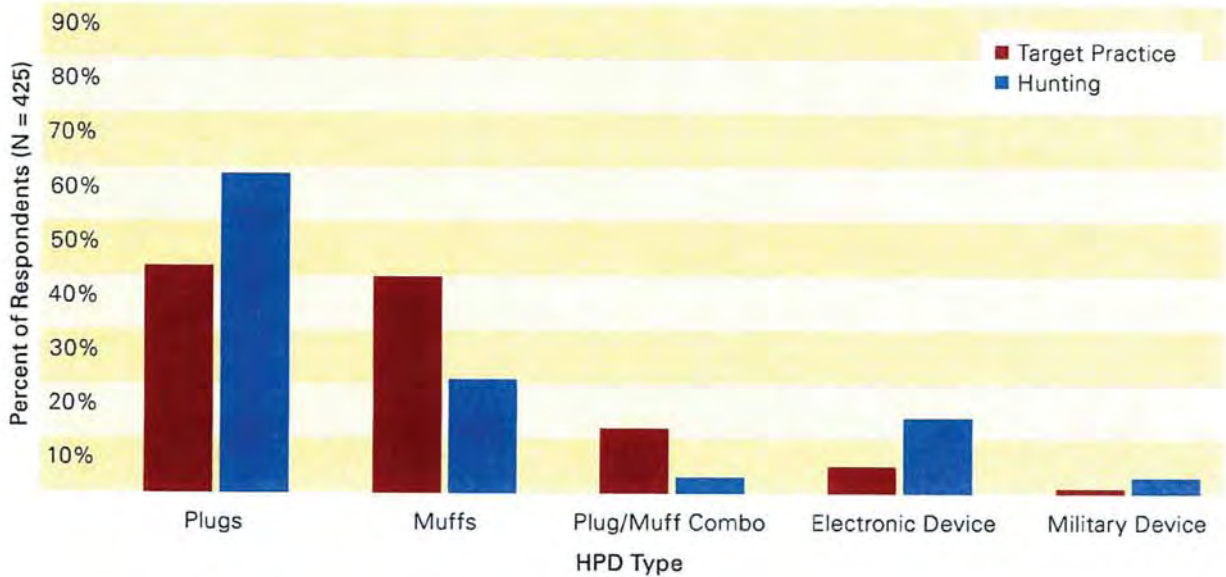


FIGURE 5. Types of HPDs used during target practice and hunting (N = 425).

from the elements while concealing him or her from approaching game.

Probably the most important aspect of shooting habits, as they relate to NIHL, is the total number of shots taken during various shooting activities in a year's time. Increasing the number of exposures, especially if unprotected, logically serves to increase the risk of hearing loss. The comparison of the number of shots reportedly taken during target practice and during small and large game hunting in the past year can be seen in FIGURE 4.

### Hearing Protection Devices

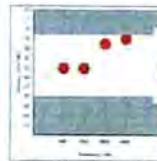
A major goal of this study was to assess the use of HPDs by recreational firearm users during firearm use. Several questions on the survey focused on this issue, including the percentage of time HPDs were worn and which types were worn during target practice versus hunting. Over 70 percent of the subjects reported never wearing HPDs during hunting activities, and only 54 percent reported consistent use of HPDs during target practice. These results are consistent with those of prior studies (Wagner et al, 2006; Stewart et al, 2009) and suggest many recreational firearm users are putting themselves at risk for NIHL, especially while hunting with large-bore (loud) firearms. FIGURE 5 shows that the most common types of HPDs used by subjects for both target practice and hunting were nonelectronic plugs or muffs. Approximately 15 percent of the subjects reported using electronic hearing protective devices (EHPDs) when hunting. This is a significant increase in EHPD use, compared to a previous study by Wagner et al in 2006, and indicates hunters are becoming more aware of this type of protective device. Although over 50 percent of the subjects reported that they were aware of the nonlinear (military) type of HPDs, few reported utilizing these devices during target practice or hunting.

Large numbers of shots and lack of HPD use increase auditory risk. FIGURE 6 shows the reported number of shots taken by subjects in the past year without HPDs as a function of firearm type. The types of firearms were categorized as small, medium, and large rifles, small and large pistols, and shotguns. Rifles categorized as small included the .17 and .22 caliber rimfire guns. Rifles categorized as medium included .22-250, .223, .243, .25-06, and .257 caliber. Rifles categorized as large included .30 caliber and larger. Any pistol larger than a .22 caliber was classified as large. Shotguns were placed in the same category regardless of gauge. Most subjects reported being exposed to either 1-10 or 11-50 unprotected shots in the past year across firearm types. However, many

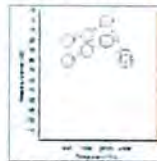
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individuals reported much higher numbers of unprotected shots for various firearm types. For example, over 15, 18, and 10 percent reported being exposed to over 200 unprotected shots in the past year from large pistols, medium rifles, and shotguns, respectively. Individuals exposed to a high number of unprotected shots in a year's time from firearms capable of generating high impulse noise levels may be at considerable risk for NIHL.

### Subjective Hearing Status

Self-perceived hearing ability was assessed for both right and left ears. Subjects were asked to categorize their right and left ear hearing ability as being excellent, very good, good, fair, or poor. Although over 75 percent of the subjects assessed right and left hearing ability to be good to excellent, approximately 20 percent reported right and left hearing to be either fair or poor. In the personal clinical experience of the authors, it has been observed that most patients presenting with a hearing loss underestimate the severity of their hearing loss when asked to make a self-assessment.

In addition to self-assessment of their hearing ability, subjects were asked if they experience temporary or constant tinnitus, or if they noticed an increase in tinnitus, a

major symptom of sensorineural hearing loss (Axelsson and Barrenas, 1992; Eggermont and Roberts, 2004; Moller, 2007; Bauer and Brozoski, 2008; Dawes and Welch, 2010; Mazurek et al, 2010), following firearm use. Twenty-two percent of the subjects reported constant tinnitus (81 percent bilateral, 11 percent left ear only, eight percent right ear only) while approximately 44 percent reported temporary tinnitus or an increase in constant tinnitus after shooting a firearm in the past year. The reported incidence of constant tinnitus by firearm users in this study is significantly higher than the national average of 10–15 percent (Henry et al, 2005; American Speech-Language-Hearing Association [ASHA]) and suggests many of these individuals may have NIHL secondary to firearm noise exposure. Individuals reporting temporary tinnitus after shooting a firearm may have been exposed to SPLs high enough to cause NIHL.

### Discussion

Results of this study reveal that the shooting habits and inconsistent use of HPDs reported by many recreational firearm users may put them at risk of acquiring an NIHL. The majority of subjects reported using firearms for over 20 years. The most frequently used firearms reported by

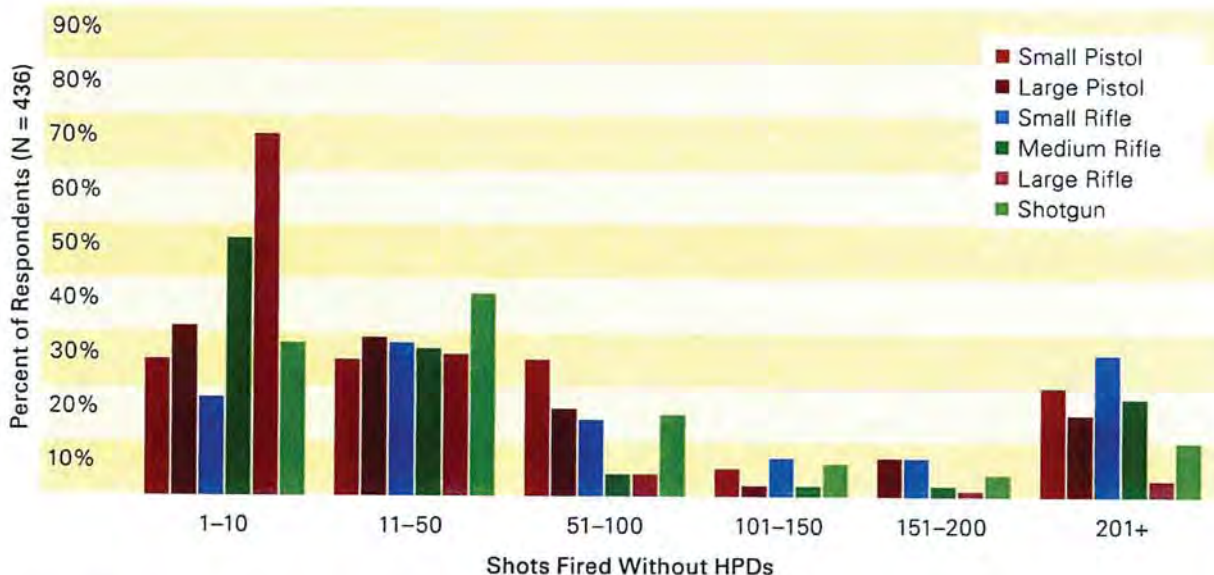


FIGURE 6. Number of shots fired without HPDs as a function of firearm type (N = 436).

shooters in this study for hunting small and large game were the 12 gauge shotgun and 30.06 rifle, respectively. Most shooters reported using either the semiautomatic or pump actions for small game hunting, while the most common action for large game was a bolt. The most com-

monly used firearms for both small and large game are not only loud (over 160 dB peak SPL) but are equipped with actions that allow up to five shots to be fired in a few seconds. Also, small game hunters often hunt in groups, which could serve to increase the number of exposures to high-level firearm noise during a single hunting excursion. The majority of large game hunters in this study reported frequently, if not always, hunting from an enclosure (hunting blind), which can increase peak SPL and duration of the impulse noise generated by their firearms via reverberation and lead to an increase in auditory risk.

Many subjects reported inconsistent use of HPDs, especially during hunting activities. Over 70 percent of the hunters reported never using HPDs while hunting, while only slightly more than one-half reported consistent use of HPDs during target practice. Ironically, using HPDs during target practice would not only protect hearing but also has the potential side benefit of increasing accuracy by reducing physical flinching by the shooter caused by anticipation of hearing the loud shot. Over half of the shooters reported they were aware of non-electronic, level-dependent (i.e., military style) HPDs specifically designed for the shooting sports, yet fewer than five percent reported using them during hunting activities. Approximately 12 percent of the shooters did report using electronic HPDs when hunting. Overall, the finding that approximately 17 percent of the hunters in this study used either active or level-dependent HPDs for hunting purposes is encouraging and indicates a significant increase in both awareness and use of these devices compared to previous studies (Wagner et al, 2006; Stewart et al, 2009). Both of these devices are especially applicable for hunting game since they allow hearing of softer environmental and animal sounds while protecting hearing from loud firearm noise.

Although an overwhelming majority (88 percent) of recreational firearm users in this study acknowledged that firearm noise can cause hearing loss, many reported a large number of unprotected firearm noise exposures within the past year. This finding suggests that recre-

ational firearm users in this study may be recklessly putting themselves at risk for NIHL. Audiologists and other hearing health professionals should be aware of this behavior and effectively counsel recreational firearm

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## Approximately 20 percent of the subjects reported right and left hearing to be either fair or poor.

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users about the importance of protecting their hearing during target practice and especially while hunting.

The reported incidence of subjective hearing problems and tinnitus by recreational firearm users in this study should be of concern to audiologists and hearing conservationists, as approximately 20 percent of the subjects rated their hearing to be only fair or poor, 22 percent reported constant tinnitus, and 44 percent reported tinnitus or an increase in their constant tinnitus after firing a gun in the past year. Many of these subjects may be hearing aid candidates (although only four percent reported wearing hearing aids), and the incidence of constant tinnitus is significantly higher than the estimated rate in the general adult population of 10–15 percent (Henry et al, 2005; ASHA). The percentage of subjects with tinnitus who reported their tinnitus as being severely annoying (nine percent) is similar to findings by Axelsson and Barrenas (1992). These subjects may be considered candidates for a tinnitus therapy program.

Results of this study support the need for hearing conservation educational programs for recreational firearm users. A major focus of the educational training should stress the hazardous effects of firearm noise on hearing so shooters fully understand the auditory consequences of excessive exposure. Appropriate selection and proper use of HPDs should be a major component of any educational program. Students enrolled in these programs should be advised on the effectiveness of various types of HPDs and when double protection (muff and plug) may be needed to attenuate firearm noise to nonhazardous levels. They also need to be knowledgeable about and able to select appropriate active (electronic) and level-dependent HPDs that are specially designed for the shooting sports. Demonstrations of simulated hearing loss (NIOSH, 2004) and simulated tinnitus (Martin, 2009) should also be used to allow the students to actually hear the consequences of excessive firearm noise exposure. Students should also receive a basic hearing test by a qualified hearing health professional to identify possible hearing loss and establish

a baseline audiogram. The educational programs could be offered through hunter safety courses, hunting clubs, or during shooting instructions. A special firearm noise section in industrial hearing conservation program educational programs could be included for workers who use firearms. Finally, clinical audiologists should educate their patients who use firearms with regard to the hazards and types of hearing protection to prevent NIHL. ❧

Michael Stewart, PhD, is a professor of audiology, Lauren Foley, BS, is an AuD student, and Mark Lehman, PhD, is a professor of speech-language pathology in the Department of Communication Disorders at Central Michigan University. Andrea Gerlach, AuD, is the territory manager at Phonak Hearing Systems, Dallas, TX.

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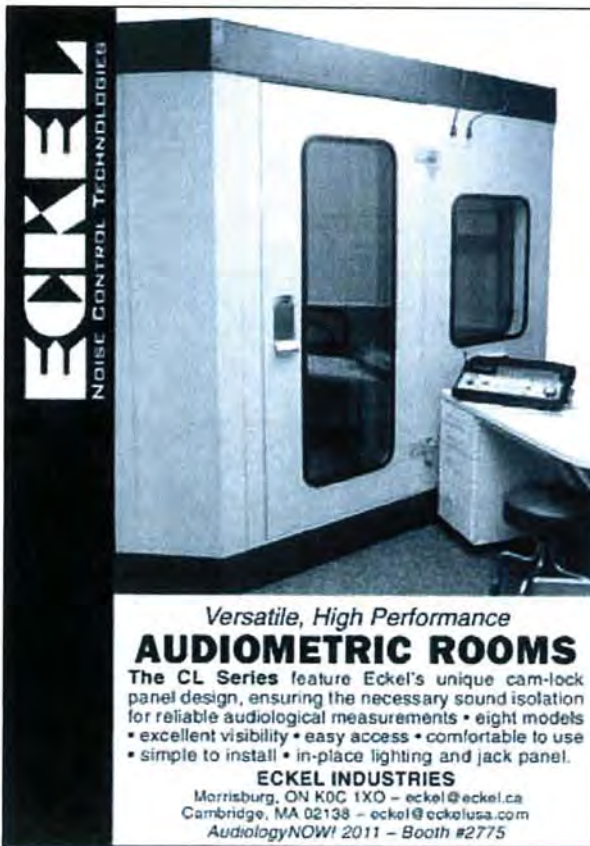
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## Appendix A Shooter Survey

Department of Communication Disorders  
Central Michigan University

Age: \_\_\_\_\_ County of Residence: \_\_\_\_\_ Sex: M  F   
Occupation: \_\_\_\_\_ Do you work in loud noise? Yes  No

1. Do you feel that noise from shooting a gun may cause hearing loss?  
 Yes  No
2. Do you shoot:  
 Right-handed  Left-handed
3. How many years have you been shooting guns?  
\_\_\_\_\_ years
4. Which type of gun do you use the most for small game hunting?  
Caliber/gauge \_\_\_\_\_  
 Auto  Single/double barrel  Bolt  Pump  
 Lever

5. Which type of gun do you use the most for large game hunting?  
 Caliber/gauge \_\_\_\_\_  
 Auto    Single/double barrel    Bolt    Pump  
 Lever

6. How many shots do you typically fire per year during target practice?  
 1-10    11-50    51-100    101-150    151-200  
 201+

7. What percentage of time do you use ear protection during target practice?  
 100%    75%    50%    25%    0%

8. Are you aware of the non-electronic type of hearing protection device used by the military to reduce loud sounds while allowing softer sounds to be heard?  
 Yes    No

9. If you use ear protection during target practice, which type do you use?  
 Plugs    Muffs    Plug/muff combo  
 Electronic device    Military device

10. How many shots do you typically fire per year while hunting small game?  
 1-10    11-50    51-100    101-150    151-200  
 201+

11. How many shots do you typically fire per year while hunting large game?  
 1-10    11-50    51-100    101-150    151-200  
 201+

12. What percentage of time do you use ear protection while hunting?  
 100%    75%    50%    25%    0%

13. If you used ear protection while hunting, which type did you use?  
 Plugs    Muffs    Plug/muff combo  
 Electronic device    Military device

14. When hunting large game, what percentage of time do you shoot from an enclosed blind?  
 100%    75%    50%    25%    0%

15. How would you rate your hearing ability?  
 Right Ear   Left Ear  
 Excellent    Excellent  
 Very good    Very good  
 Good    Good  
 Fair    Fair  
 Poor    Poor

16. Do you wear hearing aids?  
 Yes    No

If yes, which ear?  
 Right    Left    Both

17. Do you notice constant or almost constant ringing in your ears?  
 Yes    No

If yes, which ear?  
 Right    Left    Both

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18. If you experience ringing in your ears, at which level of annoyance do you find it:

- Severely  Moderately  Mildly

19. Do you ever notice ringing or an increase of ringing in your ears after shooting?

- Yes  No

If yes, how many times in the past year?  
\_\_\_\_\_ times

20. List all guns you've shot in the past year without wearing hearing protection. List the bore size and whether the gun is a rifle, shotgun, carbine, or pistol. Check the number of shots that you take per year with each gun.

Gun #1: \_\_\_\_\_

Number of shots per year without protection:

- 1-10  11-50  51-100  101-150  151-200  
 201+

Gun #2: \_\_\_\_\_

Number of shots per year without protection:

- 1-10  11-50  51-100  101-150  151-200  
 201+

Gun #3: \_\_\_\_\_

Number of shots per year without protection:

- 1-10  11-50  51-100  101-150  151-200  
 201+

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# **Exhibit**

## **I**



# Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise

DOI: 10.3766/jaaa.22.2.4

Gregory A. Flamme\*  
Michael Stewart†  
Deanna Meinke‡  
James Lankford§  
Per Rasmussen\*\*

## Abstract

**Background:** What is the risk of hearing loss for someone standing next to a shooter? Friends, spouses, children, and other shooters are often present during hunting and recreational shooting activities, and these bystanders seem likely to underestimate the hazard posed by noise from someone else's firearm. Hunters use hearing protection inconsistently, and there is little reason to expect higher use rates among bystanders. Acoustic characteristics and estimates of auditory risk from gunfire noise next to the shooter were assessed in this study.

**Research Design:** This was a descriptive study of auditory risk at the position of a bystander near a recreational firearm shooter.

**Data Collection and Analysis:** Recordings of impulses from 15 recreational firearms were obtained 1 m to the left of the shooter outdoors away from reflective surfaces. Recordings were made using a pressure-calibrated 1/4 inch measurement microphone and digitally sampled at 195 kHz (24 bit depth). The acoustic characteristics of these impulses were examined, and auditory risk estimates were obtained using three contemporary damage-risk criteria (DRCs) for unprotected listeners.

**Results:** Instantaneous peak levels at the bystander location ranged between 149 and 167 dB SPL, and 8 hr equivalent continuous levels ( $L_{eq,8h}$ ) ranged between 64 and 83 dB SPL. Poor agreement was obtained across the three DRCs, and the DRC that was most conservative varied with the firearm. The most conservative DRC for each firearm permitted no unprotected exposures to most rifle impulses and fewer than 10 exposures to impulses from most shotguns and the single handgun included in this study. More unprotected exposures were permitted for the guns with smaller cartridges and longer barrel length.

**Conclusions:** None of the recreational firearms included in this study produced sound levels that would be considered safe for all unprotected listeners. The DRCs revealed that only a few of the small-caliber rifles and the smaller-gauge shotguns permitted more than a few shots for the average unprotected listener. This finding is important for professionals involved in hearing health care and the shooting sports because laypersons are likely to consider the bystander location to be inherently less risky because it is farther from the gun than the shooter.

**Key Words:** Auditory risk, firearms, impulse noise, noise exposure, prevention—hearing loss

**Abbreviations:** AHAH = Auditory Hazard Assessment Algorithm for Humans; ACP = automatic Colt pistol; BOSS<sup>®</sup> = Ballistic Optimizing Shooting System; DRC = damage-risk criterion; HPD = hearing protection device; MPE = maximum permissible exposure; SEL = sound exposure level

The use of firearms and participation in recreational hunting vary as a function of geographical location and culture. In the United States, 18.6 million individuals over the age of 16 yr hunted an aver-

age of 18 days a year during the 5 yr period from 2002 to 2006. Youth hunters 6 to 15 yr of age are estimated to number 1.6 million (U.S. Fish and Wildlife Service, 2006). The National Shooting Sports Foundation (2009)

\*Western Michigan University, Kalamazoo; †Central Michigan University, Mount Pleasant; ‡University of Northern Colorado, Greeley; §Northern Illinois University, DeKalb; \*\*G.R.A.S. Sound and Vibration A/S, Holte, Denmark

Gregory A. Flamme, Ph.D., Western Michigan University, Department of Speech Pathology and Audiology, 1903 Michigan Ave., Kalamazoo, MI 49008; Phone: 269-387-8067; Fax: 269-387-8044; E-mail: greg.flamme@wmich.edu

reports that there are 30 million active sports shooters (hunters, cowboy shooters, etc.) over age seven in the United States. In addition, there are an estimated 20.3 million active target shooters (skeet, trap, and sporting clays) in the United States (National Shooting Sports Foundation, 2009). These statistics do not include the "occasional shooter" who may fire a weapon at gun shows, guest resort activities, rural farms/ranches, or outdoor fundraising/sporting events. Friends, family members, spectators, and instructors may accompany these "shooters" and be indirectly exposed to firearm impulses that potentially put them at risk of acoustic trauma.

Impulses from firearms are commonly referenced in terms of instantaneous peak sound pressure levels. Peak sound pressure levels typically exceed the U.S. Occupational Safety and Health Administration (1983), the National Institute of Occupational Safety and Health (NIOSH), the U.S. MIL-STD-1474D (U.S. Department of Defense, 1997), and the World Health Organization (1999) limit of 140 dB SPL (Odess, 1972; Ylikoski et al, 1995; Kardous et al, 2003; Murphy and Tubbs, 2007) and can potentially lead to noise-induced hearing loss (Patterson and Hamernik, 1992; Chan et al, 2001). However, the potential damage to the auditory system is not fully represented by peak SPL values. Sound exposure characteristics such as the total energy contained in the impulse, frequency spectrum, and pressure wave (i.e., *A*) and pressure envelope (i.e., *B*) durations of the time waveform are important considerations in terms of describing auditory risk from firearms (see Flamme et al, 2009a, for a review; Committee on Hearing, Bioacoustics, and Biomechanics [CHABA], 1992). Briefly, the *A*-duration is the time interval between the initial pressure rise of the impulse and the moment the pressure passes through ambient. The *B*-duration is the time interval during which the envelope of the signal resides within 20 dB of the peak pressure.

Firearm impulse sound exposure contributes to the poorer hearing ability and hearing handicap evident in sports hunters when compared to nonhunters (Taylor and Williams, 1966; Stewart et al, 2002). Nondahl et al (2000) calculated a 7% increase in the likelihood of having a marked high-frequency hearing loss for every 5 yr of hunting. In addition, hunters consistently used hearing protection less than 5% of the time during their hunting activities (Wagner et al, 2006). Hunters are more likely (62–80%) to wear hearing protection when target shooting than when hunting (Wagner et al, 2006), and the use of hearing protection tends to be higher among target shooters (Nondahl et al, 2000). This tendency was also noted in police officers, who were also more likely to consistently wear hearing protection devices (HPDs) during job-related firearms-qualification activities (95%) as opposed to nonoccupational shooting activities (0% [Hughes and Lankford, 1992]). In workers exposed to occupational noise, the additional exposure to

firearm noise can be expected to lead to a greater degree of hearing loss than for peers without exposure to firearm noise (Prosser et al, 1988; Clark, 1991; Kryter, 1991; Pekkarinen et al, 1993; Stewart et al, 2001; Neitzel et al, 2004).

Exposure to firearm noise is encountered in both occupational and nonoccupational settings. Law enforcement, security, military, wildlife officers, hunting guides, firearm and ballistics/accessory manufacturers, gunsmiths, and firearm range personnel are occupationally exposed to firearm noise. Recreational firearm use encompasses the traditional hunter and target shooters and also extends to cowboy action shooting, travel resort shooting galleys, dog training, .50 caliber shooting associations, gun shows, Boy/Girl Scouts, and 4-H activities. In most if not all of these situations, a bystander may be participating in the training and/or observing the event.

Bystander firearm noise exposure has primarily been assessed in the occupational shooting range environment. Recently, Kardous et al (2003) recorded a time-weighted average noise exposure of 108 dBA (19,282% daily dose) for an observer in an indoor shooting range using the NIOSH (1998) noise sampling criteria. While these authors recognize the limitations of noise dosimeter instrumentation in terms of capturing the impulse noise source, the results are valid in terms of documenting overexposure for the bystander.

While there are few data concerning the auditory risk to those near the shooter, there is evidence to suggest that the noise exposure is dependent upon the location of the listener (or bystander). Plomp (1967) showed that the Fusil Automatique Léger assault rifle produced lower peak levels 180 degrees from the line of fire than at other locations. Similar results were obtained recently with a bolt-action rifle chambered for the .22 Hornet cartridge (Rasmussen et al, 2009). The current study was designed to measure the impulse sound levels and estimate the auditory risk for persons standing approximately 1 m to the left of a right-handed shooter. The auditory risk for a bystander will be estimated by using the waveform parameter-based damage-risk criterion (DRC) developed by Coles et al (1967) and modified by the National Academy of Sciences Committee on Hearing, Bioacoustics, and Biomechanics (1968); the energy-based approach advocated by Smoorenburg (2003); and the Auditory Hazard Assessment Algorithm for Humans (AHAH) developed by Price and Kalb (1991) and described further by Price (2007).

## METHOD

### Firearms and Ammunition

The 15 firearms used in this study were selected to represent a variety of those used for recreational shooting activities such as hunting and target practice.

Details concerning each firearm are presented in Table 1. Photographs of the guns and ammunition are available as supplementary data accompanying the electronic version of this article on the publisher's Web site ([www.audiology.org/resources/journal](http://www.audiology.org/resources/journal)). The .410 gauge and 20 gauge shotguns are typically used when hunting smaller game such as rabbits, squirrels, and some game birds; while the 12 and 10 gauge shotguns are favorites for hunting waterfowl (Stewart et al, 2009), pheasant, quail, and turkeys. The .30-06 rifle, 7 mm Remington Magnum rifle, .45-70 rifle, and the .50 caliber muzzle-loader are commonly used for large game such as deer, elk, and bear. According to Wagner et al (2006), the .30-06 rifles and 12 gauge shotguns are the most frequently used firearms for large and small game, respectively. For target shooters, the firearm preferences are rifles (67.4%), handguns (62.5%), muzzle-loaders (24.5%), and shotguns (20.4% [Southwick Associates, 2009]). The AR-15, the M14, and the Auto-Ordnance (Thompson) 1927-A1 Model T1 "Tommy gun" rifles are civilian versions of military models and can be used for hunting but are typically used for target practice. The .22 caliber handgun is also used primarily for target practice. Three rifles had commercial barrel modifications (muzzle brake, compensator, or flash suppressor), and measurements were obtained with these in place. These devices are designed to improve

shooting accuracy and reduce recoil; however, installing a muzzle brake on a firearm will increase peak sound pressure levels when the gun is fired. The ammunition used in the firearms in this study included a wide variety of commercially available cartridges typically used for hunting and target practice activities.

### Instrumentation

Impulse recordings were made using a 1/4 inch prepolarized pressure-calibrated microphone (G.R.A.S. Type 40BD) having an essentially flat frequency response through 70 kHz, oriented at grazing incidence to the sound source. Microphone output was conditioned by a G.R.A.S. Type 26AC preamplifier and a G.R.A.S. Type 12AA power supply and routed to a Tucker-Davis Technologies real-time processor (RP2.1). The real-time processor was configured to perform 24 bit analog-to-digital conversion at a 195 kHz sample rate prior to storage in a memory buffer and subsequent transfer and scaling into Pascal units in MATLAB.

### Data Analyses

After recordings were transferred to the analysis computer, impulse baseline corrections were made by

**Table 1. Description of Recreational Firearms and Ammunition Used in the Measurement of Impulse Noise**

Manufacturer	Model	Gauge/Caliber	Cartridge/Bullet	Action	Barrel Length (inches)
<i>Rifles</i>					
Winchester	Model 70	7 mm Remington Magnum	140 grain	bolt action	26 with BOSS
Remington	742 Woodsman	.30-06	165 grain	semiautomatic	18
Remington	742 Woodsman	.30-06	165 grain	semiautomatic	22
Ruger	Model 1S	.45-70	300 grain	single shot, lever	22
Thompson/Center	Encore Pro Hunter	.50	250 grain with 150 grain powder	muzzle-loader	22
Rock River Arms	M14	7.62 × 51 mm (.308)	150 grain	semiautomatic	24 with flash suppressor
Colt	AR-15	5.56 × 45 mm (.223)	60 grain	semiautomatic	20
Auto-Ordnance (Tommy Gun)	1927-A1 Model T1	.45 ACP	230 grain	semiautomatic	16.5 with compensator
<i>Shotguns</i>					
Remington	SP10	10 gauge	3.5 inch	semiautomatic	28
Remington	11-87 slug gun	12 gauge	3 inch copper solid	semiautomatic	21
Remington	11-87 turkey gun	12 gauge	3 inch turkey load	semiautomatic	21
Remington <sup>a</sup>	11-87 standard	12 gauge	3 inch duck load	semiautomatic	26
Remington <sup>a</sup>	11-87 standard	12 gauge	2.75 inch field load	semiautomatic	26
Mossberg	—	20 gauge	2.75 inch	pump	26
Mossberg <sup>b</sup>	—	.410 caliber	3 inch	bolt	24
Mossberg <sup>b</sup>	—	.410 caliber	2.5 inch	bolt	24
<i>Handgun</i>					
Ruger	Bearcat	.22 Long Rifle	40 grain	revolver	4

<sup>a</sup>Same gun.

<sup>b</sup>Same gun, with and without external choke.

subtracting the mean value during a silent period in the waveform from all points on the recording. Each impulse was then analyzed independently using MATLAB software routines developed in the NIOSH Taft Laboratories (Cincinnati, Ohio). Risk estimates were calculated in terms of maximum permissible exposure (MPE) via the three DRCs for a listening condition in which the adult bystander was directly facing the sound source (i.e., grazing incidence to the ear). The MPE metric represents the highest number of exposures allowable without exceeding the exposure limits defined within the DRCs. We judged the median to be the best indicator of MPE for each firing condition, while ranges are also reported in the results that follow.

The DRCs included the Coles/CHABA (Coles et al, 1967; CHABA, 1968) approach based on waveform parameters, the Smoorenburg (2003) approach based on A-weighted energy in the impulse, and the AHAH, developed by Price and Kalb (1991), using a physiological model of the ear (Price, 2007). A detailed review of these DRCs has been presented elsewhere (Flamme et al, 2009a), but prior comparisons of these DRCs (Flamme et al, 2009a; Flamme et al, 2009b) have revealed that there are substantial differences in MPE determined by these DRCs. The Coles/CHABA criterion is most conservative for high-level impulses and least conservative for low-level impulses, the Price/Kalb DRC is the least conservative for high-level impulses and most conservative for low-level impulses, and the Smoorenburg DRC lies somewhere in the middle for impulses less than 116 dBA sound exposure level (SEL). The SEL represents the integrated sound level over an averaging period of 1 sec (see Earshen, 2000, p. 72). In this sense, SEL is similar to the 8 hr equivalent continuous level, but instead of dividing the sound energy over a time frame of 8 hr, the amount of sound energy is divided over a 1 sec period when computing SEL. The Smoorenburg DRC is discontinuous for impulses with 8 hr equivalent A-weighted sound pressure levels greater than 80 dB. In this range, MPE is 0 for impulses with peak levels above 116 dBA SEL but increases to a fixed value of 50 for impulses below 116 dBA SEL and above 80 dBA 8 hr equivalent continuous level ( $dBL_{eqA8}$ ). As suggested by Smoorenburg (2003), a +4 dB correction was applied to the SEL limit (i.e., 120 dB SEL) to retain consistency with the other DRCs, which presumed that the impulse source was oriented at grazing incidence to the ear. The Price/Kalb DRC permits separate assessments of auditory risk for listeners who are unwarned or warned that firing is imminent. The difference between these conditions follows a hypothesis that human listeners who know an impulse is imminent (i.e., warned listeners) will contract their middle-ear muscles in anticipation and therefore gain some additional protection from the high-pass filtering provided when the middle-ear

muscles are contracted. On the other hand, the middle-ear muscle contractions for unwarned listeners will be reflexive and follow the latency characteristics of a reflex, resulting in a contraction long after the impulse has passed. MPEs via the Price/Kalb DRC were calculated using a maximum of 500 auditory risk units under unwarned listening conditions (i.e., no anticipatory middle-ear muscle contraction). We elected to use the unwarned condition based on the results of Bates et al (1970), which found that anticipatory middle-ear muscle contractions cannot be conditioned in the majority of human listeners.

## Procedure

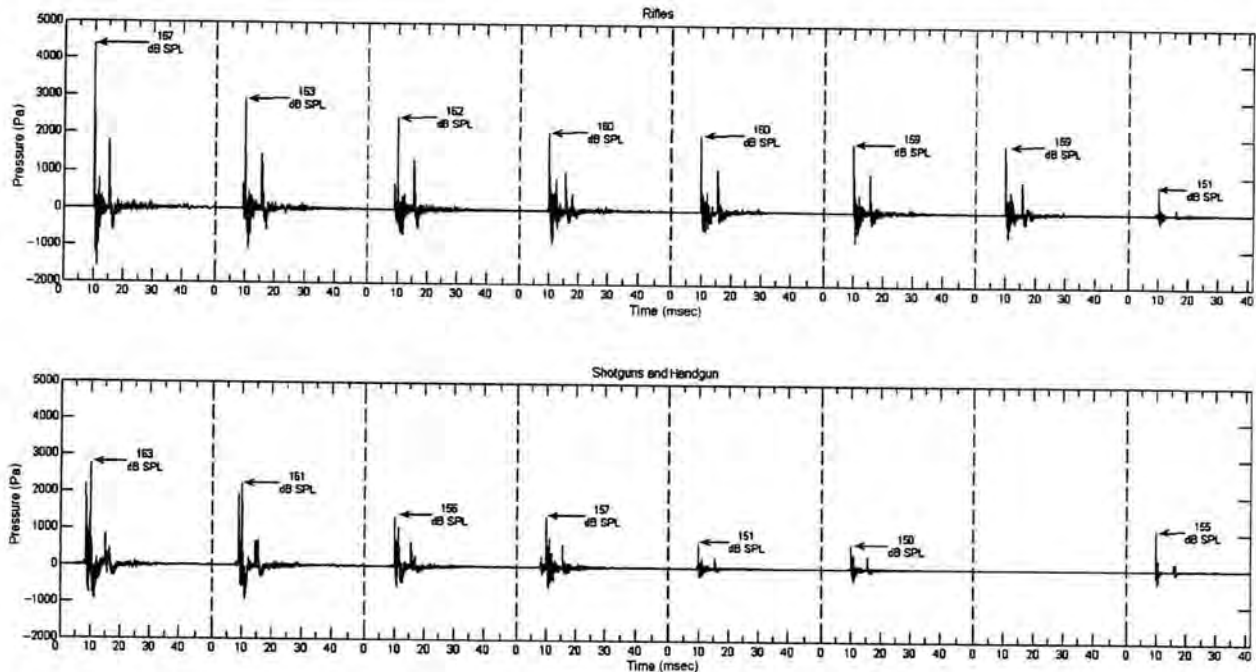
A minimum of five shots (range = 5–24) were fired from each firearm. The firearms were fired on a horizontal plane in a nonreverberant open field with the shooter in a typical standing shooting position. The microphone was positioned with a grazing incidence 1 m immediately to the left of the right-handed shooter to simulate a typical bystander location for civilian shooting conditions.

## RESULTS

### Acoustic Characteristics of Firearm Impulse Noise

Examples of noise impulses from each type of firearm are presented in Figure 1. For each gun, a secondary peak caused by ground reflection lagged the primary peak by approximately 6 msec. Standard deviations of impulse levels were 1 dB or less for all guns except the A-weighted peak level produced by the Remington SP10 Magnum, 10 gauge (Table 2). Unweighted peak levels produced at the bystander location ranged between 149.1 dB SPL for the Mossberg .410 shotgun and 166.5 dB SPL for the Winchester Model 70 with the Ballistic Optimizing Shooting System® (BOSS) muzzle brake. A-weighted levels were 1.7 to 3.7 dB lower than unweighted levels. Peak levels of shotguns and the handgun were more affected by A-weighting than those of rifles. A-weighted 8 hr equivalent continuous levels ( $L_{eqA8}$ ) varied between 64.0 and 82.9 dB SPL and corresponding sound exposure levels ranged between 108.6 and 127.5 dB SPL.

Rifles tended to produce the highest peak levels at the bystander location, followed by shotguns and the .22 handgun. Exceptions were the Remington SP10 Magnum 10 gauge and Remington 11-87 12 gauge slug shotguns, which produced greater peak levels than most rifles (see Table 2). The Remington SP10 Magnum and the Remington 11-87 slug gun also produced higher peaks than all other shotguns. This may be related to the type of ammunition used in these particular shotguns. The Remington SP10 Magnum 10 gauge shotgun fired a 3.5



**Figure 1.** Examples of individual impulses from each gun. The upper panel includes sample impulses for each rifle; examples from the shotguns and the handgun are in the lower panel. Upper panel impulses are from the Winchester Model 70 (7 mm Magnum), Remington #742 carbine (.30-06), Remington #742 with a 22 inch barrel (.30-06), Ruger Model 1 (.45-70), Thompson/Center Encore muzzle-loader (.50), M14 (7.62 × 51 mm), Colt AR-15 (5.56 × 45 mm), and Auto-Ordnance Tommy gun (.45 ACP), respectively. Lower panel sample impulses are from the Remington SP10 Magnum (10 gauge), Remington 11-87 slug gun (12 gauge), Remington 11-87 turkey gun (12 gauge), Remington 11-87 standard gun firing a 3 inch cartridge (12 gauge), Mossberg 20 gauge, Mossberg .410 caliber firing a 3 inch cartridge, and Ruger Bearcat .22 caliber, respectively. Differences between individual examples and summary values (Table 1) are due to rounding and the specific example selected for display.

inch cartridge as opposed to a 3 or 2.75 inch cartridge, while the Remington 11-87 12 gauge slug shotgun fired a cartridge with a single large (1 oz) projectile (i.e., slug) rather than multiple smaller projectiles (i.e., shot). The .22 caliber revolver also produced higher bystander peak levels than the 20 gauge and .410 caliber shotguns and the Auto-Ordnance Tommy gun, which fires .45 caliber handgun ammunition. The higher bystander peak levels produced by the .22 handgun, which fires the smallest cartridge of all the firearms in this study, may be related to the significantly shorter barrel length and action of this firearm, which resulted in the bystander being positioned closer to the sound source.

A comparison of the acoustic characteristics of impulses generated by the same firearm but with different-size cartridges is also shown in Table 2. Three-inch cartridges fired in the Remington 11-87 12 gauge shotgun (turkey or duck loads) generated impulses with higher peak levels and longer durations compared to 2.75 inch cartridges fired by the same firearm. Three-inch and 2.5 inch cartridges fired in the same .410 shotgun produced essentially equivalent peak levels, and B-durations, but the smaller cartridge had shorter A-durations.

Table 2 also displays the mean durations for firearm impulses measured in this study. Pressure wave A-

durations were generally less than 500 msec, particularly for smaller cartridges. Pressure envelope B-durations for impulses ranged from 6.8 to 9.3 msec. In general, the 10 and 12 gauge shotguns produced the longest B-duration values (approximately 9 msec), while the Winchester Model 70 (7 mm Remington Magnum) rifle and the .22 Ruger Bearcat revolver produced the shortest and nearly identical mean B-durations of 6.868 and 6.896 msec, respectively.

### Risk Estimates

Maximum permissible exposures, assuming no hearing protection, differed across DRCs. The Coles/CHABA DRC showed the greatest range of median unprotected MPEs across firearms, ranging from 0.18 MPE (i.e., no allowable unprotected exposure) for the Winchester Model 70, 7 mm Remington Magnum, equipped with a muzzle brake to 217 MPE for the .45 Tommy gun. The Price/Kalb DRC produced the smallest range of unprotected median MPEs, with values ranging from 4 MPE for the Winchester Model 70, 7 mm Remington Magnum, to 26 MPE for the .45 Tommy gun. The Smoorenburg DRC generated median MPEs of either 0 MPE (big-bore rifles and the M14) or 50 MPE (all other firearms).

**Table 2. Acoustic Characteristics of Firearm Impulses at the Bystander Location**

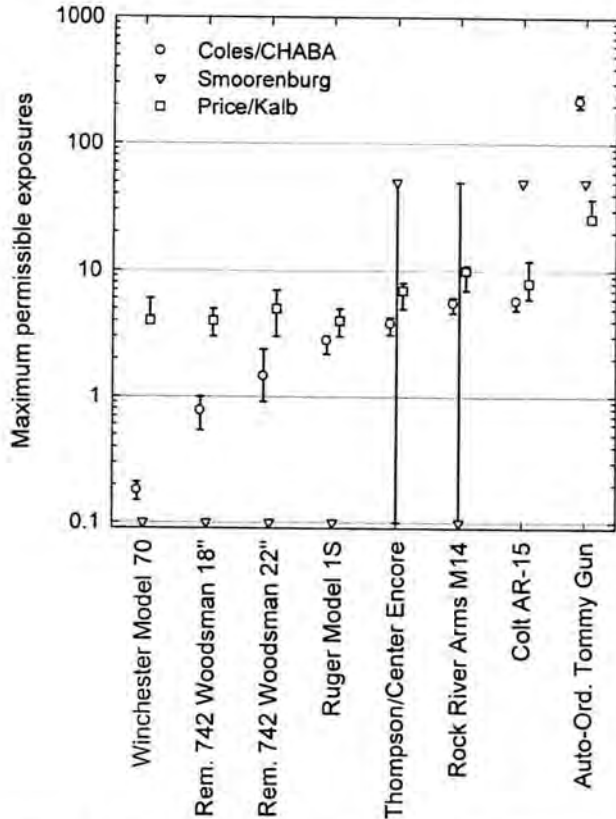
Firearm and Ammunition	N	Variable	Peak (dB SPL)	A-Weighted		SEL <sub>A</sub> (dB SPL)	A-Duration (μ-sec)	B-Duration (msec)
				Peak (dB SPL)	L <sub>eqAB</sub> (dB SPL)			
<i>Rifles</i>								
Winchester Model 70, 7 mm Magnum	5	Mean	166.5	164.8	82.9	127.5	519	6.868
		SD	0.3	0.5	0.3	0.3	32	0.061
Remington 742 carbine, .30-06	13	Mean	162.9	160.6	78.9	123.5	378	7.907
		SD	0.4	0.2	0.2	0.2	85	0.173
Remington 742 22 inch barrel, .30-06	24	Mean	161.6	159.4	77.7	122.3	353	8.044
		SD	0.5	0.4	0.3	0.3	57	0.287
Ruger Model 1, .45-70	5	Mean	160.1	157.6	77.4	122.0	442	8.354
		SD	0.2	0.1	0.7	0.7	77	0.450
Thompson/Center Encore, .50	5	Mean	159.7	157.2	75.3	119.9	427	7.396
		SD	0.2	0.3	0.2	0.2	32	0.670
M14, 7.62 × 51 mm	5	Mean	159.0	156.4	75.6	120.2	403	7.126
		SD	0.2	0.2	0.1	0.1	11	0.139
Colt AR-15, 5.56 × 45 mm	5	Mean	158.9	156.4	74.5	119.1	382	7.305
		SD	0.1	0.2	0.6	0.6	155	0.441
Auto-Ordinance Tommy Gun, .45 ACP	5	Mean	151.0	148.5	64.0	108.6	238	7.080
		SD	0.4	0.2	0.2	0.2	25	0.609
<i>Shotguns</i>								
Remington SP10 Magnum, 10 gauge	5	Mean	161.4	157.7	79.8	124.4	518	9.228
		SD	1.0	1.2	0.4	0.4	184	2.199
Remington 11-87 12 gauge slug	5	Mean	160.1	157.1	78.2	122.8	461	8.792
		SD	0.8	0.3	0.5	0.5	139	2.113
Remington 11-87 12 gauge turkey load, 3 inch ammunition	5	Mean	156.0	153.3	73.9	118.5	300	9.205
		SD	0.3	0.3	0.3	0.3	26	2.375
Remington 11-87 12 gauge duck load, 3 inch ammunition	5	Mean	156.1	153.2	72.6	117.2	382	9.090
		SD	0.4	0.6	0.3	0.3	114	0.054
Remington 11-87 12 gauge, 2.75 inch ammunition	5	Mean	152.7	149.7	68.2	112.8	230	7.904
		SD	0.6	0.7	0.7	0.7	32	0.527
Mossberg 20 gauge	5	Mean	150.1	147.1	66.2	110.8	208	7.438
		SD	0.4	0.4	0.3	0.3	38	0.221
Mossberg .410, 3 inch ammunition	5	Mean	149.1	145.8	64.5	109.1	382	7.750
		SD	0.3	0.5	0.6	0.6	114	0.750
Mossberg .410, 2.5 inch ammunition	5	Mean	150.0	146.6	65.8	110.4	248	7.358
		SD	0.4	0.6	0.7	0.7	23	0.554
<i>Handgun</i>								
Ruger Bearcat .22	6	Mean	154.0	150.6	67.1	111.7	134	6.896
		SD	0.6	0.8	0.7	0.7	10	0.098

## Rifles

The preponderance of DRCs recommended no more than 10 unprotected exposures to impulses produced by the rifles in this study (Fig. 2). For large conventional hunting rifles (e.g., those firing 7 mm Magnum, .30-06, and .45-70 cartridges), median MPEs ranged between 0 (Smooenburg DRC) and 5 (Price/Kalb DRC). The median MPEs for the Thompson/Center Encore .50 caliber muzzle-loader and the M14 and AR-15 rifles ranged between 0 (M14 rifle, Smooenburg DRC) and 50 (Thompson/Center Encore and AR-15 rifles, Smooenburg DRC). Median MPEs for the .45 Tommy gun ranged between 26 (Price/Kalb DRC) and 217 (Coles/CHABA DRC).

## Shotguns

Most of the shotguns included in this study (i.e., all but the 10 gauge shotgun and the 12 gauge slug gun) produced noise impulses with unprotected median MPEs greater than 1 as estimated by all three damage-risk criteria (Fig. 3). The Smooenburg DRC generated median MPE values of either 50 or 0 across all shotguns, while the Price/Kalb produced median MPE values ranging from 1 to 26 across all shotguns. The Coles/CHABA DRC tended to produce similar MPE values as the other two DRCs for the large-bore shotguns (10 and 12 gauge) but calculated much larger median MPEs (300–500) for the smaller-bore shotguns (20 and .410 gauge). In general,



**Figure 2.** Median maximum permissible unprotected exposures for each rifle, by damage-risk criterion. Error bars represent the range of maximum permissible unprotected exposures across shots. Permissible exposures of 0 returned by the Smoorenburg criterion were entered as 0.1 to permit plotting.

greater numbers of permissible exposures were observed for shotguns firing smaller-diameter cartridges. The 10 gauge shotgun and 12 gauge slug gun had the fewest permissible exposures (unprotected), while the .410 caliber shotgun had the most by all three DRCs. The two types of ammunition used in the standard 12 gauge firearm had a substantial effect on MPE estimated by the Coles/CHABA risk criterion, increasing from 16 MPE with a 3 inch cartridge to 69 MPE with a 2.75 inch cartridge. However, small differences (<1 dB) in the opposite direction were observed with the .410 gauge shotgun. Fewer exposures were permissible with the shorter cartridge (2.5 inch) than with the longer cartridge (3 inch) for the Coles/CHABA and the Price/Kalb DRCs. Medians for the Smoorenburg DRC were 50 MPE regardless of .410 gauge shell length.

### Handgun

Unprotected MPEs for the Ruger Bearcat .22 Long Rifle caliber handgun exhibited similar trends to those observed with the other types of recreational firearms. A minimum of 40 MPE and maximum of 86 MPE (median

55) were estimated via the Coles/CHABA DRC (Fig. 3). The Smoorenburg DRC resulted in an estimate of 50 MPE for all impulses from this gun. The Price/Kalb DRC estimated a range of 9 to 15 MPE (median 10).

## DISCUSSION

### Auditory Risk to Bystanders

The focus of this investigation was to describe auditory risks for bystanders exposed to civilian firearm noise. This study reports the acoustic characteristics and risk estimates for firearm noise across several rifles ( $N=8$ ), several shotguns ( $N=6$ ), and a handgun at a single position where a bystander might typically be located. That location was 1 m to the left of the individual firing each of the guns listed in Table 1. Although numerous other locations could and should be assessed, this location was chosen as a likely position for a hunting guide, firearms instructor, hunting partner, observer, or additional shooter who might or might not be an active part of a shooting event. It should also be mentioned that these data were collected outdoors in a nonreverberant open field without walls, barriers, trees, or other obstructions. The magnitude of each impulse was evaluated using unweighted instantaneous peak levels and A-weighted instantaneous peak levels, 8 hr equivalent continuous levels ( $L_{eqA8}$ ), and sound exposure levels ( $SEL_A$ ). In addition, the pressure wave durations (i.e., A-durations) and the pressure envelope durations (i.e., B-durations) of the impulse waveforms were evaluated (Table 2).

Several different approaches to determining auditory damage risk from exposure to impulse noise can be applied (Coles et al, 1967; CHABA, 1968; Smoorenburg, 2003; Price, 2007), and the results of each can be transformed into maximum permissible unprotected exposures, which is simply the number of gunshot exposures allowed for a given firearm. These can be seen in Figures 2 and 3 for the firearms used in this study. It is noted that the Price/Kalb model appears to compress the range of MPEs across firearms compared to the other two models. This makes it atypically liberal relative to the other DRCs that would allow few shots (e.g., large game rifles) and also atypically conservative in cases where the other DRCs would tend to allow many unprotected shots (e.g., the 20 gauge and .410 shotguns). It is apparent for the rifles tested (Fig. 2) that most MPE values ranged from 0 to 10, whereas for shotguns tested (Fig. 3) most ranged from 0 to 50 MPE. As expected, the higher the peak sound pressure levels, the lower the MPE for both the rifles and shotguns. The one rifle that produced the highest peak SPL (166.3 dB) was a bolt-action rifle with a 26 inch barrel and a BOSS muzzle brake. This particular firearm configuration used a belted 7 mm Remington

Magnum cartridge (high velocity and high powder capacity).

The higher peak SPLs for rifles may relate to the larger powder charge and/or the higher bullet velocity when all other variables are considered. The exception to this generalization is the addition of porting or brakes to the barrel of the firearm. The brake allows the muzzle gases to escape from openings in the brake, permitting the noise to travel more directly toward the bystander and shooter. Ports (holes) and slits in the barrel of firearms and muzzle brakes (used to reduce recoil, barrel elevation, and vibration) are potentially more hazardous to hearing than firearms without such alterations.

There is also a trend for the unprotected MPEs to be lower for more powerful hunting rifles than for the military-style rifles (AR-15, M14, and Tommy gun), particularly when those rifles were evaluated using the Coles/CHABA and Smoorenburg DRCs (Fig. 2). The rationale for this outcome may be that the military-style firearms have smaller powder capacities (.223, .308, and .45) than the typical hunting rifles (7 mm

Remington Magnum, .30-06, and .45-70), regardless of the caliber of the cartridge.

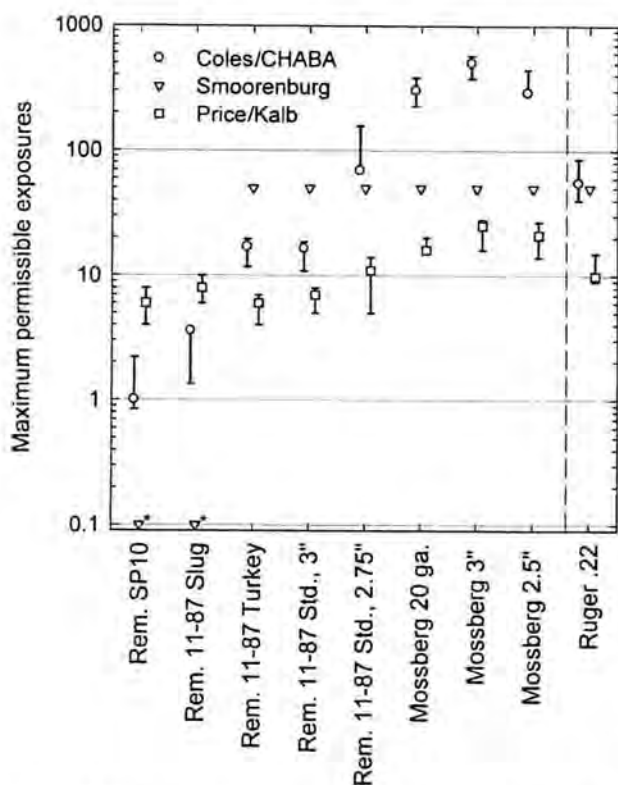
The highest peak noise level from a shotgun at the bystander location (161.4 dB SPL) was produced by the largest-gauge shotgun sampled, a 10 gauge firing a 3.5 inch cartridge. On the other end of the shotgun noise level range was the .410 gauge shotgun firing a 3 inch cartridge and producing a peak level of 149.1 dB SPL. When the same 12 gauge shotgun is fired with two different cartridges (2.75 vs. 3 inch), the longer cartridge yields a higher peak SPL (150.0 dB), assuming barrel length and distance to the bystander are held constant. It is also apparent that the larger cartridge diameters (gauge) yield higher peak SPLs.

The impulse noise from the handgun assessed in this study should also be mentioned. This small revolver fired one of the smallest cartridges commercially available: the .22 Long Rifle. However, the peak was 154.0 dB SPL, which exceeded the peak levels of five of the other firearms. This may be explained in two ways. First, the shorter 4 inch barrel length places the noise source closer to the bystander. Second, since this firearm is a revolver, there is a significant blast of gases and noise emitted between the exit chamber from the cylinder and the rear opening of the barrel, further reducing the distance between the noise source and the ears of the bystander. These two factors probably account for the high SPL for such a small cartridge.

When the Auto-Ordinance .45 Tommy gun and the .22 Ruger revolver noise levels are compared, another seemingly counterintuitive finding was observed. The Tommy gun shoots a rather substantial (larger) handgun cartridge (.45 automatic Colt pistol [ACP]) that produced a peak level of 151.0 dB SPL, while the .22 caliber Ruger revolver produced a higher peak level (154.0 dB SPL). This probably again reflects the short barrel length of the handgun and the opening between the cylinder and barrel when compared to the longer barrel and closed interface of the chamber with the barrel of the Tommy gun.

It could be concluded that firing a handgun with a short barrel length (especially one with a large bore), compared to long-barreled rifles and shotguns, may increase the auditory risk factor for the bystander. And when the handgun is a revolver, the bystander's risk for hearing loss may be greater than for semiautomatics or single-shot handguns.

Estimates of MPEs were based on the assumption that the shooter or bystander is unprotected (not wearing earplugs and/or earmuffs). Hearing protectors can be expected to generally decrease the auditory risks to the wearer in direct proportion to the reduction in the peak sound level (W. Murphy, personal communication, March 4, 2010). Therefore, the unprotected MPEs from the current study could be adjusted by the proportional effect of a given ear protector. For example, with



**Figure 3.** Maximum permissible unprotected exposures for each shotgun and the Ruger .22 caliber handgun, by damage-risk criterion. Error bars represent the range of maximum permissible unprotected exposures across shots. Separate estimates of maximum permissible unprotected exposures were obtained for each cartridge fired in the 12 gauge standard and the .410 caliber shotguns. Permissible exposures of 0 returned by the Smoorenburg criterion were entered as 0.1 to permit plotting.



the Winchester Model 70 (7 mm Remington Magnum) rifle with the BOSS muzzle brake producing an unprotected MPE of 0.2 (Coles/CHABA DRC) or 4 (Price/Kalb DRC), an ear protector that reduces the DRCs by a factor of 100 would increase the MPE to 20 or 400, respectively. Unfortunately, this approach would not be suitable for the Smoorenburg DRC, because many guns have an MPE of either 0 or 50 and increases in MPEs due to the hearing protector would need to be determined by the effect of the hearing protector on the A-weighted 8 hr equivalent level and the SEL, after transformation of the recordings under the protector to equivalent levels in the undisturbed sound field.

None of the guns included in this study should be considered safe for unprotected bystanders, but the sound produced by some guns (e.g., Mossberg bolt-action .410) is less risky than others, and the longer gun barrels and lower-powered guns and ammunition carry less risk to the unprotected auditory system. We assumed a grazing incidence for the risk estimates in this study, and this situation may not always reflect the angle of incidence to the bystander's ear in the field. The relative risk of auditory damage may be higher for normal incidence where the acoustic effects of the head and pinna lead to greater gain in the high frequencies (Shaw, 1974).

The presumed location of the bystander in this study was 1 m to the left of a right-handed shooter. However, the sound field surrounding the firearm and shooter is not uniform (Rasmussen et al, 2009). The results of the current study can be expected to provide underestimates of sound levels and auditory risk for bystanders nearer the muzzle (e.g., closer to the shooter or forward) and could overestimate the risk for those farther away. Companion hunters, shooting instructors, and long-range precision shooting teams are examples where bystanders might be closer than the conditions evaluated in this study. In the case of companion hunters, particularly waterfowl hunters in a blind, it is possible to have a group of three or more shooters firing at flying waterfowl simultaneously from inside an enclosure (e.g., a duck blind [Stewart et al, 2009]). In such conditions, each person is both a bystander and a shooter, and each listener's distance to the muzzle is determined by the flight path of the bird. Shooting instructors will occasionally help the student shooter use the gunsight from a position directly behind the student shooter. In these conditions, it would be most appropriate to apply auditory risk estimates obtained at the shooter's location. Long-range precision shooting teams employ a person in the role of spotter who assists in identifying the location and range to the target, and competitions of this sort could lead to the spotter occupying a location forward of the shooter, particularly when shooting from inside an enclosure or in close quarters.

## Clinical Implications

People involved in hearing health care are acutely aware of the general risk of unprotected firearm noise exposure for shooters, and this research highlights the need to extend this clinical awareness to bystanders. The specific auditory risk to any particular bystander is contingent upon the shooter's behavior, the firearm in use, the number of shots fired, the ammunition used, and the shooting environment. Bystanders accompanying hunters may not recognize that their relative risk would be expected to increase when accompanying bird hunters who may have higher daily limits on quail (10) and are successful on every third shot versus pheasant hunters with a lower daily limit (two–five) or deer hunters who may fire only one or two limited opportunity shots. Bird hunts are often group hunts, and bystander exposure is common. Persons functioning as hunting guides or instructors may find themselves routinely in the bystander position regardless of the type of hunting. Many hunters assist other hunters once they have gained the skills or harvested their personal game, thus increasing their personal risk of hearing loss.

Hearing protection is advisable for anyone observing in close proximity to a shooter, whether a family member accompanying a hunter to a waterfowl blind or an observer at a target shooting event. Firearm users who take turns shooting and become temporary bystanders may not realize that they could be positioned in a more hazardous situation than the shooter. These situations may necessitate the utilization of hearing protection. Bystanders cannot predict the frequency and acoustic conditions of impulse noise exposure, and consequently a conservative approach to universally recommending HPDs is justified. Shooters themselves may be the most likely person to advise a bystander of the need to wear hearing protection, since shooters are often aware of other safety considerations before firing a shot. Electronic or nonlinear hearing protection may be especially useful for bystanders who wish to maintain speech communication and environmental awareness while participating in the shooting activity.

It may be advantageous to relocate bystanders or fellow shooters to a less hazardous observation point when feasible and practical. If close observation is not warranted or desired, then increasing the distance between the bystander and the muzzle blast would be preferable. In the case of formal shooting events and supervised target practice, spectators can be required to observe from a substantial distance. In many sports, video cameras are used to bring the "action" closer to the spectator, and these strategies might be useful in terms of hearing loss prevention for bystanders at shooting events.

Special consideration for children who are bystanders may be warranted, since the World Health Organization (1999) suggests that children should not be

exposed to impulse peak sound levels greater than 120 dB SPL. In this case, hearing protection that fits well and provides adequate attenuation is necessary when bystander exposure cannot be avoided. The American culture of passing on hunting traditions from parents and grandparents to young children can be respected by counseling adults on the importance of eliminating unnecessary and unprotected firearm exposure to children and modeling appropriate protective behaviors.

Audiologists are encouraged to expand their clinical inquiry beyond asking, "Do you shoot firearms?" to address any history of firearm noise exposure as a bystander and/or shooter, e.g., "Are you exposed to any firearm noise?" Follow-up questions would then focus on the use of hearing protection, the description of bystander situations, and the types of firearms (if known). Any specific occurrences of unprotected firearm noise exposure should receive special attention. Extensive counseling focusing on higher-risk situations—using high-powered rifles, large shotguns, handguns, and firearms with muzzle brakes—should emphasize the need to wear effective HPDs in these instances. Routine audiologic monitoring should also be encouraged for bystanders exposed to firearm noise in order to monitor hearing protector effectiveness.

## CONCLUSION

Bystanders are at risk of auditory damage from unprotected civilian firearm noise exposure, and HPD use is warranted. Civilian firearm impulse noise peak levels ranged from 149 to 166.5 dB SPL when measured from a bystander location 1 m to the left of the shooter. These results illustrate that maximum permissible exposures (unprotected) vary across firearms, ammunition, and DRCs. MPEs ranged from 0 to 217 dependent upon the DRC applied and firearm used. In general, firearms with longer barrels and lower-power ammunition are less hazardous to hearing. The risk of auditory damage is influenced by a variety of acoustic, firearm, ammunition, environmental, and circumstantial conditions that cannot always be predicted in advance of the exposure. Damage-risk criteria can be used to quantify the relative auditory damage risk between various firearms and shooting conditions. Audiologists are advised to consider unprotected bystander firearm noise exposure in the clinical evaluation of hearing loss and when implementing hearing loss prevention programs for recreational firearm users and bystanders/spectators.

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# **Exhibit**

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## Noise Induced Hearing Loss

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### What is Noise Induced Hearing Loss?

Noise induced hearing loss is a permanent hearing impairment resulting from prolonged exposure to high levels of noise. One in 10 Americans has a hearing loss that affects his or her ability to understand normal speech. Excessive noise exposure is the most common cause of hearing loss. The National Institute of Health reports that about 15 percent of Americans aged 20 to 69 have high frequency hearing loss related to occupational or leisure activities. Because of occupational risk of noise induced hearing loss, there are government standards regulating allowable noise exposure. People working before the mid1960s may have been exposed to higher levels of noise where there were no laws mandating use of devices to protect hearing. Recent studies show an alarming increase in hearing loss in youngsters. Evidence suggests that loud rock music along with increased use of portable radios with earphones may be responsible for this phenomenon.

An example of a noise induced hearing loss is shown in Figure 1. There is a "notch" at 3000 Hz, with better hearing at both lower and higher frequencies. When noise is too loud, it begins to kill cells in the inner ear. As the exposure time

to loud noise increases, more and more hair cells are destroyed. As the number of hair cells decreases, so does your hearing. Currently, there is no way to restore life to dead hair cells; the damage is permanent.

The damage caused by noise, called **sensorineural hearing loss**, can be caused by several factors other than noise, but noise-induced hearing loss is different in one important way – it can be reduced or prevented altogether.

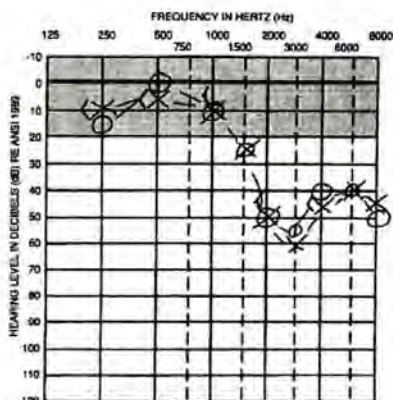


Figure 1: Example audiogram showing noise induced hearing.

Noise can also cause a reversible hearing loss, called a temporary threshold shift. This typically occurs in individuals who are exposed to gunfire or firecrackers, and hear ringing in their ears after the event (**tinnitus**).

### What Causes Noise Induced Hearing Loss?

First, we have to define noise. Sound can be measured scientifically in two ways – intensity and pitch. Both of these affect the degree to which sound (noise) damages hearing.

#### Intensity of Sound

Intensity of sound is measured in decibels (dB). The scale runs from the faintest sound the human ear can detect, which is labeled 0 dB, to over 180 dB, the noise at a rocket pad during launch. Decibels are measured logarithmically, being 20 times the log of the ratio of a particular sound pressure to a reference sound pressure. This means that as decibel intensity increases by units of 20, each increase is 10 times the lower figure. Thus, 20 decibels is 10 times the intensity of 0 decibels, and 40 decibels is 100 times as intense as 20 decibels. Sound intensity may be given in two different units. Persons interested in the actual physical quantification of sound use units of sound pressure level (SPL). SPL is calibrated to a constant sound pressure level that does not vary with frequency. On audiograms, however, sound intensity is calibrated in hearing level (HL), meaning that the reference sound is one that just barely heard by a normal population. Thus HL units are relative ones and do not generally correspond to SPL units. Higher intensity (db) of sound causes more damage. Many experts agree that continual exposure to more than 85 decibels may become dangerous.

The following table illustrates some common sounds and their intensity.

Approximate Decibel Level	Examples
0 dB	the quietest sound you can hear.
30 dB	whisper, quiet library.
60 dB	normal conversation, sewing machine, typewriter.
90 dB	lawnmower, shop tools, truck traffic; 8 hours per day is the maximum exposure (protects 90% of people).
100 dB	chainsaw, pneumatic drill, snowmobile; 2 hours per day is the maximum exposure without protection.
115 dB	sandblasting, loud rock concert, auto horn; 15 minutes per day is the maximum exposure without protection.
140 dB	gun muzzle blast, jet engine; noise causes pain and even brief exposure injures

unprotected ears; maximum allowed noise with hearing protector.
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### Frequency

Pitch is measured in frequency of sound vibrations per second, called Hertz (Hz). Frequency is measured in cycles per second, or Hertz (Hz). The higher the pitch of the sound, the higher the frequency. A low pitch such as a deep voice or a tuba makes fewer vibrations per second than a high voice or violin. Generally noise induced hearing loss occurs at a pitch of about 2000-4000 Hz. Frequency is measured in cycles per second, or Hertz (Hz). The higher the pitch of the sound, the higher the frequency. Young children, who generally have the best hearing, can often distinguish sounds from about 20 Hz, such as the lowest note on a large pipe organ, to 20,000 Hz, such as the high shrill of a dog whistle that many people are unable to hear.

Human speech, which ranges from 300 to 4,000 Hz, sounds louder to most people than noises at very high or very low frequencies. When hearing impairment begins, the high frequencies are often lost first, which is why people with hearing loss often have difficulty hearing the high-pitched voices of women and children.

Loss of high frequency hearing also can distort sound, so that speech is difficult to understand even though it can be heard. Hearing impaired people often have difficulty detecting differences between certain words that sound alike, especially words that contain S, F, SH, CH, H, or soft C, sounds, because the sound of these consonant is in a much higher frequency range than vowels and other consonants.

### Duration

In addition, the duration (how long you are exposed to a noise) can affect the extent of noise induced hearing loss. The longer you are exposed to a loud noise, the more damaging it may be.

Every gunshot produces a noise that could damage the ears of anyone in close hearing range. Large bore guns and artillery are the worst because they are the loudest. But even cap guns and firecrackers can damage your hearing if the explosion is close to your ear. Anyone who uses firearms without some form of ear protection risks hearing loss.

Excessive noise is present in many situations. Some of the more common ones include occupational noise (machinery, etc.), loud music, and non-occupational noise (lawn mowers, snow blowers, etc.).

### Occupational Noise

Habitual exposure to noise above 85 dB will cause a gradual hearing loss in a significant number of individuals, and louder noises will accelerate this damage. For unprotected ears, the allowed exposure time decreases by one half for each 5 dB increase in the average noise level. For instance, exposure is limited to 8 hours per day at 90 dB, 4 hours per day at 95 dB, and 2 hours per day at 100 dB. The highest permissible noise exposure for the unprotected ear is 115 dB for 15 minutes per day. Any noise above 140 dB is not permitted.

The [Occupational Safety and Health Administration](#), in its Hearing Conservation Amendment of 1983, requires hearing conservation programs in noisy work places. This includes a yearly hearing test for the approximately five million workers exposed to an average of 85 dB or more of noise during an 8-hour work day.

Ideally, noisy machinery and work places should be engineered to be more quiet or the worker's time in the noise should be reduced; however, the cost of these actions is often prohibitive. As an alternative, individual hearing protectors are required when noise averages more than 90 dB during an 8-hour day.

When noise measurements indicate that hearing protectors are needed, the employer must offer at least one type of earplug and one type of earmuff without cost to employees. If the yearly hearing tests reveal hearing loss of 10 dB or more in higher pitches in either ear, the worker must be informed and must wear hearing protectors when noise averages more than 85 dB for an 8-hour day.

### Non-Occupational Noise

Non-occupational noises are also regularly encountered during recreational activities and are a source of premature

hearing reduction. Peak noise levels, in dB, are provided in the following table taken from Smith et al, 1999.

Noise	Level
Firecracker	180
Gunshot	167
Car Stereo	154
Children's toys	150
Sporting events	127
Rock Concert	120
Health Club	120
Motorboats	115
Video Arcade	110
Snowmobile	99
Movie	94

Musical instruments can generate considerable sound and thus can also cause hearing loss. The most damaging type of sound is in the high-frequencies. Violins and violas can be sufficiently loud to cause permanent hearing loss. This is typically worse in the left ear, which is nearer the instrument. Unlike other instruments, the ability to hear the high-frequency harmonics is crucial to these musicians. Mutes can be used while practicing to reduce long-term exposure. In addition, attending live concerts (where noise levels can exceed 120 dB) can damage hearing, as well as listening to loud music through headphones.

If you think you have grown used to a loud noise, it probably has damaged your ears, and there is currently no treatment – no medicine, no surgery, not even a hearing aid, that truly corrects your hearing once it is damaged by noise.

#### Other Factors

Anyone who is exposed to loud noise is at risk of hearing damage. Genetic factors may make some individuals more susceptible (Davis et al 2003, Konings et al 2009). Other things that have been linked with an increased risk of noise induced hearing loss include smoking (Palmer et al 2004, Wild et al 2005), male gender, race, poor diet, diabetes, cardiovascular disease (Daniel 2007) and concomitant exposure to carbon monoxide or hydrogen cyanide (Fechter 2004).

### How is Noise Induced Hearing Loss Diagnosed?

Hearing loss usually develops over a period of several years. Since it is painless and gradual, you might not notice it. What you might notice is a ringing or other sound in your ear (**tinnitus**), which could be the result of long-term exposure to noise that has damaged hearing. Or, you may have trouble understanding what people say; they may seem to be mumbling, especially when you are in a noisy place such as in a crowd or at a party. This could be the beginning of high-frequency hearing loss; a hearing test will detect it. If you have any of these symptoms, you may have nothing more serious than **impacted wax** or an ear infection, which might be simply corrected. However, it might be hearing loss from noise. In any case, take no chances with noise – the hearing loss it causes is permanent.

If you suspect a hearing loss, consult a physician with special training in ear care and hearing disorders (called an otolaryngologist or otologist). This doctor can diagnose your hearing problem and recommend the best way to manage it.

People differ in their sensitivity to noise. As a general rule, noise may damage your hearing if you have to shout over background noise to make yourself heard, the noise hurts your ears, it makes your ears ring, or you are slightly deaf for several hours after exposure to the noise.

### How is Noise Induced Hearing Loss Treated?



If you think you have grown used to a loud noise, it probably has damaged your ears, and there is no treatment – no medicine, no surgery, not even a hearing aid, that truly corrects your hearing once it is damaged by noise.

The only thing you can do at this point is to protect what remaining hearing you have. There are a number of things you can do.

#### Avoidance:

While it may seem silly and obvious to point this out, usually the best way to prevent future injury from noise is to avoid exposure to noise! If you have control over the noise (i.e. if you are exposing yourself to the noise), stop doing it! It is also generally prudent to avoid things that might contribute to ear damage – try to avoid ototoxic drugs like aspirin, and avoid whenever possible exposing yourself to situations where your ear might be damaged (for example, Scuba diving).

#### Hearing Protection

If cannot avoid excessive noise you should wear protectors. Examples of situations where you should wear them are when you are using power tools, noisy yard equipment, or firearms.

Hearing protection devices decrease the intensity of sound that reaches the eardrum. They come in two forms: earplugs and earmuffs.

Earplugs are small inserts that fit into the outer ear canal. To be effective they must totally block the ear canal with an airtight seal. They are available in a variety of shapes and sizes to fit individual ear canals and can be custom made. For people who have trouble keeping them in their ear, they can be fitted to a headband. Simple foam ear-plugs are available at very low cost from the drugstore. Custom made earplugs can be obtained from audiologists. Earplugs must be snugly sealed so the entire circumference of the ear canal is blocked. An improperly fitted, dirty or worn-out plug may not seal and can irritate the ear canal. Ordinary cotton balls or tissue paper wads stuffed into the ear canals are very poor protectors; they reduce noise only by approximately 7 dB.

Earmuffs fit over the entire outer ear to form an air seal so the entire circumference of the ear canal is blocked, and they are held in place by an adjustable band. Earmuffs will not seal around eyeglasses or long hair, and the adjustable headband tension must be sufficient to hold earmuffs firmly around the ear.

Properly fitted earplugs or muffs reduce noise 15 to 30 dB. The better earplugs and muffs are approximately equal in sound reduction, although earplugs are better for low frequency noise and earmuffs for high frequency noise. Simultaneous use of earplugs and muffs usually adds 10 to 15 dB more protection than either used alone. Combined use should be considered when noise exceeds 105 dB. Note that for such situations, it may be that there is no type of hearing protection that will stop a very loud noise from affecting you.

#### Investigational Treatments

The mechanism of noise induced damage is proposed to include reactive oxygen species (Henderson, 2006; Le Prell, 2003), which can cause cell death. Reactive oxygen species are removed by antioxidants. Antioxidants that have been studied include N-acetylcysteine, magnesium, salicylate, vitamin E and ebselen (Coleman et al 2007, Le Prell et al 2007, Lynch & Kil 2005, Sendowski et al 2006, Suckfuell et al 2007). Two recent studies have demonstrated a degradation of cell-cell junctions (important for structural and function purposes) and genetic transcriptional changes in animal models. This means that noise-induced damage can modify "genetic maintenance" of the cochlea (Cai et al 2012, Zheng & Hu 2012).

Glucorticoids, such as cortisol, may modulate hearing sensitivity (Canlon et al 2007) and also shows some protective effects (Le Prell et al 2003, Oishi & Schacht 2011). Increasing interest is developing with regard to oral antioxidant treatment/prevention of NIHL. D-methionine (D-met), salicylate, ebselen, N-acetylcysteine (NAC), ACE Mg, and sodium thiosulfate are all in or near clinical trials. See the work of Kathleen Campbell for a thorough discussion of pharmacologic otoprotective agents .

Gene therapy and stem cell therapy are also under investigation for the treatment of sensorineural hearing loss(Sun et al 2011).

#### What Are the Common Problems of Hearing Protectors?

Studies have shown that one half of the workers wearing hearing protectors receive one half or less of the noise reduction potential of their protectors because these devices are not worn continuously while in noise or because they do not fit properly.

A hearing protector that gives an average of 30 dB of noise reduction, if worn continuously during an 8-hour work day, becomes equivalent to only 9 dB of protection if taken off for one hour in the noise. This is because decibels are measured on a logarithmic scale, and there is a 10-fold increase in noise energy for each 10 dB increase.

During the hour with unprotected ears, the worker is exposed to 1,000 times more sound energy than if earplugs or muffs had been worn. In addition, noise exposure is cumulative. So the noise at home or at play must be counted in the total exposure during any one day. A maximum allowable while on-the-job followed by exposure to a noisy lawnmower or loud music will definitely exceed the safe daily limit.

Even if earplugs and/or muffs are worn continuously while in noise, they do little good if there is an incomplete air seal between the hearing protector and the skin. When using hearing protectors, you will hear your own voice as louder and deeper. This is a useful sign that the hearing protectors are properly positioned.

### Can I Hear Other People and Machine Problems If I Wear Hearing Protectors?

Hearing protectors reduce hearing and therefore do reduce one's ability to understand normal conversation. A normal hearing person wearing hearing protectors should be able to understand a regular conversation. A person who has impaired hearing already, perhaps due to noise, might be unable to understand coworkers when they are wearing hearing protectors.

### For Musicians

There are a number of strategies that can be used to reduce the change of noise injury from other instrumentalists. Musicians ear plugs are generally "flat" so that bass and treble notes are not relatively favored, thus distorting perception. Nevertheless, a "vented" ear plug can be used to tune the ear cavity to low frequencies, which are less damaging. Drummers should use musicians ear plugs, such as the ER-25. Guitarists and vocalists can use the less attenuating ER-15. Too much ear protection can result in overplaying and not enough protection can result in hearing loss.

Plexiglas baffles can be used to reduce the noise from other instruments. These are particularly relevant for drummer's high-hat cymbals. Drums and brass can be particularly a problem. Ear monitors are small in-the-ear devices that look like hearing aids that can be used to electronically protect hearing, while allowing the musicians to hear themselves. Acoustic monitors are stethoscope like devices that block sound from other in the group, but allow the instrumentalist to hear their own instrument.

Loudspeakers produce both high- and low-frequency sounds. High frequencies tend to emanate in almost a straight line, while low frequencies are present in nearly all directions. Thus, standing besides a high-frequency source may provide some protection. Humming just prior to, and through a loud noise such as a cymbal crash or rim shot may provide some protection. Small protective muscles in the ear contract naturally when we sing or hum, and thus humming may protect from other noises.

### Hearing Aids

Hearing aids can be set to limit noise and thus can be set up so that they do not contribute to additional hearing loss. For someone whose life is affected by noise induced hearing loss, a hearing aid may be a very reasonable thing to consider.

### How Might Noise Induced Hearing Loss Affect My Life?

Hearing loss can impact ones life in many ways. You may be less able to understand conversation or appreciate music. A ringing in the ears, called tinnitus, commonly occurs after noise exposure, and it often becomes permanent. Some people react to loud noise with anxiety and irritability, an increase in pulse rate and blood pressure, or an increase in stomach acid. Very loud noise can reduce efficiency in performing difficult tasks by diverting attention from the job.

## Research Studies on Noise Induced Hearing Loss

As of 8/2012, a visit to the National Library of Medicine's search engine, Pubmed, revealed 6260 research articles concerning noise induced hearing loss published since 1951. At the [American Hearing Research Foundation \(AHRF\)](#), we have funded basic research on noise induced hearing loss [in the past](#), and are interested in funding sound research in the future. [Learn more about donating to American Hearing Research Foundation \(AHRF\) to diagnose and treat noise induced hearing loss.](#)

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*The American Hearing Research Foundation is a non-profit foundation that funds research into hearing loss and balance disorders related to the inner ear, and to educating the public about these health issues. The AHRF is a proud member of Community Health Charities.*

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# **Exhibit**

**K**



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## Recreational Firearm Noise Exposure

Michael Stewart, PhD, CCC-A, Professor of Audiology, Central Michigan University

### Firearms Are Loud

Exposure to noise greater than 140 dB can permanently damage hearing. Almost all firearms create noise that is over the 140-dB level. A small .22-caliber rifle can produce noise around 140 dB, while big-bore rifles and pistols can produce sound over 175 dB. Firing guns in a place where sounds can reverberate, or bounce off walls and other structures, can make noises louder and increase the risk of hearing loss. Also, adding muzzle brakes or other modifications can make the firearm louder. People who do not wear hearing protection while shooting can suffer a severe hearing loss with as little as one shot, if the conditions are right. Audiologists see this often, especially during hunting season when hunters and bystanders may be exposed to rapid fire from big-bore rifles, shotguns, or pistols.

### AUDIOLOGY Information Series

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### Hearing Loss Due To Firearm Noise

People who use firearms are more likely to develop hearing loss than those who do not. Firearm users tend to have high-frequency permanent hearing loss, which means that they may have trouble hearing speech sounds like "s," "th," or "v" and other high-pitched sounds. The left ear (in right-handed shooters) often suffers more damage than the right ear because it is closer to, and directly in line with, the muzzle of the firearm. Also, the right ear is partially protected by head shadow. People with high-frequency hearing loss may say that they can hear what is said but that it is not clear, and they may accuse others of mumbling. They may not get their hearing tested because they don't think they have a problem. They may also have ringing in their ears, called tinnitus. The ringing, like the hearing loss, can be permanent.

### Protecting Your Hearing From Firearm Noise

The good news is that people can prevent hearing loss by using appropriate hearing protective devices (HPDs), such as earmuffs or earplugs. However, studies have shown that only about half of shooters wear hearing protection all the time when target practicing. Hunters are even less likely to wear hearing protection because they say they cannot hear approaching game or other noises. While some HPDs do limit what a person can hear, there are many products that allow shooters to hear softer sounds while still protecting them from loud sounds like firearm noise.

Two types of HPDs designed for shooting sports are electronic HPDs and nonlinear HPDs. Electronic HPDs make softer sounds louder but shut off when there is a loud noise. The device then becomes hearing protection. Electronic HPD styles include earmuffs, custom-made in-the-ear devices, one-size-fits-all plugs, and behind-the-ear devices.

Nonlinear HPDs are not electronic and are designed to allow soft and moderate sounds to pass through, while still reducing loud sounds. Nonlinear HPDs can be either earplugs that are inserted into the ear or custom-made earmolds. Nonlinear HPDs that have filters are the best choice. They are better than those that use mechanical valves. This is because the valves may not close fast enough to protect hearing from loud noise.

The U.S. military uses both electronic and nonlinear HPDs to protect soldiers' hearing during combat and weapons training. Electronic HPDs cost from less than \$100 for earmuffs to over \$1,000 for high-technology custom-made devices. Insert plug-type nonlinear HPDs cost around \$10-\$20, while custom-made nonlinear devices cost around \$100-\$150 per pair. Talk with your audiologist to choose the type of hearing protection that is right for you.

### Tips To Protect Your Hearing

- Always use some type of hearing protection any time you fire a gun.
- Always have disposable HPDs handy—make them part of your gear.
- Double-protect your ears, like putting muffs over plugs, when shooting big-bore firearms.
- Choose smaller caliber firearms for target practice and hunting.
- Choose single-shot firearms instead of lever action, pump, or semi-automatic guns.
- Avoid shooting in groups or in reverberant environments.
- Use electronic or nonlinear HPDs for hunting.

# **Exhibit**

**L**



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Scand J Work Environ Health. 1994 Apr;20(2):93-100.

## Hearing loss and handicap of professional soldiers exposed to gunfire noise.

Ylikoski ME, Ylikoski JS.

Lappeenranta Regional Institute of Occupational Health, Finland.

### Abstract

**OBJECTIVES:** The aim of the study was to investigate the prevalence and degree of hearing loss and other disabling consequences of noise among professional soldiers.

**METHODS:** A cross-sectional audiometric survey was combined with a questionnaire study on disabilities in a stratified random sample of 699 army officers (mean age 39.8 years) with long-term exposure to gunfire noise.

**RESULTS:** In 224 (32%) officers, the hearing threshold was found to be 20 dB or less at all of the frequencies measured (0.5, 1, 2, 3, 4, 6, and 8 kHz). Most of the 475 (68%) subjects with hearing loss belonged to older age categories, but more than one-fourth (26%) of the officers under 30 years of age had a hearing loss. Low frequencies were deteriorated in 110 (16%) subjects. The average of the hearing threshold levels of the frequencies 2 and 4 kHz exceeded 20 dB in 229 (33%) officers. For 347 (49.6%) subjects hearing was normal for their age. The degree of age-corrected hearing loss, especially at low frequencies, correlated highly significantly with exposure. Altogether 220 (32%) men experienced tinnitus, 118 (17%) of them continuously. Tinnitus was the most common among the men with severe or disabling hearing loss. Twenty-four (3.4%) of 699 officers needed sound amplification in noisy environments.

**CONCLUSIONS:** The prevalence of hearing loss in the Finnish Defence Forces seems to have decreased, but a fairly large number of younger men still suffer considerable hearing loss and disabling tinnitus, although the use of hearing protectors has substantially increased during the past 15 years. Most of the subjects experienced communication difficulties in noisy environments.

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# **Exhibit**

**32**

## VERIFIED STATEMENT OF ALAN J. GALARZA

My name is Alan J. Galarza. I am an employee of the Philadelphia District Attorney's Office. I work for the Dangerous Drug Offender Unit ("DDOU"). Since November 2010 I have been a County Detective for the Office.

I am also an employee of the U.S. Drug Enforcement Agency ("DEA"). Since February 2012, I have been a Task Force Officer ("TFO").

In those roles I am subject to a thorough background check. A clearance must be maintained in order to stay as an active member of these units.

I understand that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") is proposing to extend the requirement that individuals seeking to acquire firearms regulated under the National Firearms Act ("NFA") obtain the signature of a chief law enforcement officer ("CLEO"). Based on my experience, ATF should abolish the requirement entirely as CLEOs refuse to sign for law-abiding individuals who they *know* are not prohibited from owning firearms. Certainly, ATF should not extend the CLEO certification requirement to apply to individuals associated with LLCs, trusts, or other legal entities as that would entirely preclude citizens like me from acquiring firearms that both Congress and my State legislature have determined are appropriate for civilian ownership.

In September 2012, I purchased a short-barreled rifle ("SBR") for my personal and recreational use. SBRs are among the firearms on which I can receive training for use on the job. Completing the necessary paperwork to take possession of this firearm became a bigger problem than I anticipated.

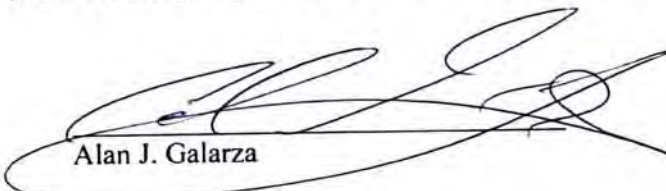
To complete the Form 4, I requested the signature of the Chief of Detectives in the very office where I work. He asked why I needed the SBR. I explained that it was for recreational

use and so that I would have it to train with DEA. He declined to sign, saying that if it was for recreational purposes he did not need to sign.

I also requested the signature of my Deputy District Attorney and also my DEA Assistant Special Agent-in-Charge ("ASAC") and they responded the signature should come from my Chief of Detectives.

Eventually, I formed a legal entity so that I could submit my Form 4. It was the only way I could avoid the arbitrary refusal to grant me a signature on my Form. If I cannot get a signature from people who know me, know my background, and work with me, I can only conclude that the average citizen has zero chance of getting a CLEO signature in the City of Philadelphia.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 2013.

  
Alan J. Galarza

# **Exhibit**

**33**

## GUN SHY: City published personal information of some gun owners



"Lawrence," holding the Ruger .380-caliber handgun for which he applied for a permit to carry, is irate that the city published his personal data on the new L&I website. (ALEJANDRO A. ALVAREZ / STAFF PHOTOGRAPHER)

BY WILLIAM BENDER, Daily News Staff Writer

POSTED: October 23, 2012

LAWRENCE ISN'T a violent felon or a stickup artist with a lengthy rap sheet. He's not a drug dealer holding down the corner with a Glock tucked in his waistband, or a straw purchaser selling guns to street thugs.

He's a Philadelphia church pastor and a robbery victim who routinely carries large sums of money and drives a nice car. So he applied for a gun permit last year for his personal protection.

"It's not that I'm thinking God does not walk with me when I go places," Lawrence said. "But anything could happen. We're living in some bad times."

The last thing he expected was for his request for a concealed-carry permit to make its way to the Drudge Report's 1.9 million daily visitors.

Police initially denied Lawrence's application - apparently due to a misdemeanor 40 years ago for which he served no jail time - but he was granted the gun permit in December after he obtained a letter from state police and appealed to the city's Department of Licenses and Inspections.

Then something strange happened: Over the summer, L&I posted on its website Lawrence's full name, address and the specific reasons he wanted the permit - along with an interactive map to help users find their way to his doorstep.

The information was yanked from L&I's site at the request of police, but Lawrence and other angry gun owners - some who say the disclosure may have jeopardized their jobs - want the city held accountable. Lawsuits are likely.

"A lot of pastors don't believe in this. They could say, 'Why would you want to carry a gun? You don't believe Jesus will protect you?'"

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Lawrence said. "I'm not the type of person to spread that to my congregation and all the pastors I know. That's my personal and private business and they exposed that. It was done in bad taste."

Lawrence, which is not his real name, is among what is believed to be hundreds of gun owners that L&I literally put on the map - a clickable icon of a revolver appeared over their homes - when the department revamped its website in August.

Police say the disclosure raised safety concerns, and gun-rights advocates say it might have been illegal because permit information in Pennsylvania is confidential under the Uniform Firearms Act. The *Daily News* is not republishing the names or addresses.

"We have a local government that's operating out of control," said Kim Stolfer, chairman of Firearm Owners Against Crime. "It's shameful."

In Philadelphia, people who have their gun-permit application denied or their existing permit revoked can file an appeal with L&I's Review Board, which is appointed by the mayor.

L&I spokeswoman Maura Kennedy said those appellants were included on the interactive map, along with playgrounds, building permits, polling places, code violations and other data to "help citizens hold us accountable" and discover what's happening around the city. People who obtained gun permits without appealing to L&I were not on the map.

"We touch a lot of people's lives in a lot of intimate ways," Kennedy said. "We really wanted to give citizens tools."

But the data dump, even if well-intentioned, raises the question: Can there be *too much* government transparency?

Lawrence and other gun owners had their information published around the world after a *Philadelphia* magazine blog, The Philly Post, reported on L&I's new web app and the high-traffic Drudge Report linked to the story. The Philly Post redacted the names and addresses after L&I removed them from its site.

Police asked L&I to pull the information down because details about why a person wants to carry a gun, combined with his name and location, could make him a target of any criminal with Internet access, said Lt. Ray Evers, a police spokesman.

"We were erring on the side of caution to protect the confidentiality of the gun-permit appellants," Evers said. "We believe the information that was out there and the narrative - the reasons for having a gun and for appealing - should not be public information. There are some dumb criminals out there and there are some smart ones."

Jon Mirowitz, a Philadelphia attorney who specializes in firearms cases, is planning to sue the city on behalf of dozens of people who were listed on L&I's gun map.

"Why should someone have to stand up in front of the world and say, 'I'm a gun owner,' or 'I want a carry permit?'" Mirowitz asked. "It has a chilling effect."

Pennsylvania is among 29 states with laws to protect the confidentiality of gun-permit holders, according to the National Rifle Association, which supports those laws.

"When you go and put their private, personal information out there and make it publicly accessible, you're potentially endangering them," said NRA spokeswoman Jacqueline Otto.

But Mayor Nutter's spokesman, Mark McDonald, said the L&I information is public record because permit holders or applicants waive their right to confidentiality when they appeal a permit denial or revocation.

"It becomes a public thing at that point," McDonald said.

Some of the disseminated cases involved appellants who can't get a permit for legitimate reasons, such as a violent crime or a restraining order. But Mirowitz said many other appealed cases are resolved prior to the L&I hearing - including those in which the permit shouldn't have been revoked or denied in the first place.

"I've had times of mistaken identity, times when the victim of a crime in the database is listed as a defendant, times when cases are expunged and for some reason pop up again. All sorts of erroneous reasons" to deny a permit, said Mirowitz. He sat on a 1995 committee chaired by then-state Sen. Vince Furno that added the confidentiality language into the state's permit-application process.

Lawrence still doesn't understand why the city published his personal information, but he wants answers.

"It was totally an infringement and I'm still upset," he said. "I'm appalled. It's a disgrace."

Contact William Bender at [benderw@phillynews.com](mailto:benderw@phillynews.com) or 215-854-5255. Follow him on Twitter @wbender99

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# **Exhibit**

**34**

**The New York Times**

January 18, 2013

# Newspaper Takes Down Map of Gun Permit Holders

By J. DAVID GOODMAN

A newspaper has removed an interactive online map of handgun permit holders in two New York counties that drew nationwide anger and prompted threats against its staff, the publisher said Friday.

The decision by the paper, The Journal News, to take the information off its Web site came in response to the passage of sweeping gun legislation in Albany this week, the publisher, Janet Hasson, said in a statement. "While the new law does not require us to remove the data, we believe that doing so complies with its spirit," she said.

Legislators pushed to add the measure to the new law in response to the paper's publication after an outcry from gun-rights advocates and some law enforcement groups.

"From the beginning it was irresponsible conduct from The Journal News," said Roy T. Richter, the head of the Captains Endowment Association, which represents the upper echelons of the New York Police Department. He said thousands of retired officers live in the two counties — Westchester and Rockland, just north of the city — and some objected to seeing their personal information published on the newspaper's Web site.

"The problem is," he said, "once you put things on the Internet, they're stuck out there."

The newspaper, which is based in White Plains, used public records to create the map, a clickable collection of the names and addresses of thousands of permit holders in the two counties. Since it first appeared in late December, the online map had been viewed nearly 1.2 million times, the paper said.

The paper received a flood of angry phone calls and letters, and opponents posted the home address of editors and other staff members online. The reaction prompted the paper to hire armed security for its headquarters and for a bureau in Rockland.

The new gun law, which Gov. Andrew M. Cuomo signed on Tuesday, includes a provision prohibiting the release of information on gun permit holders for 120 days, and it also allows

those with permits already in the statewide database to request the removal of their names and addresses.

State Senator Greg Ball, a Putnam County Republican and a sponsor of the provision, applauded the map's removal. "I am proud to have passed legislation keeping The Journal News from doing this ever again," he said.

In a note to readers published on Friday, Ms. Hasson said the decision to remove the interactive map, which was posted in response to the mass shooting at an elementary school in Newtown, Conn., was neither a concession to critics nor a response to threats. "We know our business is a controversial one, and we do not cower," she said.

She said the paper would continue to pursue its request for permit records from Putnam County. Local officials have so far declined to release them.

Ms. Hasson said a snapshot of the map — with its dots visible but personal information absent — would also remain on the site, "to remind the community that guns are a fact of life we should never forget."

# **Exhibit**

**35**

# Philadelphia

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NAVIGATION ▼

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## These Philadelphians Want Gun Permits

"I have never been in jail for more than 2-3 days."

BY VICTOR FIORILLO | AUGUST 15, 2012 AT 9:07 AM

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Last weekend, Philadelphia's Department of Licenses and Inspections, an agency not usually known for its transparency and user-friendliness, unveiled **a new web app** that displays licensing, permit and violation information on a (relatively) easy-to-use interactive map. One of the more interesting aspects to this new data transparency is an array of gun permit appeals, essentially a **list of Philadelphians who have been denied a gun permit or had their permit revoked and who have appealed to have the decision overturned.**

The appeal information contained therein includes the appellant name, street address, and grounds for appeal, and I can only imagine that the National Rifle Association will have a few things to say about the city's decision to publish the information, as the NRA typically doesn't like lists of people who want to own guns.

Here, a sampling of the information found via the new app.

UPDATE [8/15/12, 9:30 a.m.]: It appears that the city has removed the gun permit appeal information from its site, and I have contacted an L&I spokesperson for an explanation, which I will report when it is provided.

UPDATE [8/15/12, 1:30 p.m.]: L&I spokesperson Maura Kennedy confirms that the information was removed from the city's website at the request of the police department. The police referred me to the mayor's office, and the mayor's office says it is reviewing the matter.

UPDATE [8/15/12, 4:40 p.m.]: Mark McDonald from the mayor's press office called with the following explanation: "The legal department has determined that this is public information. Its publication is legal. An individual who is denied a permit and files an appeal, that person has waived their right to confidentiality. All that said, within the government, there is a concern about the propriety of publishing the information, and so we're looking at this again. On the one hand, city government wants to be transparent and believes in the concept of open data. Access to information makes for strong citizenry and effective government. But on the other hand, there are public safety concerns with regard to this information. Perhaps some of it should be redacted, although we haven't made a conclusion that way. We'll work toward a decision to whether this stuff gets put back up."

UPDATE [8/15/12, 5:45 p.m.]: In light of concerns over public safety and in light of the fact that the city has removed Internet access to the information pending a policy review, we have redacted all names and addresses from this article.

**Grounds:** I forgot about a prior arrest which occurred when I was a juvenile. I also did not know that I was permitted to answer any questions regarding expungement.

**Grounds:** I was wrongly accused of being a bartender. I was not arrested or charged with any crime.

**Grounds:** I am pastor of a church; I carry large sums of money to bank at least 2-3 times a week. As a businessman, I was robbed once. I could very well be a target for the automobile I drive and my appearance.

**Grounds:** I answered all questions on the gun permit application truthfully. The previous referred to in the denial letter occurred more than thirty years ago.

**Grounds:** **18 PA. Cons. Stat 9124** (6)(1) prohibits consideration of information which was used as the sole grounds for denying my license.

**Grounds:** Your reasoning for disapproving me is speculative and illegal. I am a productive member of society with a family.

**Grounds:** I failed to mention a citation that occurred in 1996 that I forgot about.

**Grounds:** I answered truthfully. I didn't remember the two previous arrests. They were ten years ago.

**Grounds:** I am appealing this because no charges were filed against me. I am a model citizen and I have never been in trouble.

**Grounds:** I failed to give truthful answer regarding previous arrest. This was an honest mistake. I did not purposely leave this information out.

**Grounds:** I gave all truthful answers to the best of my knowledge. I've been the best citizen of Philadelphia since my last arrest. I was never a dangerous person.

**Grounds:** I have never been convicted of a crime. I have never been in jail for more than 2-3 days. This is a mistake. I am handicapped and I should have the right to defend myself.

**Grounds:** I don't think it was right for them to take my license. I was the victim. They came into my home and I shot a warning shot.

**Grounds:** I need my license reinstated for work.

**Grounds:** Arrest cited was over 18 years ago. Did not realize I had a record until I researched it myself. I was under the notion charge was no longer an issue. I am a CPA, licensed with PA.

**Grounds:** I, by mistake, checked off that I was never arrested when I indeed had been.

**Grounds:** As a business owner, I feel it is necessary for security. There are many Philadelphia residents who don't have as much of a need to carry but are able to obtain it.



**Grounds:** I answered the questions to the best of my ability. I did not recall the charges against me in 1987.

**Grounds:** After completing program, record was supposed to be expunged. I was a teenager.

**Grounds:** The reason why my gun was left in my car was due to the fact that my brother asked me to watch my nephew for a few minutes and I was on my way out. My nephew likes to grab on me and hang on me and I was afraid he would grab my weapon. I never leave my weapon in my vehicle and would never do it again.

**Grounds:** The use of my medication has not affected my ability to function normally.

**Grounds:** PFA [protection from abuse order] was vacated on 2-12-2012.

**Grounds:** I disagree that I am an individual who would be likely to act in a manner dangerous to public safety. I am a family man and a father. I think the reason I was denied was unjust and unfair; I forgot the date of a time I was arrested.

**Grounds:** I did not know that I had a record for an arrest because I was told at the time it would be expunged. The second time I was released on ROR so I assumed that would also be off my record. I would like to be approved for my permit to carry only to protect myself and family.

**Grounds:** Reason for denial is false and misleading. My character is of the highest standard and to be denied my rights as a citizen of the U.S.A. because of false accusations is not a sign of justice, which is one of the fundamental principles laid down by our forefathers.

**Grounds:** There was a misunderstanding of the two questions I answered "no". My one prior was 1986 and the other was 1992. There was no intent to give the wrong information to the police. I have not been in trouble with the police for over 20 years. Please reevaluate my case.

**Grounds:** I didn't mention the 1985 arrest because I didn't remember it until it was brought to my attention. There are a lot of things in my past I don't remember since my brain surgery three years ago. That's why I was taking up this hobby, because I am no longer able to do my previous hobbies.

**Grounds:** The officer took my weapon and permit and stated "only drug dealers around that neighborhood carry guns", and "we don't need guns in this area." The officer also stated he will make sure i don't get either one back ever again.

**Grounds:** I dont agree.

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# **Exhibit**

**36**

**lehighvalleylive.com**

## **Former Northampton County sheriff's deputy cleared for first-time offenders program**

**Tom Shortell | The Express-Times** By **Tom Shortell | The Express-Times**

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on August 14, 2013 at 3:04 PM, updated August 14, 2013 at 6:51 PM

Northampton County District Attorney **John Morganelli** has cleared the way for the former president of the Northampton County sheriff's deputies union to enter a first-time offenders program.

Morganelli said he would not deny **Darin Steward's** application to enter the accelerated rehabilitative disposition program, which wipes a first-time nonviolent defendant's criminal record clean if successfully completed.

**Steward was accused of** leaking **Tricia Mezzacappa's** license to carry a firearm application to **West Easton** Council President **Kelly Gross**, whom Mezzacappa has identified in court documents as her rival and personal enemy. The firearm application somehow made its way to Allentown lawyer Richard Orloski, who reported the matter to authorities.

Under the law, elected and law enforcement officials cannot be held to a higher standard for ARD applications, Morganelli said. Given that and the fact Steward immediately cooperated with the investigation and willingly resigned from his position, Morganelli said clearing him for the program was the right choice.

"We punished the appropriate person. That doesn't mean he is going to jail," Morganelli said.

Victor Scomillio, Steward's attorney, said he and Steward were heartened to hear Morganelli will not block the ARD application. Steward, who worked as a part-time police officer before the charges, hopes to continue a career in law enforcement, he said.

"We're very happy with Mr. Morganelli's decision," Scomillio said.

Steward still needs a judge's approval for entry into the ARD program. However, it is rare for a judge to deny entry after the district attorney has signed off on it.

The leaked license to carry a firearm application revealed the sheriff's department had **not been following up on listed character references on applications**. Sheriff Randall Miller said his staff was inundated by a record number of applications, so he allowed staff to skip the character references, which are not required by law.

Orloski and County Executive John Stoffa were listed on Mezzacappa's application, and both men said they would

not have recommended Mezzacappa be allowed to carry a concealed weapon. An anonymous person whose situation closely mirrors Mezzacappa's has since sued the department for revoking her license to carry.

Mezzacappa also filed a motion in Northampton County Court in an effort to force Morganelli to press charges against Gross, whom she believes leaked the confidential document to Orloski. President Judge Stephen Baratta **denied the motion**, but Mezzacappa has vowed to appeal.

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# **Exhibit**

**37**

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U.S. NEWS | Updated October 3, 2013 7:36 p.m. ET

# Silencers Loophole Targeted for Closure

## ATF Seeks Background Checks for All Members of Weapon-Buying Trusts

Article

Comments (105)

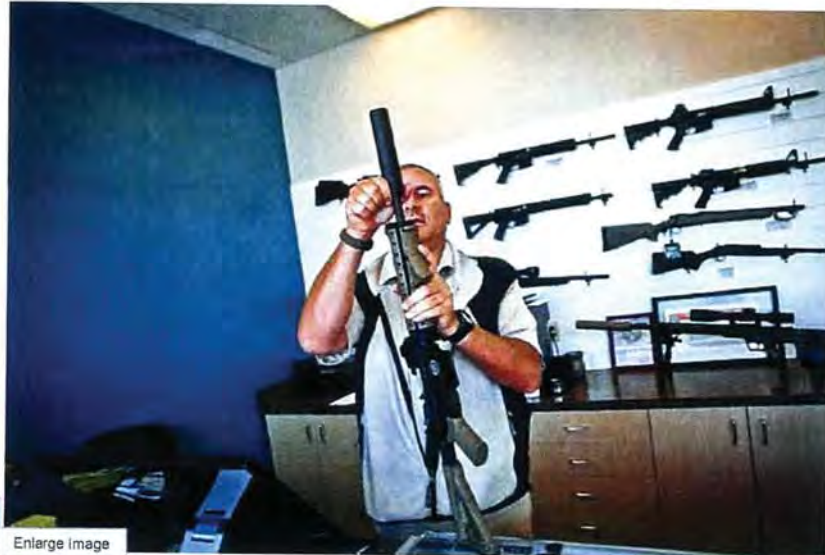
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By **JOE PALAZZOLO** [CONNECT](#)



Erin Tneb for The Wall Street Journal

Paul Bonelli, an employee at Silencer Shop in Austin, Texas, demonstrates a silencer assembly. Proprietor Dave Matheny says a proposal that could curb silencer sales would 'destroy the market.'

Dave Matheny started selling gun silencers about three years ago as a hobby and took in about \$19,000 in his first month. He now sells close to \$1 million of the sound-suppressing devices each month from his Austin, Texas-based Silencer Shop.


But a recently proposed federal regulation that would close a loophole in current law could stifle sales of silencers—one of the fastest-growing segments of the gun industry—and, thereby, Mr. Matheny's business.



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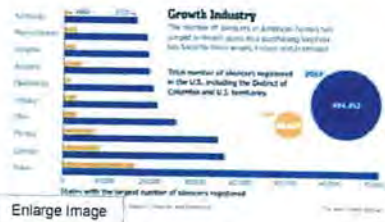
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The loophole involves a legal construct known as a trust, which has allowed many gun buyers to sidestep a requirement of the National Firearms Act of 1934 that local sheriffs or chiefs of police approve purchases of silencers and highly regulated firearms, such as machine guns. The trusts used to purchase many of the silencers range in sophistication and scale, but generally they allow a group of people to purchase weapons or accessories and transfer them among themselves.



Under the new rule, proposed Sept. 9 by the Bureau of Alcohol, Tobacco, Firearms and Explosives, people linked to the trusts also would have to obtain a sign-off from local law enforcement and undergo criminal background checks. The proposal is open to public comment until

December.

The proposed rule is galvanizing gun-control supporters, who say silencers inherently make a weapon more dangerous, and gun-rights advocates, who say the popular portrayal of silencers as the tools of criminals is off base and that silencers protect owners' hearing.

Mr. Matheny, who said about 80% of his clients use gun trusts to buy their silencers, is worried that the sign-off requirement would crush sales of silencers, which range in price from about \$200 to more than \$2,000.

"It's going to absolutely destroy this market," said Mr. Matheny, who employs eight people at his shop. "If sheriffs won't sign, they've essentially made them illegal."

The number of such trusts jumped from 840 in 2000 to 40,700 in 2012, according to the ATF, as the trust loophole became more widely known and promoted. As of April 2013, there were 494,452 silencers in American homes, according to the ATF, a figure that is up 73% since 2011.

The ATF's move comes as part of President [Barack Obama's](#) push to expand federal gun regulations through legislative and executive means after 20 children and six adults were shot to death at an elementary school in Newtown, Conn., last year. The rule doesn't need congressional approval.

While federal law permits ownership of silencers, they are banned in 11 states, according to the American Silencer Association, a group of dealers and manufacturers that has focused its efforts in recent years on improving the device's image in popular culture. The group promotes silencers as a guard against hearing loss and an aid for young and inexperienced shooters who are jarred by the sound of gunfire.

The efforts of the ASA and the National Rifle Association, which endorsed the use of silencers to prevent hearing loss in 2011, have led to a number of state legislatures easing restrictions on the devices. For instance, North Carolina and North Dakota approved silencers for hunting this year. Arizona, Texas and Oklahoma passed silencer-related bills or regulations in 2012.

"Requiring background checks for corporations and trusts does not keep firearms out of the hands of criminals," Andrew Arulanandam, an NRA spokesman, said of

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the proposed regulation. ASA President Knox Williams declined to comment.

Gun-control advocates say the proposed change would close a dangerous loophole that has been exploited thousands of times in recent years.

Ladd Everitt, spokesman for the Coalition to Stop Gun Violence, said guns' loud sound serves as a warning to stay away, a function undermined by silencers. "You want to alert someone to your presence when you are firing a weapon," he said.

The ATF's proposal says "responsible persons" of a trust seeking to purchase a silencer or other weapons covered by the National Firearms Act would have to submit fingerprints and a photo to the federal government, pass a criminal-background check and get local law-enforcement approval. Even absent background checks and the law-enforcement sign-off, dealers say it takes the ATF from two to nine months to process the paperwork.

Gun dealers said signatures are hard to get in many jurisdictions. The ATF acknowledged as much, disclosing in its proposal that several sheriffs and police chiefs had privately expressed their discomfort at signing off on applications for items regulated under the National Firearms Act. A spokeswoman for the ATF declined to comment.

Sheriff David B. Shoar in St. Johns County, Fla., said last year that he would no longer sign off on the paperwork for those seeking weapons covered by the National Firearms Act, including silencers. Commander Chuck Mulligan, a spokesman for the office, said the sheriff's decision was driven by a lack of resources to conduct the necessary checks.

Federal courts have upheld the sign-off requirement, most recently in 2002. The U.S. Court of Appeals for the D.C. Circuit rejected complaints that the rule allowed law-enforcement officials in Virginia and Alaska to arbitrarily wall off access to weapons and accessories that are otherwise legal.

Mr. Matheny said silencers don't live up to their name or their portrayal in movies as reducing the noise of a gunshot to a deadly whisper. An AR-15, the most popular semiautomatic rifle by sales, fitted with a top-of-the-line silencer still registers 129 decibels when it is fired, he said. According to the American Speech-Language-Hearing Association, that's about as loud as a jackhammer.

Attached to some smaller-bore weapons, however, a silencer comes closer to its stereotype. A silenced .22-caliber gun loaded with special ammunition makes a noise that is "quieter than an air gun," said Mark Attanasio, owner of Virginia-based gun store Immortal Arms.

Silencers are good for taking care of pests without scaring neighbors or livestock, or damaging hearing, he said. "If you get around a lot of old hunters, they are all deaf," said Mr. Attanasio.

Write to Joe Palazzolo at [joe.palazzolo@wsj.com](mailto:joe.palazzolo@wsj.com)

*A version of this article appeared October 4, 2013, on page A3 in the U.S. edition of The Wall Street Journal, with the headline: Rule Seeks to Close Silencer Loophole.*

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# **Exhibit**

**38**

**VERIFIED STATEMENT OF THOMAS F. BRADDOCK, JR.**

My name is Thomas F. Braddock, Jr. I previously submitted my own comment in this rulemaking proceeding which was assigned docket number ATF-2013-0001-1087. I am providing this statement to address subsequent developments and to provide additional detail.

After almost twenty-seven years, I retired from the Pennsylvania National Guard as a Major. I also worked thirteen years as a federal law enforcement employee in federal correctional institutions. I have had a secret-level security clearance for twenty-five years and the Federal Bureau of Prisons did a background check on me every five years. I am certainly not a criminal and I am not prohibited from owning firearms under either federal or Pennsylvania law.

I have lived in the same rural community since 1992. We have no local law enforcement officers and response times from the Pennsylvania State Police can take an hour to ninety minutes. In light of those circumstances, I have concerns about self- and home-defense.

I am familiar with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Notice of Proposed Rulemaking ("NPR") published on September 9, 2013, in volume 78 of the *Federal Register* at pages 55014 through 55029. I purchase and collect firearms including certain firearms and regulated by ATF under the National Firearms Act ("NFA")

The comment I submitted previously documented the problems I encountered when I sought to obtain the required signature from a Chief Law Enforcement Officer ("CLEO") on my Form 4, starting with my April 19, 2013 encounter with Sheriff Jack Robshaw. Since the events described in my comment, I have encountered yet additional refusals from CLEOs to sign my forms for ATF despite the absence of any disqualifying factor in my background.

On Monday, October 28, 2013, I requested the signature of the new, interim sheriff for Luzerne County, Brian Szumski. I was again denied. And, once again, local media reported on the event, with Jennifer Learn-Andes reporting for the *Times-Leader* that Sheriff Szumski stated that he "agrees with Robshaw's philosophical stance against such permits." As demonstrated in my prior comment, that philosophy is that no civilian should possess NFA firearms despite the decisions of Congress and the Pennsylvania state legislature that such items are appropriate for private ownership.


After Sheriff Szumski refused to sign, I had my attorney determine whether he could obtain certification from some other individual who would qualify as a CLEO. By e-mail dated November 18, the Pennsylvania State Police refused to sign. *See* Exhibit A. By letter dated November 19, the judges of the Luzerne County Court of Common Pleas refused to sign. *See* Exhibit B. Neither communication identified any basis that would indicate an individualized determination; both seemed to reflect a policy to sign no Form 1s or Form 4s for any applicant. Letters were also sent to the District Attorney for Luzerne County and the State Attorney General, although neither of them have responded.

In addition to requesting a signature for my application, my attorney also asked each CLEO whether the policy of refusing to sign would be likely to change if the wording of the certification reflected ATF's current proposal. No CLEO indicated that the change ATF proposes would clear the way to obtaining a certification in the future. The State Police stated only that it was "uncertain" whether any change in language would prompt a revision of the policy. *See* Exhibit A. The response from the Court of Common Pleas made clear that no change in the working of the certification would make any difference. *See* Exhibit B.

The response from the Court of Common Pleas also evidenced another problem with ATF's regulations. ATF seems to think that if it names some State or local official as acceptable for purposes of supplying a CLEO certification that the official is a legally available alternative even if, as a matter of fact, the officials refuse to sign any forms. But the response from the Court of Common Pleas shows that some officials ATF designates as CLEOs are not even legally available. See Exhibit B. ATF shows no sensitivity to State law that preempts local officials from establishing local policies contrary to that enacted by the State legislature, as detailed in my prior comment. And ATF further shows complete disregard for State statutes and rules that confine State and local officials to jurisdiction over limited subject matter.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 4<sup>th</sup>, 2013.



Thomas F. Braddock, Jr.

# **Exhibit**

**A**

31821  
CA

Josh

FICG vs ATF

"Smith, Carlton M" <carltsmith@pa.gov>  
To: Joshua Prince  
Thomas Braddock

November 18, 2013 11:08 AM

---

Good morning, On behalf of the Commissioner, I am responding to your letter dated November 5, 2013, requesting the Commissioner's signature for Thomas Braddock's ATF Form. At this time, the Commissioner has elected to refrain from certifying your client's ATF Form. I am uncertain as to whether a change in the language of the form will affect his evaluation of future applications.

Carlton M. Smith | Assistant Counsel for Pa. State Police  
Governor's Office of General Counsel  
1800 Elmerton Avenue | Hbg PA 17110  
Phone: 717 346-0339 | Fax: 717 772-2883  
[carltsmith@pa.gov](mailto:carltsmith@pa.gov)

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# **Exhibit**

**B**

Phone (570)-825-1596  
(570)-825-1593  
(570)-825-1594

31821  
NOV 22 2013  
CEB



Fax (570) 825-6242  
TDD (570) 825-1860

OFFICE OF COURT ADMINISTRATION

COURT OF COMMON PLEAS

LUZERNE COUNTY COURTHOUSE  
200 NORTH RIVER STREET  
WILKES-BARRE, PENNSYLVANIA 18711

November 19, 2013

Joshua Prince, Esq.  
Prince Law Offices, P.C.  
646 Lenape Road  
Bechtelsville, PA 19505-9135

Re: Chief Law Enforcement Signature for ATF Form 1

Dear Mr. Prince:

This is in response to your recent letter in regard to the above-captioned topic, addressed to several judges who serve the Luzerne County Court of Common Pleas.

Kindly be advised that there will be no action taken in response to your letter. The protocol of the court is to act only upon matters properly brought before it in accordance with the Pennsylvania Rules of Procedure and/or express statutory authority allowing it to act. Your correspondence fails to meet either criterion.

Yours truly,

A handwritten signature in blue ink that reads "Michael A. Shucosky".

MICHAEL A. SHUCOSKY, ESQ.  
District Court Administrator  
11<sup>th</sup> Judicial District of PA

cc: Judges, Luzerne County Court of Common Pleas



# **Exhibit**

**39**



**EARL R. BUTLER, SHERIFF  
CUMBERLAND COUNTY SHERIFF'S OFFICE**



*An Internationally Accredited Law Enforcement Agency*

November 7, 2013

Michael E. Hyers, Msgt., USAF (Ret)  
6297 Lakeview Drive  
Fayetteville NC 28304

**Re:** Policy Regarding BATFE Form 4

Dear Mr. Hyers:

Sheriff Butler reviewed your letter and transmitted it to me to provide a response. Accordingly, I am writing to you to inform you of the Sheriff's position with regard to suppressors.

Before setting out his position and our reasoning regarding the matter, I thank you on behalf of myself, Sheriff Butler, and the members of the Cumberland County Sheriff's Office for your service to our nation. We are, indeed, grateful.

As a matter of policy, based on criminal investigative and intelligence information, Sheriff Butler essentially does not execute the ATF-F-5320.4 (Form 4) either for citizens who make application for it or even for his own deputies. While I am not at liberty to reveal the substance of the investigative and intelligence information, there are fundamental and compelling reasons for Sheriff Butler's policy.

Neither Sheriff Butler nor I can predict whether those circumstances will change, but he would certainly welcome your inquiries at any time.

Additionally, Sheriff Butler asked that I convey his thanks to you for your efforts and vigilance in attempting to aid us in minimizing criminal activity. The Sheriff and all of the personnel of this office appreciate the commitment of good citizens in aid of the fight against crime in Cumberland County.

If you have further questions or wish to discuss anything about this response, I would be happy to talk with you about any of these matters.

Thank you.

Ronnie M. Mitchell  
Legal Counsel, Cumberland County Sheriff's Office

# **Exhibit**

**40**

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

\_\_\_\_\_)  
Machine Guns, Destructive Devices )  
and Certain Other Firearms; )  
Background Checks for Responsible )  
Persons of a Corporation, Trust or )  
Other Legal Entity With Respect to )  
Making or Transferring a Firearm )  
\_\_\_\_\_)

Docket No. ATF 41P  
RIN 1140-AA43

**DECLARATION OF ERNEST J. MYERS  
WITH RESPECT TO INQUIRY TO  
PAUL ROONEY, CHIEF OF POLICE, ORLANDO POLICE DEPARTMENT  
REGARDING CHIEF LAW ENFORCEMENT OFFICER CERTIFICATION  
ON TRANSACTIONS REGULATED BY THE NATIONAL FIREARMS ACT**

ERNEST J. MYERS declares:

1. I am an attorney licensed to practice law in the State of Florida, and have been practicing law for more than 21 years.
2. As part of my practice, I prepare trusts which are used by my clients to acquire, control, and responsibly manage items regulated by the National Firearms Act.
3. My law practice is located in Orlando, Florida.
4. I am scheduled to appear as a guest on a local radio program on October 27, 2013.

One of the topics that I have been asked to be prepared to be interviewed about will be the proposed changes to the ATF rules regarding the National Firearms Act, published as Docket No. ATF 41P.

5. Currently, the Chief of Police of the Orlando Police Department, Paul Rooney, refuses to sign the Chief Law Enforcement Officer Certification on ATF Forms 1, 4, and 5.

6. In preparation for my upcoming radio interview, I sent an email to Chief Rooney asking whether he would change his policy and begin signing the CLEO Certifications if ATF made the changes to the certification that are proposed in Docket ATF 41P.

7. Chief Rooney, through a subordinate, sent me a response which stated:

Unfortunately, we do not believe the proposed language amendment will change our position with respect to whether the Orlando Police Chief should execute these forms for firearms transfers. It remains our position that the local law enforcement chief executive officer should not be involved in, or liable for, individual firearms transfers.

8. A true and correct copy of the email inquiry I sent on October 22, 2013 at 12:22 p.m. to the general email address for the Orlando Police Department (opd@cityoforlando.net) is attached hereto as Exhibit "A".

9. A true and correct copy of the email I received on October 22, 2013 at 12:33 p.m. from the Orlando Police Department indicating that my email inquiry would be forwarded to the appropriate authority for response is attached hereto as Exhibit "B".

10. A true and correct copy of the email I received on October 22, 2013 at 2:25 p.m. from Lee Ann Freeman, the Police Legal Advisor for the Orlando Police Department sent on behalf of Orlando Police Chief Rooney indicating that the Orlando Police Chief will continue to refuse to sign CLEO Certifications even if the language of the certification is changed as proposed by Docket ATF 41P is attached hereto as Exhibit "C".

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of October, 2013, at Orlando, Orange County, Florida.

  
ERNEST J. MYERS

## Ernest Myers

**From:** Ernest Myers  
**Sent:** Tuesday, October 22, 2013 12:22 PM  
**To:** 'opd@cityoforlando.net'  
**Subject:** Approval of ATF Form 4 following ATF's proposed change in procedure

Dear Chief Rooney:

It is my understanding that neither you nor anyone with your office currently will sign an ATF Form 4 as the Chief Law Enforcement Officer of the City of Orlando to authorize the transfer of an item regulated by the National Firearms Act. The ATF has proposed a change to its procedures (ATF Docket 41P) whereby the Chief Law Enforcement Officer certification on the Form 4 will be reworded. ATF is of the opinion that if this wording change is adopted, then Chief Law Enforcement Officers, such as yourself, who have previously refused to sign the Form 4, will now agree to sign the Form 4.

Specifically, the Form 4 now requires the CLEO to certify that he or she has no information indicating that the transferee will use the firearm described on the Form 4 for other than lawful purposes. The proposed change would eliminate this language and require the CLEO to certify that he or she is satisfied that the fingerprints and photograph accompanying the form are those of the responsible person and that the certifying official has no information indicating that receipt or possession of the firearm by the transferee would be in violation of state or local law.

If this change is made, will you be willing to sign the Chief Law Enforcement Officer certification section of an ATF Form 4? I am being interviewed on this topic on Sunday, and I would greatly appreciate a response before then.

Thank you for your consideration of this issue. If I can provide any additional information, please call me.

Ernest J. Myers, Esq.  
Marcus & Myers, P.A.  
1515 Park Center Drive, Suite 2G  
Orlando, FL 32835  
Telephone: 407-447-2550, x304  
Facsimile: 407-447-2551  
[emyers@marcusmyerslaw.com](mailto:emyers@marcusmyerslaw.com)

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## Ernest Myers

**From:** barb.opd.jones@cityoforlando.net on behalf of Orlando Police Department [opd@cityoforlando.net]  
**Sent:** Tuesday, October 22, 2013 12:33 PM  
**To:** Ernest Myers  
**Subject:** Re: Approval of ATF Form 4 following ATF's proposed change in procedure

I will forward this email to the appropriate authority for a response.  
Best regards.

On Tue, Oct 22, 2013 at 12:22 PM, Ernest Myers <[EMyers@marcusmyerslaw.com](mailto:EMyers@marcusmyerslaw.com)> wrote:  
Dear Chief Rooney:

It is my understanding that neither you nor anyone with your office currently will sign an ATF Form 4 as the Chief Law Enforcement Officer of the City of Orlando to authorize the transfer of an item regulated by the National Firearms Act. The ATF has proposed a change to its procedures (ATF Docket 41P) whereby the Chief Law Enforcement Officer certification on the Form 4 will be reworded. ATF is of the opinion that if this wording change is adopted, then Chief Law Enforcement Officers, such as yourself, who have previously refused to sign the Form 4, will now agree to sign the Form 4.

Specifically, the Form 4 now requires the CLEO to certify that he or she has no information indicating that the transferee will use the firearm described on the Form 4 for other than lawful purposes. The proposed change would eliminate this language and require the CLEO to certify that he or she is satisfied that the fingerprints and photograph accompanying the form are those of the responsible person and that the certifying official has no information indicating that receipt or possession of the firearm by the transferee would be in violation of state or local law.

If this change is made, will you be willing to sign the Chief Law Enforcement Officer certification section of an ATF Form 4? I am being interviewed on this topic on Sunday, and I would greatly appreciate a response before then.

Thank you for your consideration of this issue. If I can provide any additional information, please call me.

Ernest J. Myers, Esq.  
Marcus & Myers, P.A.  
1515 Park Center Drive, Suite 2G  
Orlando, FL 32835  
Telephone: 407-447-2550, x304  
Facsimile: 407-447-2551  
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Florida has a very broad public records law. As a result, any written communication created or received by the City of Orlando officials and employees will be made available to the public and media, upon request, unless otherwise exempt. Under Florida law, email addresses are public records.

If you do not want your email address released in response to a public records request, do not send electronic mail to this office. Instead, contact our office by phone or in writing.



## Ernest Myers

**From:** Lee Ann Freeman [leeann.freeman@cityoforlando.net]  
**Sent:** Tuesday, October 22, 2013 2:25 PM  
**To:** Ernest Myers; Paul Rooney  
**Cc:** Natasha Williams; Jody Litchford; Christine Gigicos  
**Subject:** ATF Form 4 approvals by Chief law enforcement officer

Dear Mr. Myers:

Orlando Police Chief Rooney is out of town on agency business; he asked me to respond on his behalf to your inquiry about proposed changes to the ATF Form 4.

Your communicate suggests that ATF believes the language change will make local chiefs and sheriffs more inclined to sign the Form 4.

The current language requires the chief law enforcement officer to certify that he or she has no information indicating that the person to whom the firearm will be transferred will use the firearm for anything other than a lawful purpose.

The proposed change would have the chief law enforcement officer instead certify that:

- (1) the prints and photo provided with the form belong to the person responsible; and
- (2) the chief law enforcement officer has no information to indicate that receipt or possession of the subject firearm violates state or local law.

Unfortunately, we do not believe the proposed language amendment will change our position with respect to whether the Orlando Police Chief should execute these forms for firearms transfers. It remains our position that the local law enforcement chief executive officer should not be involved in, or liable for, individual firearms transfers.

Sincerely,

--

Lee Ann Freeman  
Police Legal Advisor  
Orlando Police Department  
P.O. Box 913  
Orlando, Florida 32802-0913  
407.246.2356  
407.246.3889 Telefax  
[leeann.freeman@cityoforlando.net](mailto:leeann.freeman@cityoforlando.net)





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# **Exhibit**

**41**



NSSF is the trade association for America's firearms industry.  
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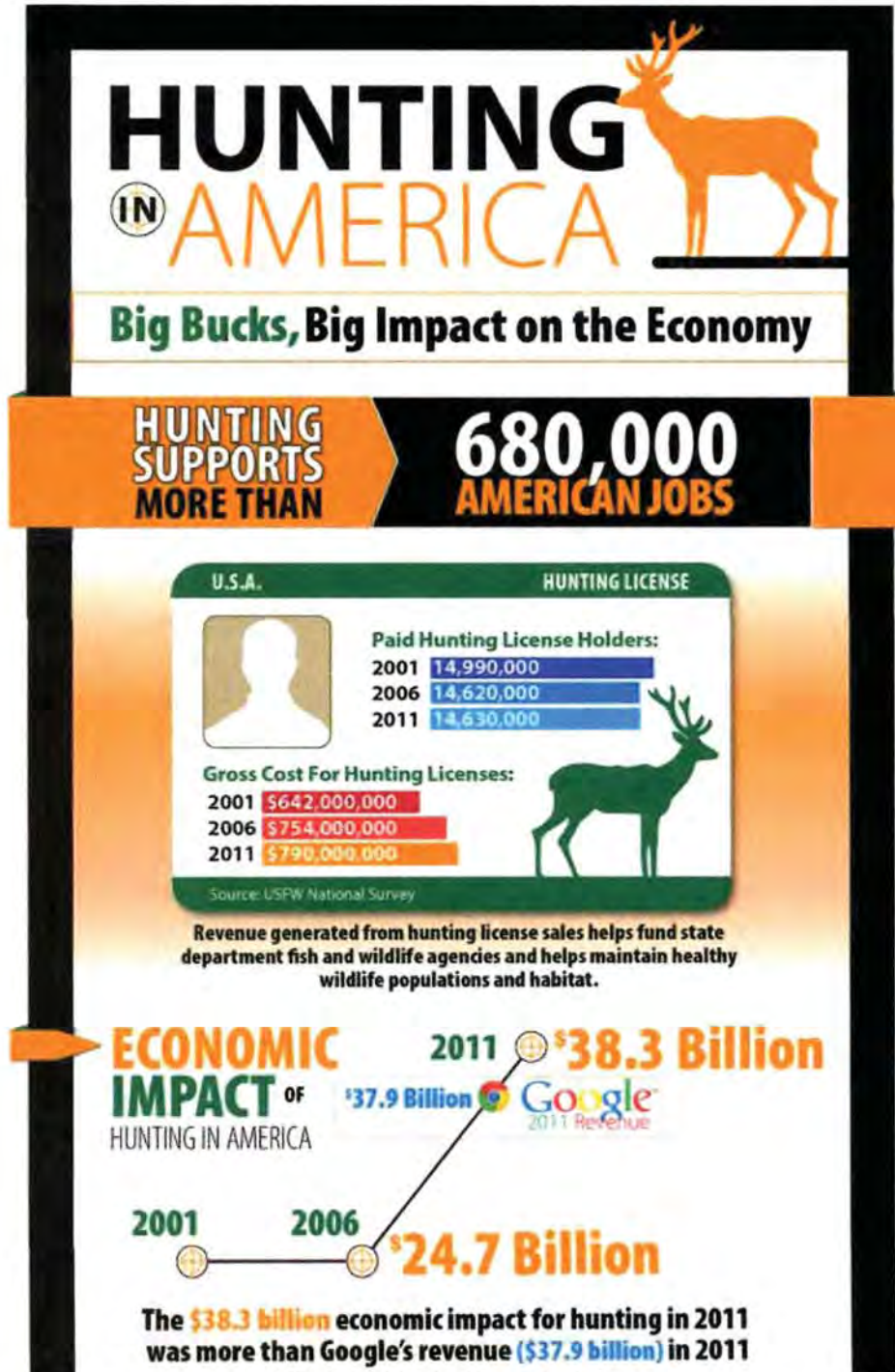
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## INFOGRAPHIC: Hunting in America. Big Bucks, Big Impact on the Economy

September 19, 2013 By Bill Dunn [No Comments](#)

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"Before teaching the sport, I always teach

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Source: NSSF & Southwick Associates Hunting in America Report

## HUNTERS

Age 16+ by type



**11.6 Million**  
Big Game Hunters  
Age 16+ in 2011



Source: USFW National Survey

## HUNTING IS A GREAT WAY TO GET OUTDOORS

Total days afield of hunters age 16+



Source: USFW National Survey



## GENDER

of Hunters 2011



Source: USFW National Survey

## MORE PEOPLE HUNT

Each year than play



Source: National Sporting Goods Association 2012

## DUCK STAMP SALES

1934-2011 133 Million stamps sold

= \$817 Million



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# **Exhibit**

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**U.S. Department of  
Transportation**


Office of the Secretary  
of Transportation

February 28, 2013

1200 New Jersey Avenue, SE  
Washington, DC 20590

**MEMORANDUM TO: SECRETARIAL OFFICERS  
MODAL ADMINISTRATORS**

**From:** Polly Trottenberg   
Under Secretary for Policy  
X6-4540

Robert S. Rivkin   
General Counsel  
x6-4702

**Subject:** Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in  
U.S. Department of Transportation Analyses

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Departmental guidance on valuing reduction of fatalities and injuries by regulations or investments has been published periodically by this office since 1993. We issued a thorough revision of our guidance in 2008 and have issued annual updates to adjust for changes in prices and real incomes since then. Our most recent update, dated July 29, 2011, stated that a new review of the technical literature would be conducted to inform the next publication. The conclusions of that review are incorporated in this guidance.

Empirical studies published in recent years indicate a VSL of \$9.1 million in current dollars for analyses using a base year of 2012. We also find that an income elasticity of 1.0 should be used to project VSL to future years. Based on wage forecasts from the Congressional Budget Office, we estimate that there will be an expected 1.07 percent annual growth rate in median real wages over the next 30 years (2013-2043). These estimates imply that VSL in future years should be estimated to grow by 1.07 percent per year before discounting to present value.

This guidance also includes a table of the relative values of preventing injuries of varied severity, unchanged since the 2011 guidance. We also prescribe a sensitivity analysis of the effects of using alternative VSL values. Instead of treating alternative values in terms of a probability distribution, analysts should apply only a test of low and high alternative values of \$5.2 million and \$12.9 million.

This guidance and other relevant documents will be posted on the Reports page of the Office of Transportation Policy website, <http://www.dot.gov/policy>, and on the General Counsel's regulatory information website, <http://www.dot.gov/regulations>. Questions should be addressed to Jack Wells, (202) 366-9224 or [jack.wells@dot.gov](mailto:jack.wells@dot.gov).

cc: Regulations officers and liaison officers

**Revised Departmental Guidance 2013:  
Treatment of the Value of Preventing Fatalities and Injuries  
in Preparing Economic Analyses**

On the basis of the best available evidence, this guidance identifies \$9.1 million as the value of a statistical life to be used for Department of Transportation analyses assessing the benefits of preventing fatalities and using a base year of 2012. It also establishes policies for projecting future values and for assigning comparable values to prevention of injuries.

**Background**

Prevention of injury, illness, and loss of life is a significant factor in many private economic decisions, including job choices and consumer product purchases. When government makes direct investments or controls external market impacts by regulation, it also pursues these benefits, often while also imposing costs on society. The Office of the Secretary of Transportation and other DOT administrations are required by Executive Order 13563, Executive Order 12866, Executive Order 12893, OMB Circular A-4, and DOT Order 2100.5 to evaluate in monetary terms the costs and benefits of their regulations, investments, and administrative actions, in order to demonstrate the faithful execution of their responsibilities to the public. Since 1993, the Office of the Secretary of Transportation has periodically reviewed the published research on the value of safety and updated guidance for all administrations. Our previous guidance, issued on July 29, 2011, stated that a new review of the literature (our first since 2008) would be conducted to inform the next publication. The conclusions of that review are incorporated in this guidance.

The benefit of preventing a fatality is measured by what is conventionally called the Value of a Statistical Life (VSL), defined as the additional cost that individuals would be willing to bear for improvements in safety (that is, reductions in risks) that, in the aggregate, reduce the expected number of fatalities by one. This conventional terminology has often provoked misunderstanding on the part of both the public and decision-makers. What is involved is not the valuation of life as such, but the valuation of reductions in risks. While new terms have been proposed to avoid misunderstanding, we will maintain the common usage of the research literature and OMB Circular A-4 in referring to VSL.

Most regulatory actions involve the reduction of risks of low probability (as in, for example, a one-in-10,000 annual chance of dying in an automobile crash). For these low-probability risks, we shall assume that the willingness to pay to avoid the risk of a fatal injury increases proportionately with growing risk. That is, when an individual is willing to pay \$1,000 to reduce the annual risk of death by one in 10,000, she is said to have a VSL of \$10 million. The assumption of a linear relationship between risk and willingness to pay therefore implies that she would be willing to pay \$2,000 to reduce risk by two in 10,000 or \$5,000 to reduce risk by five in 10,000. The assumption of a linear relationship between risk and willingness to pay (WTP) breaks down when the annual WTP becomes a substantial portion of annual income, so the assumption of a constant VSL is not appropriate for substantially larger risks.

When first applied to benefit-cost analysis in the 1960s and 1970s, the value of saving a life was measured by the potential victim's expected earnings, measuring the additional product society might have lost. These lost earnings were widely believed to understate the real costs of loss of life, because the value that we place on the continued life of our family and friends is not based entirely, or even principally, on their earning capacity. In recent decades, studies based on estimates of individuals' willingness to pay for improved safety have become widespread, and offer a way of measuring the value of reduced risk in a more comprehensive way. These estimates of the individual's value of safety are then treated as the ratio of the individual marginal utility of safety to the marginal utility of wealth. These estimates of the individual values of changes in safety can then



be aggregated to produce estimates of social benefits of changes in safety, which can then be compared with the costs of these changes.

Studies estimating the willingness to pay for safety fall into two categories. Some analyze subjects' responses in real markets, and are referred to as revealed preference (RP) studies, while others analyze subjects' responses in hypothetical markets, and are described as stated preference (SP) studies. Revealed preference studies in turn can be divided into studies based on consumer purchase decisions and studies based on employment decisions (usually referred to as hedonic wage studies). Even in revealed preference studies, safety is not purchased directly, so the value that consumers place upon it cannot be measured directly. Instead, the value of safety can be inferred from market decisions that people make in which safety is one factor in their decisions. In the case of consumer purchase decisions, since goods and services usually display multiple attributes, and are purchased for a variety of reasons, there is no guarantee that safety will be the conclusive factor in any purchasing decision (even products like bicycle helmets, which are purchased primarily for safety, also vary in style, comfort, and durability). Similarly, in employment decisions, safety is one of many considerations in the decision of which job offer to accept. Statistical techniques must therefore be used to identify the relative influence of price (or wage), safety, and other qualitative characteristics of the product or job on the consumer's or worker's decision on which product to buy or which job to accept.

An additional complication in RP studies is that, even if the real risks confronted by individuals can be estimated accurately by the analyst, the consumer or employee may not estimate these risks accurately. It is possible for individuals, through lack of relevant information or limited ability to analyze risks, to assign an excessively low or high probability to fatal risks. Alternatively, detailed familiarity with the hazards they face and their own skills may allow individuals to form more accurate estimates of risk at, for example, a particular job-site than those derived by researchers, which inevitably are based on more aggregate data.

In the SP approach, market alternatives incorporating hypothetical risks are presented to test subjects, who respond with what they believe would be their choices. Answers to hypothetical questions may provide helpful information, but they remain hypothetical. Although great pains are usually taken to communicate probabilities and measure the subjects' understanding, there is no assurance that individuals' predictions of their own behavior would be observed in practice. Against this weakness, the SP method can evaluate many more alternatives than those for which market data are available, and it can guarantee that risks are described objectively to subjects. With indefinitely large potential variations in cost and risk and no uncontrolled variation in any other dimension, some of the objections to RP models are obviated. Despite procedural safeguards, however, SP studies have not proven consistently successful in estimating measures of WTP that increase proportionally with greater risks.

RP studies involving decisions to buy and/or use various consumer products have focused on decisions such as buying cars with better safety equipment, wearing seat belts or helmets, or buying and installing smoke detectors. These studies often lack a continuum of price-risk opportunities, so that the price paid for a safety feature (such as a bicycle helmet) does not necessarily represent the value that the consumer places on the improvement in safety that the helmet provides. In the case of decisions to use a product (like a seatbelt) rather than to buy the product, the "price" paid by the consumer must be inferred from the amount of time and degree of inconvenience involved in using the product, rather than the directly observable price of buying the product. The necessity of making these inferences introduces possible sources of error. Studies of purchases of automobiles probably are less subject to these problems than studies of other consumer decisions, because the price of the safety equipment is directly observable, and there are usually a variety of more or less expensive safety features that provide more of a range of price-risk trade-offs for consumers to make.

While there are many examples of SP studies and RP studies involving consumer product purchases, the most widely cited body of research comprises hedonic wage studies, which estimate the wage differential that

employers must pay workers to accept riskier jobs, taking other factors into account. Besides the problem of identifying and quantifying these factors, researchers must have a reliable source of data on fatality and injury risks and also assume that workers' psychological risk assessment conforms to the objective data. The accuracy of hedonic wage studies has improved over the last decade with the availability of more complete data from the Bureau of Labor Statistics' (BLS) Census of Fatal Occupational Injuries (CFOI), supported by advances in econometric modeling, including the use of panel data from the Panel Study of Income Dynamics (PSID). The CFOI data are, first of all, a complete census of occupational fatalities, rather than a sample, so they allow more robust statistical estimation. Second, they classify occupational fatalities by both industry and occupation, allowing variations in fatalities across both dimensions to be compared with corresponding variations in wage rates. Some of the new studies use panel data to analyze the behavior of workers who switch from one job to another, where the analysis can safely assume that any trade-off between wage levels and risk reflects the preferences of a single individual, and not differences in preferences among individuals.

VSL estimates are based on studies of groups of individuals that are covered by the study, but those VSL estimates are then applied to other groups of individuals who were not the subjects of the original studies. This process is called benefit transfer. One issue that has arisen in studies of VSL is whether this benefit transfer process should take place broadly over the general population of people that are affected by a rulemaking, or whether VSL should be estimated for particular subgroups, such as workers in particular industries, and people of particular ages, races, and genders. Advances in data and econometric techniques have allowed specialized estimates of VSL for these population subgroups. Safety regulations issued by the Department of Transportation typically affect a broad cross-section of people, rather than more narrowly defined subgroups. Partly because of that, and partly for policy reasons, we do not consider variations in VSL among different population groups (except to take into account the effect on VSL of rising real income over time).

### **Principles and policies of DOT guidance**

This guidance for the conduct of Department of Transportation analyses is a synthesis of empirical estimates, practical adaptations, and social policies. We continue to explore new empirical literature as it appears and to give further consideration to the policy resolutions embodied in this guidance. Although our approach is unchanged from previous guidance, the numbers and their sources are new, consistent with OMB guidance in Circular A-4 and other sources, and with the use of the best available evidence. The methods we adopt are:

1. Prevention of an expected fatality is assigned a single, nationwide value in each year, regardless of the age, income, or other distinct characteristics of the affected population, the mode of travel, or the nature of the risk. When Departmental actions have distinct impacts on infants, disabled passengers, or the elderly, no adjustment to VSL should be made, but analysts should call the attention of decision-makers to the special character of the beneficiaries.
2. In preparing this guidance, we have adjusted the VSL from the year of the source data to the year before the guidance is issued, based on two factors: growth in median real income and monetary inflation, both measured to the last full year before the date of the guidance.
3. The value to be used by all DOT administrations will be published annually by the Office of the Secretary of Transportation.
4. Analysts should project VSL from the base year to each future year based on expected growth in real income, according to the formula prescribed on page 8 of this guidance. Analysts should not project future changes in VSL based on expected changes in price levels.

5. Alternative high and low benefit estimates should be prepared, using a range of VSLs prescribed on page 10 of this guidance.

In Circular A-4 (2003), the Office of Management and Budget endorsed VSL values between \$1 million and \$10 million, drawing on two recently completed VSL meta-analyses.<sup>1</sup> In 2012 dollars, these values would be between \$1.24 million and \$12.4 million. The basis for the previous DOT guidance, adopted on February 5, 2008, comprised five studies, four of which were meta-analyses that synthesized many primary studies, identifying their sources of variation and estimating the most likely common parameters. These studies were written by Ted R. Miller;<sup>2</sup> Ikuho Kochi, Bryan Hubbell, and Randall Kramer;<sup>3</sup> W. Kip Viscusi;<sup>4</sup> Janusz R. Mrozek and Laura O. Taylor;<sup>5</sup> and W. Kip Viscusi and Joseph Aldy.<sup>6</sup> They narrowed VSL estimates to the \$2 million to \$7 million range in dollar values of the original data, between 1995 and 2000 (about \$3 million to \$9 million at current prices). Miller and Viscusi and Aldy also estimated income elasticities for VSL (the percent increase in VSL per one percent increase in income). Miller's estimates were close to 1.0, while Viscusi and Aldy estimated the elasticity to be between 0.5 and 0.6. DOT used the Viscusi and Aldy elasticity estimate (averaged to 0.55), along with the Wages and Salaries component of the Employer Cost for Employee Compensation, as well as price levels represented by the Consumer Price Index, to project these estimates to a 2007 VSL estimate of \$5.8 million.

Since these studies were published, the credibility of these meta-analyses has been qualified by recognition of weaknesses in the data used by the earlier primary studies whose results are synthesized in the meta-analyses. We now believe that the most recent primary research, using improved data (particularly the CFOI data discussed above) and specifications, provides more reliable results. This conclusion is based in part on the advice of a panel of expert economists that we convened to advise us on this issue. The panel consisted of Maureen Cropper (University of Maryland), Alan Krupnick (Resources for the Future), Al McGartland (Environmental Protection Agency), Lisa Robinson (independent consultant), and W. Kip Viscusi (Vanderbilt University). The Panel unanimously concluded that we should base our guidance only on hedonic wage studies completed within the past 10 years that made use of the CFOI database and used appropriate econometric techniques.

A White Paper prepared for the U.S. Environmental Protection Agency (EPA) in 2010 identifies eight hedonic wage studies using the CFOI data;<sup>7</sup> we have also identified seven additional studies, including five published since the EPA White Paper was issued (see Table 1). Some of these studies focus on estimating VSL values for narrowly defined economic, demographic, or occupational categories, or use inappropriate econometric techniques, resulting in implausibly high VSL estimates. We have therefore focused on nine studies that we

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<sup>1</sup> Viscusi, W. K. and J.E. Aldy (2003). "The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World." *Journal of Risk and Uncertainty*, 27(1): 5-76; and Mrozek, J.R. and L. O. Taylor (2002). "What Determines the Value of a Life? A Meta-Analysis." *Journal of Policy Analysis and Management*. 21(2).

<sup>2</sup> Miller, T. R. (2000). "Variations between Countries in Values of Statistical Life." *Journal of Transport Economics and Policy*. 34(2): 169-188. [http://www.bath.ac.uk/e-journals/jtep/pdf/Volume\\_34\\_Part\\_2\\_169-188.pdf](http://www.bath.ac.uk/e-journals/jtep/pdf/Volume_34_Part_2_169-188.pdf)

<sup>3</sup> Kochi, I., B. Hubbell, and R. Kramer (2006). "An Empirical Bayes Approach to Combining and Comparing Estimates of the Value of a Statistical Life for Environmental Policy Analysis." *Environmental and Resource Economics*. 34(3): 385-406.

<sup>4</sup> Viscusi, W. K. (2004). "The Value of Life: Estimates with Risks by Occupation and Industry." *Economic Inquiry*. 42(1): 29-48.

<sup>5</sup> Mrozek, J. R., and L. O. Taylor (2002). "What Determines the Value of Life? A Meta-Analysis." *Journal of Policy Analysis and Management*. 21(2).

<sup>6</sup> Viscusi, W. K. and J. E. Aldy (2003). "The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World." *Journal of Risk and Uncertainty*. 27(1): 5-76.

<sup>7</sup> U.S. Environmental Protection Agency (2010), *Valuing Mortality Risk Reductions for Environmental Policy: A White Paper (Review Draft)*. Prepared by the National Center for Environmental Economics for consultation with the Science Advisory Board – Environmental Economics Advisory Committee.

think are useful for informing an appropriate estimate of VSL. There is broad agreement among researchers that these newer hedonic wage studies provide an improved basis for policy-making.<sup>8</sup>

The 15 hedonic wage studies we have identified that make use of the CFOI database to estimate VSL are listed in Table 1. Several of these studies focus on estimating how VSL varies for different categories of people, such as males and females,<sup>9</sup> older workers and younger workers,<sup>10</sup> blacks and whites,<sup>11</sup> immigrants and non-immigrants,<sup>12</sup> and smokers and non-smokers,<sup>13</sup> as well as for different types of fatality risks.<sup>14</sup> Some of these studies do not estimate an overall (“full-sample”) VSL, instead estimating VSL values only for specific categories of people. Some of the studies, as the authors themselves sometimes acknowledge, arrive at implausibly high values of VSL, because of econometric specifications which appear to bias the results, or because of a focus on a narrowly-defined occupational group. Moreover, these papers generally offer multiple model specifications, and it is often not clear (even to the authors) which specification most accurately represents the actual VSL. We have generally chosen the specification that the author seems to believe is best. In cases where the author does not express a clear preference, we have had to average estimates based on alternative models within the paper to get a representative estimate for the paper as a whole.

**Table 1: VSL Studies Using CFOI Database**  
(VSLs in millions of dollars)

	<u>Study</u>	<u>Year of Study \$</u>	<u>VSL in Study- Year \$</u>	<u>VSL in 2012\$</u>	<u>Comments</u>
1.	Viscusi (2003) *	1997	\$14.185M	\$21.65M	Implausibly high; industry-only risk measure
2.	Leeth and Ruser (2003) *	2002	\$7.04M	\$8.90M	Occupation-only risk measure
3.	Viscusi (2004)	1997	\$4.7M	\$7.17M	Industry/occupation risk measure
4.	Kniesner and Viscusi (2005)	1997	\$4.74M	\$7.23M	Industry/occupation risk measure
5.	Kniesner <i>et al.</i> (2006) *	1997	\$23.70M	\$36.17M	Implausibly high; industry/occupation risk measure

<sup>8</sup>A current survey of theoretical and empirical research on VSL may be found in: Cropper, M., J.K. Hammitt, and L.A. Robinson (2011). “Valuing Mortality Risk Reductions: Progress and Challenges.” *Annual Review of Resource Economics*. 3: 313-336. <http://www.annualreviews.org/doi/abs/10.1146/annurev.resource.012809.103949>

<sup>9</sup>Leeth, J.D. and J. Ruser (2003). “Compensating Wage Differentials for Fatal and Nonfatal Injury Risks by Gender and Race.” *Journal of Risk and Uncertainty*, 27(3): 257-277.

<sup>10</sup>Kniesner, T.J., W.K. Viscusi, and J.P. Ziliak (2006). “Life-Cycle Consumption and the Age-Adjusted Value of Life.” *Contributions to Economic Analysis and Policy*. 5(1): 1-34; Viscusi, W.K. and J.E. Aldy (2007). “Labor Market Estimates of the Senior Discount for the Value of Statistical Life.” *Journal of Environmental Economics and Management*. 53: 377-392; Aldy, J.E. and W.K. Viscusi (2008). “Adjusting the Value of a Statistical Life for Age and Cohort Effects.” *Review of Economics and Statistics*. 90(3): 573-581; and Evans, M.F. and G. Schaur (2010). “A Quantile Estimation Approach to Identify Income and Age Variation in the Value of a Statistical Life.” *Journal of Environmental Economics and Management*. 59: 260-270.

<sup>11</sup>Viscusi, W.K. (2003). “Racial Differences in Labor Market Values of a Statistical Life.” *Journal of Risk and Uncertainty*. 27(3): 239-256, and Leeth, J.D. and J. Ruser (2003), *op. cit.*

<sup>12</sup>Hersch, J. and W.K. Viscusi (2010). “Immigrant Status and the Value of Statistical Life.” *Journal of Human Resources*. 45(3): 749-771.

<sup>13</sup>Viscusi, W.K. and J. Hersch (2008). “The Mortality Cost to Smokers.” *Journal of Health Economics*. 27: 943-958.

<sup>14</sup>Scotton, C.R. and L.O. Taylor. “Valuing Risk Reductions: Incorporating Risk Heterogeneity into a Revealed Preference Framework.” *Resource and Energy Economics*. 33 and Kochi, I and L.O. Taylor (2011). “Risk Heterogeneity and the Value of Reducing Fatal Risks: Further Market-Based Evidence.” *Journal of Benefit-Cost Analysis*. 2(3): 381-397.

6.	Viscusi and Aldy (2007) *	2000			Industry-only risk measure; no full-sample VSL estimate
7.	Aldy and Viscusi (2008) *	2000			Industry-only risk measure, no full-sample VSL estimate
8.	Evans and Smith (2008)	2000	\$9.6M	\$12.84M	Industry-only risk measure
9.	Viscusi and Hersch (2008)	2000	\$7.37M	\$9.86M	Industry-only risk measure
10.	Evans and Schaur (2010)	1998	\$6.7M	\$9.85M	Industry-only risk measure
11.	Hersch and Viscusi (2010)	2003	\$6.8M	\$8.43M	Industry/occupation risk measure
12.	Kniesner <i>et al.</i> (2010)	2001	\$7.55M	\$9.76M	Industry/occupation risk measure
13.	Kochi and Taylor (2011)*	2004			VSL estimated only for occupational drivers
14.	Scotton and Taylor (2011)	1997	\$5.27M	\$8.04M	Industry/occupation risk measure; VSL is mean of estimates from three preferred specifications
15.	Kniesner <i>et al.</i> (2012)	2001	\$4M - \$10M	\$5.17M - \$12.93M	Industry/occupation risk measure; mean VSL estimate is \$9.05M

\* Studies shown in grayed-out rows were not used in determining the VSL Guidance value.

We found that nine of these studies provided usable estimates of VSL for a broad cross-section of the population.<sup>15</sup> We excluded Viscusi (2003) and Kniesner *et al.* (2006) on the grounds that their estimates of VSL were implausibly high (Viscusi acknowledges that the estimated VSLs in his study are very high). We excluded Leeth and Ruser (2003) because it used only variations in occupation for estimating variation in risk (the occupational classifications are generally regarded as less accurate than the industry classifications). We excluded Viscusi and Aldy (2007) and Aldy and Viscusi (2008) because they did not estimate overall “full-sample” VSLs (they focused instead on estimating VSLs for various subgroups). We excluded Kochi and Taylor (2011) because it estimated VSL only for a narrow occupational group (occupational drivers). For Scotton and Taylor (2011) and Kniesner *et al.* (2012) we calculated average values for VSL from what appeared to be the preferred model specifications. For this guidance, we adopt the average of the VSLs estimated in the remaining nine studies, updated to 2012 dollars (based both on changes in the price level and changes in real incomes from the year for which the VSL was originally estimated). This average is \$9.14 million, which we round to \$9.1 million for purposes of this guidance.

Our current guidance specifies that our VSL guidance will be updated each year, to take into account both the increase in the price level and the increase in real incomes. The VSL literature is generally in agreement that VSL increases with real incomes, but the exact rate at which it does so is subject to some debate. In our

<sup>15</sup> In addition to Viscusi (2004) [cited in footnote 4], Viscusi and Hersch (2008) [cited in footnote 13], Evans and Schaur (2010) [cited in footnote 10], Hersch and Viscusi (2010) [cited in footnote 12], and Scotton and Taylor (2011) [cited in footnote 14], these include Kniesner, T.J. and W.K. Viscusi (2005). “Value of a Statistical Life: Relative Position vs. Relative Age.” *AEA Papers and Proceedings*. 95(2): 142-146; Evans, M.F. and V.K. Smith (2008). “Complementarity and the Measurement of Individual Risk Tradeoffs: Accounting for Quantity and Quality of Life Effects.” National Bureau of Economic Research Working Paper 13722; Kniesner, T.J., W.K. Viscusi, and J.P. Ziliak (2010). “Policy Relevant Heterogeneity in the Value of Statistical Life: New Evidence from Panel Data Quantile Regressions.” *Journal of Risk and Uncertainty*. 40: 15-31; and Kniesner, T.J., W.K. Viscusi, C. Woock, and J.P. Ziliak (2012). “The Value of a Statistical; Life: Evidence from Panel Data.” *Review of Economics and Statistics*. 94(1): 74-87.

current guidance, we cite research by Viscusi and Aldy (2003) that estimated the elasticity of VSL with respect to increases in real income as being between 0.5 and 0.6 (i.e., a one-percent increase in real income results in an increase in VSL of 0.5 to 0.6 percent). We accordingly have increased VSL by 0.55 percent for every one-percent increase in real income. More recent research by Kniesner, Viscusi, and Ziliak (2010) has derived more refined income elasticity estimates ranging from 2.24 at low incomes to 1.23 at high incomes, with an overall figure of 1.44.<sup>16</sup> An alternative specification yielded an overall elasticity of 1.32. Similarly, Costa and Kahn (2004) estimated the income-elasticity of VSL to be between 1.5 and 1.6.<sup>17</sup> These empirical results are consistent with theoretical arguments suggesting that the income-elasticity of VSL should be greater than 1.0.<sup>18</sup>

In view of the large increase in the income elasticity of VSL that would be suggested by these empirical results, and because the literature seems somewhat unsettled, we will increase our suggested income-elasticity figure only to 1.0. While this figure is lower than the elasticity estimates of Kniesner *et al.* and Costa and Kahn, it is higher than that of Viscusi and Aldy, the basis for our previous guidance. It is difficult to state with confidence whether a cross-sectional income elasticity (such as those estimated in these empirical analyses), representing the difference in sensitivity to fatality risks between low-income and high-income workers in a given population, corresponds to a longitudinal elasticity, representing the way in which VSL is affected by growth in income over time for an overall population. Consequently, we adopt this more moderate figure, pending more comprehensive documentation.

The index we use to measure real income growth as it affects VSL is the Median Usual Weekly Earnings (MUWE), in constant (1982-84) dollars, derived by BLS from the Current Population Survey (Series LEU0252881600 – not seasonally adjusted). This series is more appropriate than the Wages and Salaries component of the Employment Cost Index (ECI), which we used previously, because the ECI applies fixed weights to employment categories, while the weekly earnings series uses a median employment cost for wage and salary workers over the age of 16. A median value is preferred because it should better reflect the factors influencing a typical traveler affected by DOT actions (very high incomes would cause an increase in the mean, but not affect the median). In contrast to a median, an average value over all income levels might be unduly sensitive to factors that are less prevalent among actual travelers. Similarly, we do not take into account changes in non-wage income, on the grounds that this non-wage income is not likely to be significant for the average person affected by our rules. The MUWE has been virtually unchanged for the past decade, so this has very little effect on the VSL adjustment over the past ten years. However, it is likely to be more significant in the future.

We have chosen the Consumer Price Index (CPI-U) as a price index that similarly is representative of changes in the value of money that would be considered by a typical worker making decisions corresponding to his income level. This index grew from 2002 to 2012 by 27.62 percent, raising estimates of VSL in 2002 dollars by over 27 percent over ten years.

In 2011, we adopted a procedure for estimating VSL in each future year as it would respond to expected growth in real income levels. Logical consistency required that higher incomes in the future would influence projected VSLs, just as they affect the current year's baseline. The procedure we now specify uses the projected rate of

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<sup>16</sup> Kniesner, T.J., W.K. Viscusi, and J.P. Ziliak (2010). "Policy Relevant Heterogeneity in the Value of Statistical Life: New Evidence from Panel Data Quantile Regressions." *Journal of Risk and Uncertainty*. 40(1):15–31.

<sup>17</sup> Costa, D.L. and M.E. Kahn (2004). "Changes in the Value of Life, 1940-1980." *Journal of Risk and Uncertainty*. 29(2): 159-180.

<sup>18</sup> Eeckhoudt, L.R. and J.K. Hammitt (2001). "Background Risks and the Value of a Statistical Life." *Journal of Risk and Uncertainty*. 23(3): 261-279; Kaplow, L. (2005). "The Value of a Statistical Life and the Coefficient of Relative Risk Aversion." *Journal of Risk and Uncertainty*, 31(1); Murphy, K.M. and R.H. Topel (2006). "The Value of Health and Longevity." *Journal of Political Economy*. 114(5): 871-904; and Hammitt, J.K. and L.A. Robinson (2011). "The Income Elasticity of the Value per Statistical Life: Transferring Estimates between High and Low Income Populations." *Journal of Benefit-Cost Analysis*. 2(1): 1-27.

growth of the Real Median Wage for Workers Covered by Social Security, estimated by the Congressional Budget Office (CBO).<sup>19</sup> While the growth rate forecast fluctuates significantly over the next decade in response to incentives in the Affordable Care Act to receive wage compensation versus health insurance benefits, we believe that it is reasonable to use a long-term average growth rate to estimate changes in future VSL. We have calculated the average projected growth rate in the real median wage, based on the CBO data over the next 30 years, to be 1.07 percent per year. With an income elasticity of 1.0, the base-year VSL should thus be increased by 1.07 percent per year to estimate VSL for any future year (in base-year dollars), before discounting to present value.<sup>20</sup>

For future years, the formula for calculating future values of VSL is therefore:

$$VSL_{2012+N} = VSL_{2012} \times 1.0107^N$$

where  $VSL_{2012+N}$  is the VSL value N years after 2012

and  $VSL_{2012}$  is the VSL value in 2012 (i.e., \$9.1 million).

When conducting sensitivity analyses using alternative VSL values (see page 10), analysts should use those alternative VSL values in place of the \$9.1 million value used here. We emphasize that future VSL values should be adjusted only for changes in real wages, not for changes in price levels. For analysts using base years prior to 2012, the new VSL for 2011 (adjusted for changes in real income and prices) is \$8.98 million in 2011 dollars. For 2010, this value is \$8.86 million in 2010 dollars.

### **Value of Preventing Injuries**

Nonfatal injuries are far more common than fatalities and vary widely in severity, as well as probability. In principle, the resulting losses in quality of life, including both pain and suffering and reduced income, should be estimated by potential victims' WTP for personal safety. While estimates of WTP to avoid injury are available, often as part of a broader analysis of factors influencing VSL, these estimates are generally only available for an average injury resulting in a lost workday, and not for a range of injuries varying in severity. Because detailed WTP estimates covering the entire range of potential disabilities are unobtainable, we use an alternative standardized method to interpolate values of expected outcomes, scaled in proportion to VSL. Each type of accidental injury is rated (in terms of severity and duration) on a scale of quality-adjusted life years (QALYs), in comparison with the alternative of perfect health. These scores are grouped, according to the Abbreviated Injury Scale (AIS), yielding coefficients that can be applied to VSL to assign each injury class a value corresponding to a fraction of a fatality.

In our previous guidance, the values of preventing injuries were updated by new estimates from a study by Spicer and Miller.<sup>21</sup> The measure adopted was the quality-adjusted percentage of remaining life lost for median

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<sup>19</sup> The projected growth of the mean real wage is reported by CBO in its 2012 Long-Term Budget Outlook (p. 34, p. 65, fn. 5). CBO has provided us with unpublished forecasts of median real wages, which we believe are more relevant to estimating the VSL of the average person affected by transportation-related safety risks. We use these projected median real wage forecasts in our guidance for adjustments of future VSLs.

[http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-05-Long-Term\\_Budget\\_Outlook.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-05-Long-Term_Budget_Outlook.pdf)

<http://www.cbo.gov/sites/default/files/cbofiles/attachments/43288-LTBOSuppTables.xls>

<sup>20</sup>  $1.0107^{1.0} = 1.0107$  (annual income growth factor of 1.0107, raised to the power of the income elasticity, 1.0, yields annual real VSL growth of 1.0107).

<sup>21</sup> Rebecca S. Spicer and Ted R. Miller. "Final Report to the National Highway Traffic Safety Administration: Uncertainty Analysis of Quality Adjusted Life Years Lost." Pacific Institute for Research and Evaluation. February 5, 2010.

[http://ostpxweb.dot.gov/policy/reports/QALY\\_Injury\\_Revision\\_PDF\\_Final\\_Report\\_02-05-10.pdf](http://ostpxweb.dot.gov/policy/reports/QALY_Injury_Revision_PDF_Final_Report_02-05-10.pdf)

utility weights, based on QALY research considered “best,” as presented in Table 9 of the cited study. The rate at which disability is discounted over a victim’s lifespan causes these percentages to vary slightly, and the study shows estimates for 0, 3, 4, 7, and 10 percent discount rates. These differences are minor in comparison with other sources of variation and uncertainty, which we recognize by sensitivity analysis. Since OMB recommends the use of alternative discount rates of 3 and 7 percent, we present the scale corresponding to an intermediate rate of 4 percent for use in all analyses. The fractions shown should be multiplied by the current VSL to obtain the values of preventing injuries of the types affected by the government action being analyzed.

**Table 2: Relative Disutility Factors by Injury Severity Level (AIS)  
For Use with 3% or 7% Discount Rate**

AIS Level	Severity	Fraction of VSL
AIS 1	Minor	0.003
AIS 2	Moderate	0.047
AIS 3	Serious	0.105
AIS 4	Severe	0.266
AIS 5	Critical	0.593
AIS 6	Unsurvivable	1.000

For example, if the analyst were seeking to estimate the value of a “serious” injury (AIS 3), he or she would multiply the Fraction of VSL for a serious injury (0.105) by the VSL (\$9.1 million) to calculate the value of the serious injury (\$955,000). Values for injuries in the future would be calculated by multiplying these Fractions of VSL by the future values of VSL (calculated using the formula on page 8).

These factors have two direct applications in analyses. The first application is as a basis for establishing the value of preventing nonfatal injuries in benefit-cost analysis. The total value of preventing injuries and fatalities can be combined with the value of other economic benefits not measured by VSLs, and then compared to costs to determine either a benefit/cost ratio or an estimate of net benefits.

The second application stems from the requirement in OMB Circular A-4 that evaluations of major regulations for which safety is the primary outcome include cost-effectiveness analysis, in which the cost of a government action is compared with a non-monetary measure of benefit. The values in the above table may be used to translate nonfatal injuries into fatality equivalents which, when added to fatalities, can be divided into costs to determine the cost per equivalent fatality. This ratio may also be seen as a “break-even” VSL, the value that would have to be assumed if benefits of a proposed action were to equal its costs. It would illustrate whether the costs of the action can be justified by a VSL that is well within the accepted range or, instead, would require a VSL approaching the upper limit of plausibility. Because the values assigned to prevention of injuries and fatalities are derived in part by using different methodologies, it is useful to understand their relative importance in drawing conclusions. Consequently, in analyses where benefits from reducing both injuries and fatalities are present, the estimated values of injuries and fatalities prevented should be stated separately, as well as in the aggregate.



While these injury disutility factors have not been revised in this update of our VSL guidance, the peer review process for this guidance raised the question as to whether their accuracy could be further improved. We therefore believe that a more thorough review of the value of preventing injuries is warranted. While the results of that review are not incorporated in this guidance, we plan to incorporate the results of that review in future guidance as soon as it is completed.

### **Recognizing Uncertainty**

Regulatory and investment decisions must be made by officials informed of the limitations of their information. The values we adopt here do not establish a threshold dividing justifiable from unjustifiable actions; they only suggest a region where officials making these decisions can have relatively greater or lesser confidence that their decisions will generate positive net benefits. To convey the sensitivity of this confidence to changes in assumptions, OMB Circular A-4 and Departmental policy require analysts to prepare estimates using alternative values. We have previously encouraged the use of probabilistic methods such as Monte Carlo analysis to synthesize the many uncertain quantities determining net benefits.

While the individual estimates of VSL reported in the studies cited above are often accompanied by estimates of confidence intervals, we do not, at this time, have any reliable method for estimating the overall probability distribution of the average VSL that we have calculated from these various studies. Consequently, alternative VSL values can only illustrate the conclusions that would result if the true VSL actually equaled the higher or lower alternative values. Analysts should not imply a known probability that the true VSL would exceed or fall short of either the primary VSL figure or the alternative values used for sensitivity analysis. Kniesner et al. (2012) suggest that a reasonable range of values for VSL is between \$4 million and \$10 million (in 2001 dollars), or \$5.2 million to \$12.9 million in 2012 dollars. This range of values includes all the estimates from the eight other studies on which this guidance is based. For illustrative purposes, analysts should calculate high and low alternative estimates of the values of fatalities and injuries by using alternative VSLs of \$5.2 million and \$12.9 million, with appropriate adjustments for future VSL values and for values of injuries calculated using the VSL.

Because the relative costs and benefits of different provisions of a rule can vary greatly, it is important to disaggregate the provisions of a rule, displaying the expected costs and benefits of each provision, together with estimates of costs and benefits of reasonable alternatives to each provision.

This guidance and other relevant documents will be posted on the Reports page of the Office of Transportation Policy website, <http://www.dot.gov/policy>. Questions should be addressed to Jack Wells, (202) 366-9224, or [jack.wells@dot.gov](mailto:jack.wells@dot.gov).