

# RULE 41F: TARGETING A GUN TRUST LOOPHOLE

## Comment

*by Taylor Smith*

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## I. INTRODUCTION

In February 2013, former Los Angeles police officer Christopher Dorner unsettled the nation and sent the police on a manhunt after he began a series of shootings that spanned Los Angeles, Orange County, and Riverside County, California.<sup>1</sup> Dorner killed four people and wounded three others during his week-long rampage before he committed suicide during a standoff with police.<sup>2</sup> In a rambling 11,000 word manifesto, Dorner wrote

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1. See Lee-Ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U.L. REV. COLLOQUY 154, 154 (2013).

2. See *id.*

that he bought silencers and a short-barreled rifle from a gun store in Nevada through a gun trust and without a background check.<sup>3</sup> Although Dorner could have passed a background check to purchase these firearms as an individual, “subsequent press coverage propelled gun trusts from obscurity into the national consciousness as a wedge issue in the gun control debate.”<sup>4</sup>

Without question, one of the most heated political topics of the twenty-first century is the possible expansion of gun control regulations and the right to bear arms.<sup>5</sup> While estate planning rarely causes impassioned national discussions, the recent increased interest in firearms has placed the spotlight on an estate planning tool frequently referred to as a “gun trust.”<sup>6</sup> Although gun trusts are intended to allow owners of firearms to legally, and responsibly, pass firearms down to family members, a legal loophole has entangled this commonly used estate planning tool in this national discussion.<sup>7</sup> Due to this loophole, a growing number of shooting enthusiasts created trusts to acquire federally-restricted firearms, such as automatic guns and silencers, while circumventing the requirements that applied to individual buyers.<sup>8</sup> Gun trusts allowed people to bypass law enforcement approval and avoid criminal background checks and fingerprinting.<sup>9</sup> Recently, federal and state governments implemented Rule 41F to tighten regulations on the purchase, transfer, and ownership of machine guns and similar weapons.<sup>10</sup>

This comment will discuss why Rule 41F is relevant to modern estate planning, and why the Department of Justice’s amendment to the Gun Control Act better reflects today’s society.<sup>11</sup> This comment will first discuss the history of gun control legislation in the United States and provide a background to gun trusts in general.<sup>12</sup> Second, this comment will consider previous gun trust laws and why the legislature decided to implement Rule 41F.<sup>13</sup> Third, this comment will discuss Rule 41F, its impact on gun trust regulations, and analyze what makes Rule 41F relevant.<sup>14</sup> Finally, this comment will discuss what estate planning professionals need to know to

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3. See N.Y. TIMES, *Gun trusts allow owners to pass firearms on to family*, DENVER POST (Feb. 25, 2013), <http://www.denverpost.com/2013/02/25/gun-trusts-allow-owners-to-pass-firearms-on-to-family/> [https://perma.cc/SGR9-M9C2].

4. See Tritt, *supra* note 1, at 156.

5. See *id.*

6. See *id.*

7. See *id.*

8. See N.Y. TIMES, *supra* note 3.

9. See *id.*

10. See Gerry W. Beyer, *Target Best Practices for Guns Included in an Estate*, 43 EST. PLN. 25, 25 (2016).

11. See *infra* Parts II–V.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

revise their clients' current gun trusts and what is required to draft a future gun trust that complies with Rule 41F.<sup>15</sup>

## II. BACKGROUND

A substantive examination of gun trusts must begin with a basic overview of federal firearms laws and regulations.<sup>16</sup> Although the regulation of firearms is primarily left up to the states, several important federal firearms laws are pertinent to the discussion of the rapid growth of gun trusts.<sup>17</sup> This section will discuss the relevant federal laws for gun trusts: "The National Firearms Act of 1934 (NFA), the Gun Control Act of 1968 (GCA), and the regulations enacted and enforced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE)."<sup>18</sup>

### A. History of Gun Control Legislation

"Spurred by the bloody 'Tommy gun' era ushered in by Al Capone, John Dillinger, Baby Face Nelson, Pretty Boy Floyd and Bonnie and Clyde," President Franklin D. Roosevelt pushed for a "New Deal for Crime."<sup>19</sup> Part of this new deal was the National Firearms Act of 1934 (NFA), which was enacted under Congress' power of taxation, granted under the Sixteenth Amendment, and primarily governed the purchase, transfer, sale, use, and ownership of certain weapons.<sup>20</sup> The NFA was the first federal gun law in American history, and it was created to make it difficult to acquire certain types of especially lethal guns, particularly machine guns and sawed-off shotguns.<sup>21</sup> The Act levied a restrictive \$200 tax on the sale or manufacture of machine guns as well as sawed-off shotguns and required dealers to record all sales in a national registry.<sup>22</sup> The act aimed to constrict the circulation of "gangster-type weapons" during the Prohibition era.<sup>23</sup>

The Alcohol Tobacco and Firearms (ATF) division of the United States Department of Treasury provides information on identifying whether a weapon falls under NFA regulations.<sup>24</sup> Machine guns, suppressors, short-barreled shotguns, and destructive devices (such as grenades and mortars) are

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15. See *infra* Parts V–VI.

16. See Tritt, *supra* note 1, at 156.

17. See *id.*

18. See *id.*

19. See *History of Gun Control Legislation*, WASH. POST (Dec. 22, 2012), [https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278\\_story.html?utm\\_term=.a7ec51136f4d](https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.a7ec51136f4d) [<https://perma.cc/442T-XT28>].

20. See *id.*

21. See Tritt, *supra* note 1, at 156.

22. See WASH. POST, *supra* note 19.

23. See *id.*

24. See Beyer, *supra* note 10.

classified as NFA firearms.<sup>25</sup> These weapons are often referred to as “Title II weapons” because they are defined under Title II of the National Firearms Act and Gun Control Act.<sup>26</sup>

In the decades following prohibition and the enactment of the NFA, the public pressure for gun control measures diminished as crime rates decreased.<sup>27</sup> However, in the late-1960s, public sentiment demanded additional congressional legislation to regulate firearms.<sup>28</sup> In 1968, following a series of high profile assassinations—such as President John F. Kennedy and the Rev. Martin Luther King Jr.—Congress responded to a swing in the public mood in favor of stricter gun laws and passed the Gun Control Act of 1968 (GCA).<sup>29</sup> The GCA contains two major titles: Title I and Title II.<sup>30</sup> Title I addresses the federal regulation of handguns and long guns.<sup>31</sup> Title II revises and incorporates “provisions of the original NFA, which remained focused on a narrow variety of firearms.”<sup>32</sup> It also bars “prohibited persons” from possessing or owning the types of firearms that are commonly referred to as NFA guns or Title II firearms.<sup>33</sup> It should be noted that the majority of firearms in circulation, such as handguns, rifles, and shotguns, are not Title II firearms.<sup>34</sup> The regulation of non-NFA firearms is primarily left up to state and local authorities.<sup>35</sup>

As the political culture in the United States has evolved, Congress has amended and expanded the NFA.<sup>36</sup> Two examples are the Gun Control Act of 1968 and the Firearm Owners’ Protection Act (FOPA), which impose additional regulations on firearms.<sup>37</sup> Although the FOPA intended to protect Second Amendment rights, it altered the GCA so rigorously that it made the transfer and ownership of machine guns illegal, with two exceptions:

1. The transfer and possession of machine guns by government agencies; and
2. The transfer and possession of machine guns that were lawfully possessed in compliance with the NFA at the time of the prohibition in 1986.<sup>38</sup>

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25. *See id.* (Machine guns are the most commonly owned NFA weapons. *Id.*).

26. *See id.*

27. *See* Tritt, *supra* note 1, at 158.

28. *See id.*

29. *See* WASH. POST, *supra* note 19.

30. *See* Tritt, *supra* note 1, at 158.

31. *See id.*

32. *Id.* at 158–59.

33. *See id.* at 166.

34. *See id.* at 159.

35. *See id.* at 157.

36. *See* Beyer, *supra* note 10, at 25.

37. *See id.* at 25–26.

38. *See id.* at 26.

Whether through sale or inheritance, “[t]he second exception protects any legal transfer of machine guns lawfully possessed in 1986.”<sup>39</sup>

Today, whether actual or constructive, the unlawful possession of NFA firearms comes with a no-tolerance policy and strictly enforced criminal penalties.<sup>40</sup> Because of a fine the NFA authorized “of up to \$250,000, up to ten years in prison, and the forfeiture of the weapon and any ‘vessel, vehicle, or aircraft’ used to conceal or convey the firearm,” the seemingly tedious procedures and processes that come with owning an NFA weapon are important and relevant.<sup>41</sup> These regulations were intended to restrict the transfer and ownership of NFA weapons to weed out civilian ownership entirely.<sup>42</sup>

### *B. A Basic Understanding of Trusts*

A substantive gun trust analysis requires a basic overview of the principles of the laws of trusts.<sup>43</sup> To understand the role gun trusts play in a proper estate plan for gun owners, an appreciation of these principles is necessary.<sup>44</sup> A trust is a way for individuals to conceptually split a gift between a trustee and beneficiary.<sup>45</sup> Substantively, there are two distinct elements of asset ownership that trusts create:

1. legal title; and
2. beneficial ownership.<sup>46</sup>

The trustee acquires legal title to the property in the trust through a gift to a trust, while the equitable title rests with the beneficiaries.<sup>47</sup> Because the trustee guides the trust property for the benefit of the beneficiary, a fiduciary relationship arises.<sup>48</sup>

Trusts are entities in themselves—separate and distinct from the parties surrounding their creation such as the settlor, trustee, and beneficiary.<sup>49</sup> U.S. Department of the Treasury regulations describe trusts as independent entities with a purpose to conserve and protect property for the benefit of the beneficiaries “who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.”<sup>50</sup> Trusts have unique partitioning and protection features because

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39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* Tritt, *supra* note 1, at 162.

44. *See id.*

45. *See id.*

46. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (2003).

47. *See* Tritt, *supra* note 1, at 162.

48. *See id.*

49. *See id.*

50. *See* Treas. Reg. § 301.7701-04(a) (2013).

they are perceived as separate entities.<sup>51</sup> The trustee is split into two distinct legal persons to insulate the trustee from trust creditors and to protect trust assets from the trustee's creditors.<sup>52</sup> These two legal persons are a trustee acting on behalf of the trust and an individual acting on the individual's own behalf.<sup>53</sup> In modern estate planning, the creditor-protection characteristic of trusts is very significant.<sup>54</sup>

### C. What Is a Gun Trust?

Gun owners create gun trusts for the same reason to create any other kind of trust—"to manage specialized assets, insulate property from future changes in the law, manage property for minors, educate minor beneficiaries, protect property from creditors, avoid probate, and provide privacy."<sup>55</sup> But, trusts that are used to purchase Title II firearms create a unique benefit because of the concept that a trust is a distinct and separate entity from the trustee or beneficiary.<sup>56</sup> This unique aspect is the defining feature of gun trusts.<sup>57</sup>

An NFA trust, also known as an NFA Trust, Title II Trust, Class 3 Trust, or an ATF Trust, is used to register, own, transfer, and possess federally restricted, but legal to own, firearms in the United States.<sup>58</sup> It is a legitimate means to obtain legal weapons because gun trusts are specifically designed to own, possess, manage, and dispose of firearms.<sup>59</sup> An NFA trust has benefits like ensuring that when an owner dies, firearms are passed on responsibly and kept from falling into the wrong hands.<sup>60</sup> A trust can provide clear instructions to beneficiaries on how to handle the firearms in compliance with federal law.<sup>61</sup>

For anyone who owns Title II firearms, a trust can function as a testamentary device.<sup>62</sup> Simply leaving your NFA firearm in your estate for your family to try and figure out what to do with them in the event of your incapacity or death can be problematic because the use and transfer of Title

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51. See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (noting that the property law aspect of shielding a trustee's assets from creditors is one of the most important contributions of trust law).

52. See Tritt, *supra* note 1, at 164.

53. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387, 416 (2000).

54. See Tritt, *supra* note 1, at 164.

55. See *id.*

56. See *id.*

57. See *id.*

58. See WASH. POST, *supra* note 19.

59. See Tritt, *supra* note 1, at 164.

60. See WASH. POST, *supra* note 19.

61. See *id.*

62. See *id.*

II firearms is so tightly regulated.<sup>63</sup> People often forget that NFA items, if not handled carefully, can easily become contraband when a disqualified person holds them.<sup>64</sup> For example, imagine a father owns thousands of dollars of NFA firearms and suddenly dies. If these firearms are properly registered through a well-drafted NFA trust, they will be considered contraband and his loved ones could face a felony charge.<sup>65</sup> This could lead to the forfeiture of the firearms, as well as potential fines of up to \$250,000 and up to ten years imprisonment.<sup>66</sup> With a gun trust, trust assets are not contraband when trustees become incapacitated or die.<sup>67</sup> The trust maintains ownership of trust assets for the benefit of the beneficiaries.<sup>68</sup> Obtaining a properly formed gun trust that is focused on the protection of the specific assets in the trust to hold NFA weapons protects the assets for the owners and beneficiaries.<sup>69</sup>

The NFA specifically defines a person to include trusts, thus a trust may legally own registered Title II firearms.<sup>70</sup> Individuals are permitted to purchase Title II firearms through, or transfer Title II firearms into, a gun trust.<sup>71</sup> Through NFA trusts, more than one individual is able to lawfully possess the same NFA firearm.<sup>72</sup> Any individual who is the trustee or settlor of that trust may lawfully possess that firearm when the trust is the lawful possessor of an NFA firearm.<sup>73</sup> This means that if a group of individuals—friends, family, etc.—are part of a trust, then they can all access and share NFA firearms that the trust owns. Like most trusts, the items belong to the trust as long as it exists, unless the trustee sells items.<sup>74</sup> The assets remain legally in the trust for generations even though a gun trust can set out the division of property just like in a will.<sup>75</sup>

Generally, three main reasons exists to create a gun trust.<sup>76</sup> First, in the event of incapacity or death, gun trusts provide comprehensive estate planning for Title II firearm owners.<sup>77</sup> Again, the possession and use of Title II firearms is highly regulated, and it may be easy for owners to inadvertently

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63. *See id.*

64. *See NFA Trusts*, LAW OFFICE OF JOHN PIERCE, ESQ., <https://johnpiercesq.com/nfa-trusts/> [<https://perma.cc/6J6W-6L5G>] (last visited Jan. 27, 2016) [hereinafter LAW OFFICE].

65. *See* WASH. POST, *supra* note 19.

66. *See id.*

67. *See* LAW OFFICE, *supra* note 64.

68. *See id.*

69. *See id.*

70. 27 C.F.R. § 479.11 (2013).

71. *See* Tritt, *supra* note 1, at 164.

72. *See id.*

73. *See id.*

74. *See* Charles M. Britt, III, *The Benefits of a Gun Trust*, GUN WRITER (May 15, 2013), <https://www.thegunwriter.com/12314/the-benefits-of-a-gun-trust/> [<https://perma.cc/A69R-XZ5W>] (discussing that a trust typically trust runs seventy years).

75. *See id.*

76. *See* Tritt, *supra* note 1, at 165.

77. *See id.*

break the law if they do not have some understanding of federal gun regulations.<sup>78</sup> A gun trust provides trustees with clear guidelines on how to handle these firearms to avoid breaking state or federal law, which could significantly reduce some of this risk.<sup>79</sup>

Second, individuals cannot jointly own a single Title II firearm in their sole capacity, but through a gun trust, multiple trustees are allowed to lawfully own, possess, or even use these firearms.<sup>80</sup> Many gun owners have questioned whether an NFA trust and its benefits are right for them now that the ATF's rules for NFA trusts are changing.<sup>81</sup> There are two ways to transfer ownership of an NFA weapon so that you can use it: to a trust in which you are a trustee or as an individual directly to you.<sup>82</sup> The "standard" method is the individual transfer.<sup>83</sup> In an individual transfer, the silencer is registered in your name, and you alone are allowed to possess or use it—in other words, you are solely on the hook for the weapon.<sup>84</sup> Without a trust, no one but the individual owner can possess or use the registered weapon.<sup>85</sup>

As stated earlier, transferring a weapon to a trust creates a legal entity that can possess property in the United States.<sup>86</sup> Thus, trust ownership is the way to go for NFA weapons because it offers unique protections and goes around much of the red tape associated with personal ownership of NFA weapons.<sup>87</sup> Gun trusts allow owners of NFA firearms to use and share the firearms legally with family members and enables them to pass them down through generations.<sup>88</sup> The trust can name multiple trustees who have the authority to possess the trust's assets, and the trust can designate these at the time of creation trust or added, or deleted, at a later date.<sup>89</sup> Over the years, the trusts have become more popular because of the legal protection from future legislation banning the possession or sale of the firearms and for the flexibility they offer NFA weapon owners.<sup>90</sup> And third, before the implementation of Rule 41F, no photos, fingerprints, or CLEO signatures were required when purchasing a Title II firearm through a gun trust, thus the

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78. See WASH. POST, *supra* note 19.

79. See *id.*

80. See Tritt, *supra* note 1, at 165.

81. See Ryan M. Cleckner, *Is an NFA Trust Still Worth It?*, THE TRUTH ABOUT GUNS.COM (Jan. 11, 2016), <http://www.thetruthaboutguns.com/2016/01/daniel-zimmerman/is-an-nfa-trust-still-worth-it/> [https://perma.cc/GX5P-B622].

82. See Nick Leghorn, *Ask Foghorn: How to Buy a Silencer*, THE TRUTH ABOUT GUNS.COM (May 9, 2012), <http://www.thetruthaboutguns.com/2012/05/foghorn/ask-foghorn-how-to-buy-a-silencer/> [https://perma.cc/ST3H-PAG2].

83. See *id.*

84. See *id.*

85. See Britt, *supra* note 74.

86. See Leghorn, *supra* note 80.

87. See Britt, *supra* note 74.

88. See *id.*

89. See *id.*

90. See *id.*



NFA transfer process was easier.<sup>91</sup> The next section will discuss this in further detail.<sup>92</sup>

### III. PULLING THE TRIGGER ON RULE 41F

To fully understand the implementation of Rule 41F, it is important to understand the legislation before its enactment.<sup>93</sup> This section will discuss the gun trust regulations that existed before the enactment of Rule 41F and the reasons behind the amendment.<sup>94</sup>

#### A. Regulations Pre-Rule 41F

For many years, gun trusts have been an efficient tool for individuals to acquire, possess, and transfer Title II firearms legally.<sup>95</sup> To fully understand the implementation of Rule 41F, it is important to understand the prior NFA regulations that the new rule affected.<sup>96</sup> Prior to July 13, 2016, the law required individuals who desired to make or acquire a Title II firearm to meet numerous requirements including, but not limited to:

- “The filing of an application with the ATF;
- The payment of a \$200 stamp tax;
- The provision of fingerprints and photographs with the ATF application;
- A background check; and
- The approval of a chief law enforcement officer (“CLEO”) prior to making or acquiring the Title II firearm.”<sup>97</sup>

Because it is a federal felony for any person other than a registered owner to possess a Title II firearm, an individual’s failure to satisfy the above requirements carried stiff penalties.<sup>98</sup>

As a result of a loophole in federal regulations, buying NFA firearms through a trust exempted members of the trust from some of the requirements listed above that apply to individual buyers, including being fingerprinted, undergoing a background check, and getting the approval of a Chief Local Law Enforcement Officer (CLEO).<sup>99</sup> The number of qualifying NFA firearms acquired without a background check or fingerprints through the use

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91. See Tritt, *supra* note 1, at 165.

92. See *infra* Sections III.A–B.

93. See *infra* Sections III.A–B.

94. See *infra* Sections III.A–B.

95. See Jeffrey D. Chadwick, *Current Developments in Federal Transfer Taxes*, 2016 WL 3034552 (May 6, 2016).

96. See *id.*

97. See *id.*

98. See *id.*

99. See N.Y. TIMES, *supra* note 3.

of trusts or legal entities rapidly increased.<sup>100</sup> From 2004 to 2014, “the number of NFA applications received from trusts and legal entities increased from 1,938 to 90,726.”<sup>101</sup> From 2013 to 2014, a total of 162,759 applications from trusts and legal entities were submitted to ATF, and none of these applications were subject to a background check.<sup>102</sup> As a result, guns and accessories that would otherwise be tightly controlled, such as machine guns and silencers, were able to pass without the same level of scrutiny that normal individuals faced.<sup>103</sup>

### *B. The Enactment of Rule 41F*

In response to a petition filed on behalf of the National Firearms Act Trade & Collectors Association on December 3, 2009, the ATF published a notice of proposed rulemaking on September 9, 2013.<sup>104</sup> The National Firearms Act Trade & Collectors Association “requested to amend 27 CFR 479.63 and 479.85, as well as corresponding ATF forms 1 and 4.”<sup>105</sup> The amendment intended to make the identification and background check requirements the same for trusts and legal entities that exist for individuals purchasing NFA firearms for the purpose of providing important public security benefits.<sup>106</sup> The petition included the following proposals:

- defining the term “responsible person” for a trust or legal entity;
- requiring each responsible person to submit photographs and fingerprints, as well as CLEO certification;
- modifying the CLEO certification to remove a statement from the CLEO about the use of the firearm for other than lawful purposes; and
- adding a new section to 27 CFR part 479 to address the possession and transfer of firearms registered to a decedent.<sup>107</sup>

The final rule was revised from the notice of proposed rule to add a CLEO notification instead of requiring CLEO certification and the term “responsible person” was clarified as “a trust or legal entity includes those persons who have the power and authority to direct the management and policies of the trust or legal entity to receive, possess, ship, transport, deliver,

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100. See *41F Final Rule*, NAT’L FIREARMS ACT TRADE & COLLECTORS ASS’N, [http://www.nfatca.org/pubs/41QA\\_NFATCA.pdf](http://www.nfatca.org/pubs/41QA_NFATCA.pdf) [<https://perma.cc/EU73-98CM>] (last visited Nov. 9, 2016).

101. See *id.*

102. See *id.*

103. See Gerry W. Beyer, *New Changes Coming This Summer for Gun Trusts*, WILLS, TR. & ESTATES PROF BLOG (Apr. 2, 2016), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2016/04/new-changes-coming-this-summer-for-gun-trusts.html](http://lawprofessors.typepad.com/trusts_estates_prof/2016/04/new-changes-coming-this-summer-for-gun-trusts.html) [<https://perma.cc/36KZ-QS9X>].

104. See *General 41F Questions & Answers*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/resource-center/docs/general41fquestionsandanswersupdated-6-28-16/pdf/download> [<https://perma.cc/4YN4-7K4B>] (last visited Oct. 17, 2016).

105. See NAT’L FIREARMS ACT TRADE & COLLECTORS ASS’N, *supra* note 100.

106. See *id.*

107. See *id.*

transfer or otherwise dispose of a firearm for, or on behalf of, the trust or entity.”<sup>108</sup>

Rule 41F is a safeguard that mandates that the identification and background check requirements apply uniformly to individuals, trusts, and legal entities.<sup>109</sup> Gun trusts are intended to allow owners of firearms to legally share them with family members and pass them down responsibly.<sup>110</sup> Many gun owners say trusts have gained popularity in part because they may offer future protection from legislation intended to prohibit the possession or sale of NFA firearms.<sup>111</sup> One main reason for the enactment of Rule 41F is that “a growing number of shooting enthusiasts were creating legal trusts to acquire machine guns, silencers or other items whose sale is restricted by federal law.”<sup>112</sup>

It should be noted, however, that lawyers who handle the trusts and gun owners who have used them contend that the majority of individuals who previously bought restricted firearms through the use of trusts did not do so to avoid such requirements.<sup>113</sup> Most gun dealers, even though it was not mandatory under previous regulations, required the representative of the trust to undergo background checks.<sup>114</sup> But, as stated earlier in the case of Christopher Dorner, not everyone who uses a gun trust may have good intentions—even though Dorner probably would have passed a background check had he received one.<sup>115</sup>

Most individuals who apply to obtain an NFA firearm are not prohibited from possessing or receiving firearms.<sup>116</sup> From 2010 to 2014, approximately 270 NFA applications out of 115,842 were denied because of failed background checks.<sup>117</sup> Although the NFA does not have an exact number, it believes that the fail rate would have been higher if responsible persons associated with trusts or legal entities had undergone background checks.<sup>118</sup> The amended regulations make background checks and identification requirements for trusts and legal entities consistent with the regulations imposed on individuals, providing important public security benefits.<sup>119</sup>

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108. See NAT’L FIREARMS ACT TRADE & COLLECTORS ASS’N, *supra* note 100.

109. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

110. See N.Y. TIMES, *supra* note 3.

111. See *id.*

112. See Erica Goode, *Trusts Offer a Legal Loophole for Buying Restricted Guns*, N.Y. TIMES (Feb. 23, 2013), <http://www.nytimes.com/2013/02/26/us/in-gun-trusts-a-legal-loophole-for-restricted-firearms.html> [https://perma.cc/LW8P-GL8A].

113. See N.Y. TIMES, *supra* note 3.

114. See *id.*

115. See *id.*

116. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

117. See *id.*

118. See *id.*

119. See *id.*

## IV. THE SCOPE OF RULE 41F

On September 9, 2013, the ATF proposed a change to rules concerning form requirements for the making or transferring of NFA firearms such as machine guns, suppressers, and short barreled rifles.<sup>120</sup> The initial rule, also known as Rule 41P, proposed redefining a “responsible person” in the regulations and would have required all responsible persons to obtain the signature of their CLEO on the applications and to submit fingerprints and photographs for ATF examiners to review before purchasing or manufacturing NFA weapons. “Over 9,500 comments were submitted to the ATF voicing opposition to this proposed rule, highlighting the fact that the rule, as proposed, would create a de facto ban on NFA weapons such as silencers in jurisdictions where CLEO signatures were impossible to secure, in addition to other related concerns.”<sup>121</sup> This comment will discuss this in detail later.<sup>122</sup>

On January 4, 2016, the Attorney General amended the regulations regarding the making or transferring of a firearm under the National Firearms Act by signing “ATF Final Rule 41F, *Machineguns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Trust or Legal Entity With Respect to Making or Transferring a Firearm*.”<sup>123</sup> The Obama administration’s final version of the proposed rule is ATF Rule 41F this rule has had a substantial impact in the acquisition and sharing of NFA weapons through the use of trusts.<sup>124</sup> The final rule was enacted “to ensure that the identification and background check requirements apply equally to individuals, trusts, and legal entities who apply to make or receive NFA firearms.”<sup>125</sup> Rule 41F significantly alters the way individuals possess NFA firearms through a gun trust.<sup>126</sup>

Rule 41F changed current NFA Regulations in several ways:

- defining the term ‘responsible person,’ as used in reference to a trust, partnership, association, company, or corporation;
- requiring responsible persons of such trusts or legal entities to complete ATF form 5320.23, National Firearms Act Responsible

120. See Martin Seidler, *New ATF Trust Regulation*, GUN TR. LAWYER, <http://www.guntrustlawyer.net/proposed-atf-trust-regulation> [<https://perma.cc/5E74-KGFB>] (last visited Nov. 9, 2016).

121. *ATF Rule 41F FAQs*, NFA FREEDOM ALL., <http://www.nfafa.org/atf41p.cfm> [<https://perma.cc/WK8P-LEUJ>] (last visited Jan. 27, 2017).

122. See *infra* Section IV.C.

123. See *FINAL Rule 41F – Background Checks for Responsible Persons – Effective July 13 2016*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/final-rule-41f-background-checks-responsible-persons-effective-july-13> [<https://perma.cc/D4KR-KLZA>] (last visited Oct. 17, 2016).

124. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

125. See NFA FREEDOM ALL., *supra* note 121.

126. See *Buying a Silencer: 6 Things You Need to Know About ATF 41F*, SILENCERCO, <https://silencerco.com/blog/2016/02/11/buying-a-silencer-6-things-you-need-to-know-about-atf-41f/> [<https://perma.cc/QA9P-JP24>] (last visited Jan. 27, 2017).

Person Questionnaire and requiring them to submit photographs and fingerprints when the trust or legal entity files an application to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm;

- requiring that a copy of all applications to make or transfer a firearm, and the specified form for responsible persons (5320.23), be forwarded to the chief law enforcement officer (CLEO) of the locality in which the applicant/transferee or responsible person resides; and
- eliminating the requirement for certification signed by the CLEO.<sup>127</sup>

In addition, the final rule adds a new section to ATF's regulations to address the possession and transfer of firearms registered to a decedent.<sup>128</sup> The rule went into effect on July 13, 2016.<sup>129</sup>

#### A. The Responsible Person Requirement

A key question that attorneys have raised since the release of Rule 41F is who is defined as a "responsible person"?<sup>130</sup> After all, it is important that attorneys know the bounds of the rule to better assist clients on the best way to comply with Rule 41F.<sup>131</sup> When trusts are concerned, the rule has this definition of "responsible persons":

[T]he term 'responsible person' for a trust or legal entity includes those persons who have the power and authority to direct the management and policies of the trust or legal entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or entity. . . . In the case of a trust, those with the power or authority to direct the management and policies of the trust include any person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for or on behalf of the trust.<sup>132</sup>

The broad language is intended to include as many beneficiaries to the trust as possible subject to the requirements of Rule 41F.<sup>133</sup> In both cases, for a trust or legal entity, "the key element is the power to 'direct the management and policies of the trust . . . to receive, possess, ship, transport,

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127. See NFA FREEDOM ALL., *supra* note 121.

128. See *id.*

129. See NAT'L FIREARMS ACT TRADE & COLLECTORS ASS'N, *supra* note 100.

130. See John Pierce, *Who Is a 'Responsible Person' Under 41F?*, LAW OFFICE OF JOHN PIERCE, ESQ. (July 14, 2016), <http://johnpierceesq.com/who-is-a-responsible-person-under-41f/> [<https://perma.cc/B7NL-T8GU>].

131. See *id.*

132. See WASH. POST, *supra* note 19.

133. See Pierce, *supra* note 130.

deliver, transfer, or otherwise dispose of a firearm for or on behalf of the trust.”<sup>134</sup> Thus, power is the key element that designates someone a “responsible person.”<sup>135</sup> If a person can purchase an NFA item on behalf of the trust, can sell trust assets, or can compel possession of trust assets, regardless of the title on the trust, that person is a “responsible person.”<sup>136</sup>

### *B. Forms and fingerprinting*

Another loophole that Rule 41F eliminated was the failure to require fingerprint cards and photographs of members of the trust.<sup>137</sup> Under the new rule, all “‘responsible persons’ must submit fingerprint cards and photographs to their respective CLEO as notification and to the ATF for approval.”<sup>138</sup> After July 13, 2016, future applicants are required to submit:

- A completed copy of [the] trust and any schedule or exhibit referenced by it;
- For each [responsible person]:
  - Two FD-258 fingerprint cards
  - A 2X2-inch photograph taken within the last year
  - A completed NFA Responsible Person Questionnaire (ATF Form 5320.23). This form will require the input of a responsible person’s full name, position, Social Security number (optional), home address, date and place of birth and nationality.<sup>139</sup>

Applicants must provide fingerprint cards and the completed NFA Responsible Person Questionnaire upon every application submission with a photograph attached.<sup>140</sup>

### *C. The Elimination of the Chief Law Enforcement Officer Certification Requirement and the Implementation of the CLEO Notification Requirement*

For an individual to obtain Title II firearms prior to Rule 41F, “the signature of a local Chief Law Enforcement Officer (CLEO)” along with the individual’s picture, fingerprints, and completed transfer application form had to be submitted.<sup>141</sup> The CLEO signature requirement was controversial for gun rights proponents, “who allege[d] that CLEOs indiscriminately and arbitrarily refuse[d] to sign application forms [without] reason, or . . . based

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134. *See id.*

135. *See id.*

136. *See id.*

137. *See* Cleckner, *supra* note 81.

138. *See id.*

139. *See id.*

140. *See id.*

141. *See* Tritt, *supra* note 1, at 156.

upon political motives or personal prejudices.”<sup>142</sup> The fact that CLEOs were not required to give reason or justify their denials only added fuel to this concern.<sup>143</sup> “To reduce the burden on the public associated with making or transferring an NFA weapon, the final rule eliminates the Chief Law Enforcement Officer certification requirement for all applicat[ions] . . . and replaces it with a CLEO notification requirement.”<sup>144</sup>

The CLEO notification requirement replaced the CLEO signature requirement.<sup>145</sup> This change applies to all NFA firearms transferees and makers, and many claim this significant change is a welcome sight.<sup>146</sup> This implementation prevents anti-NFA officials from arbitrarily barring Americans from owning Title II weapons.<sup>147</sup> Instead, individual applicants send a notification to their local CLEO containing copies of all pertinent documents.<sup>148</sup> “However, the requirement is still problematic because it requires applicants to disclose confidential tax information and there is no centralized [mailing address] designated to send it [to].”<sup>149</sup> This problem raises concerns about the ability to prove compliance if the local police chief fails to retain the application in the records.<sup>150</sup> For this reason, applicants should send the forms through registered mail.<sup>151</sup>

The revisions of the regulations in 27 CFR 479.62 and 479.84 will accomplish the CLEO notification.<sup>152</sup> These regulations will “require the applicant, or responsible persons, to mail a completed copy” of either the National Firearms Act (NFA) Responsible Person Questionnaire (Form 5320.23) or a completed copy of the application, consisting of Form 1, 4, or 5, “to the CLEO of the locality of the applicant or responsible person.”<sup>153</sup> In the case of a trust, the locality” of the applicant or responsible person is considered to be at the primary location where the firearm will be maintained.<sup>154</sup> The new rule defines a CLEO as “the local chief of police, county sheriff, head of the State police, or State or local district attorney or prosecutor.”<sup>155</sup>

The CLEO is not required to act unless “the CLEO has information that the applicant, transferee, or responsible person is or may be prohibited from

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142. *Id.*

143. *See id.*

144. *See* NAT’L FIREARMS ACT TRADE & COLLECTORS ASS’N, *supra* note 100.

145. *See* NFA FREEDOM ALL., *supra* note 121.

146. *See id.*

147. *See* SILENCERCO, *supra* note 126.

148. *See id.*

149. *See* NFA FREEDOM ALL., *supra* note 121.

150. *See id.*

151. *See id.*

152. *See* NAT’L FIREARMS ACT TRADE & COLLECTORS ASS’N, *supra* note 100.

153. *See id.*

154. *See id.*

155. *See* A FREEDOM ALL., *supra* note 121.

possessing a firearm.”<sup>156</sup> In that case, the CLEO may notify the NFA Branch.<sup>157</sup> Pursuant to this final rule, the CLEO is not required to file any of the NFA forms that the CLEO may receive.<sup>158</sup> The CLEO notification’s replacement of the CLEO Certification means the CLEO’s signing or approval is not necessary.<sup>159</sup> Applications post marked on or after July 13, 2016, only require the CLEO notification process.<sup>160</sup>

*E. Addition to 27 CFR Part 479 to Address the Possession and Transfer of NFA Items Registered to a Decedent*

The final rule added a new section to 27 CFR part 479 to address the transfer and possession of firearms registered to a decedent.<sup>161</sup> This new section explains 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.”<sup>162</sup> The section also clarifies that when the transfer is to a beneficiary of the estate, the executor may transfer firearms that the estate holds on a tax-free basis.<sup>163</sup> However, the executor must pay the appropriate transfer tax when the transfer is to persons who are not lawful heirs.<sup>164</sup>

V. ESTATE PLANNING ATTORNEYS: A SPOTTER FOR CLIENTS

Most estate planners have clients who are gun owners.<sup>165</sup> Despite this, many estate planners are unfamiliar with the highly specific local and federal regulations that control making, purchasing, possession, and transfer of Title II firearms.<sup>166</sup> Because of this, many estate planners fail to plan appropriately for the ownership and transfer of these firearms in their client’s estate.<sup>167</sup> With the enactment of Rule 41F, it is important for estate planners to understand the changes that became effective on July 13, 2016, with respect to the ownership of Title II firearms through gun trusts.<sup>168</sup> This section will

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156. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.*

165. See Chadwick, *supra* note 95.

166. See *id.*

167. See *id.*

168. See *id.*



discuss the basic framework of an NFA gun trust and what clients are affected by Rule 41F.<sup>169</sup>

*A. The Basic Framework of an NFA Trust Is No Different Than Other Trusts*

Life is unpredictable—it throws us curveballs we can't always anticipate.<sup>170</sup> “While thinking about our final days isn't a subject we often take time to think about, it is something that we have to plan for.”<sup>171</sup> The wealthy, poor, old, and young alike should all have an estate plan.<sup>172</sup> There is a lot more to estate planning than just a final will—it can also include a trust agreement for certain assets.<sup>173</sup> The trust document designates a trustee who holds the trust property as a fiduciary for the named beneficiaries of the trust.<sup>174</sup> The trustees and beneficiaries may use the property that the trust owns under the conditions set forth in the trust document and in accordance with federal and local law.<sup>175</sup>

When drafting a gun trust, it is important for attorneys to help clients deliberate through the specifics of their situation.<sup>176</sup> This process ultimately requires clients to determine their present and future goals; as well as with whom these goals relate.<sup>177</sup> Although it can be difficult, it is important to determine how individuals would like their property handled at death or incapacity so that the trust can contain detailed instructions and powers for the trustee in case of unforeseen events.<sup>178</sup> NFA weapons cannot be transferred through a trust like personal property, thus without proper gun trust creation, the danger of criminal penalties and confiscation is significant.<sup>179</sup>

An NFA trust's basic framework is no different than other trusts.<sup>180</sup> An NFA trust is a legal entity in which the firearms are registered and is established for the ownership, transfer, and possession of legal to own, but federally restricted, firearms.<sup>181</sup> As with other trusts, a designated trustee holds the property for the named beneficiaries of the gun trust as a

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169. See *infra* Sections V.A–B.

170. Super User, *What You Should Know About Estate Planning*, HARLOW, SPAINER & HECKELE, PLLC (May 25, 2014), <https://www.reallawtucson.com/what-you-should-know-about-estate-planning/> [https://perma.cc/7L2K-S487].

171. See *id.*

172. See *id.*

173. See *id.*

174. See WASH. POST, *supra* note 19.

175. See *id.*

176. See Beyer, *supra* note 10.

177. See *id.*

178. See *id.*

179. See *id.*

180. See WASH. POST, *supra* note 19.

181. See *id.*

fiduciary.<sup>182</sup> “The trustees and beneficiaries may use the property owned by the trust under the conditions set forth in the trust document and in accordance with federal and local law.”<sup>183</sup> Because trusts are fairly flexible legal instruments, they can be created to hold almost any type of property.<sup>184</sup> “However, if a trust is created in order to hold Title II firearms, it’s advisable that the trust only contain restricted guns to avoid unnecessary confusion and complexity.”<sup>185</sup>

### *B. Who Is Affected by Rule 41F?*

Not only does each violation of the NFA force the owner to forfeit all weapons, but it also subjects the owner to 10 years in prison and fines of up to \$250,000.<sup>186</sup> Thus, estate planning professionals must be educated “on how to protect their client’s ownership, transfer, and possession rights of National Firearms Act (NFA) weapons, while alive, when incompetent, and at death.”<sup>187</sup> Creating a NFA Firearms Trust provides guidance to beneficiaries and managers of a trust to help avoid NFA violations that could result in such penalties.<sup>188</sup>

The construction of the final rule applies to future applications that both individuals and entities make.<sup>189</sup> It does not apply directly to existing trusts or entities in possession of NFA weapons.<sup>190</sup> If clients are “applying as a trust or legal entity to make and register an NFA firearm . . . or receiving an NFA firearm in the name of a trust or other legal entity as the transferee,” there is new information they need to know regarding the application process.<sup>191</sup> First, all responsible persons named are required to undergo a background check, must complete the Form 5320.23 with photo attached, and provide two FD-258 fingerprint cards.<sup>192</sup> Secondly, the CLEO notification has replaced the former Chief Law Enforcement Officer (CLEO) certification.<sup>193</sup> Thus, an applicant and transferee must forward a completed copy of the application to the chief law enforcement officer of the locality in which the applicant or transferee resides.<sup>194</sup> “In addition, all responsible

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182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See* David M. Goldman, *Why Do I Need an NFA Firearms Trust?*, NFA GUN TRUST LAWYER BLOG (Oct. 6, 2009), <https://www.guntrustlawyer.com/2009/10/why-do-i-need-an-nfa-firearms.html> [https://perma.cc/P6N2-F7SP].

187. *See* Beyer, *supra* note 10.

188. *See* Goldman, *supra* note 186.

189. *See* A FREEDOM ALL., *supra* note 121.

190. *See id.*

191. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

192. *See id.*

193. *See id.*

194. *See id.*

persons must also submit a completed copy of Form 5320.23, to the chief law enforcement officer of the locality in which the responsible person resides.<sup>195</sup> Rule 41F is not meant to be retroactive, and thus it does not apply to applications that are pending in status.<sup>196</sup> Any applications post marked prior to the effective date of July 13, 2016, will be processed according to previous regulations.<sup>197</sup> The new regulations only apply to those applications postmarked on or after July 13, 2016.<sup>198</sup> It should be noted, however, that after July 13, 2016, all previous versions of ATF Forms 1, 4, and 5 became obsolete.<sup>199</sup> The change from the CLEO certification to CLEO notification required a revision to the forms and all applicants after Rule 41F came into effect must use the new versions of the forms to be accepted.<sup>200</sup>

## VI. THE TRAJECTORY OF RULE 41F

Many people are questioning whether the new rule will render gun trusts meaningless—the answer to that question is no.<sup>201</sup> After July 13, 2016, and the full implementation of Rule 41F, gun trusts are still exceedingly useful as a means for transferring NFA weapons inexpensively to one's decedents in the event of a trust holder's death.<sup>202</sup> Additionally, trusts remain the most legally-sound method of responsibly sharing NFA weapons with others.<sup>203</sup>

While applicants are subject to the new requirements of Rule 41F in making future applications, holding the weapons in a gun trust and making co-trustees and beneficiaries of the trust reduce the possibility of an accidental felony transfer of NFA weapons.<sup>204</sup> Additionally, using a gun trust will eliminate the need for a judicial probate process to transfer your NFA weapons upon death.<sup>205</sup> Using a gun trust is a no brainer when you consider that attorney's retainer to do a basic probate may be \$2,500 or more.<sup>206</sup>

Finally, a properly constructed gun trust can protect your successors from getting into trouble with these weapons.<sup>207</sup> It serves as a comprehensive management system that instructs successors on how to handle these weapons and to inform them of the restrictions involved when owning an NFA weapon.<sup>208</sup>

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195. *See id.*

196. *See id.*

197. *See id.*

198. *See* NAT'L FIREARMS ACT TRADE & COLLECTORS ASS'N, *supra* note 100.

199. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 104.

200. *See id.*

201. *See* A FREEDOM ALL., *supra* note 121.

202. *See* SILENCERCO, *supra* note 126.

203. *See id.*

204. *See* A FREEDOM ALL., *supra* note 121.

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.*

## VII. CONCLUSION

The goal of Rule 41F was to guarantee that the identification and background check requirements apply uniformly to individuals, trusts, and legal entities.<sup>209</sup> As with most meaningful amendments to regulations or laws, the implementation of Rule 41F caused some operational or procedural changes, and it altered the workload for government workers and industry members.<sup>210</sup> Considering these costs and changes, the benefits of ensuring that persons prohibited from possessing NFA weapons do not easily obtain them outweighs the cost of implementing the rule.<sup>211</sup>

Regardless of the ongoing debates in this country regarding gun rights and gun control, the fact remains that millions of Americans own firearms that they have legitimate estate planning concerns about.<sup>212</sup> Through this recent legislation, the tightening of regulations on the purchase, transfer, and ownership of machine guns and similar weapons though the implementation of Rule 41F has made the creation of gun trusts a less complex and a more straightforward process.<sup>213</sup> Rule 41F resolved questions and given estate planners guidance and direction on creating gun trusts that ensure the safety of their client's assets.<sup>214</sup>

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209. Loretta E. Lynch, *Machineguns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Trust or Legal Entity With Respect to Making or Transferring a Firearm*, FED. REGISTER (Jan. 4, 2016), <https://www.federalregister.gov/documents/2016/01/15/2016-00192/machineguns-destructive-devices-and-certain-other-firearms-background-checks-for-responsible-persons> [https://perma.cc/X98A-MHM5].

210. *See id.*

211. *See id.*

212. *See* Tritt, *supra* note 1, at 156.

213. *See* Beyer, *supra* note 10.

214. *See* Lynch, *supra* note 209.