

**WealthCounsel**  
**Federal News Brief**

THE IMPACT OF BATF RULE 41F  
ON FIREARMS TRUSTS



## WEALTHCOUNSEL FEDERAL NEWS BRIEF: THE IMPACT OF BATF RULE 41F ON FIREARMS TRUSTS.

by C. Dennis Brislawn, JD and Matthew T. McClintock, JD

On January 4, 2016 United States Attorney General Loretta Lynch signed ATF Rule 41F. The Rule administratively changes federal regulations regarding firearms regulated by Title II of the Gun Control Act (GCA), specifically known as the National Firearms Act, 26 U.S.C. Chapter 53 (the NFA).

Rule 41F affects the making and transfer of NFA firearms for individuals and entities and was specifically intended to address those firearms made or received by trusts or other legal entities. The Rule was published in the Federal Register on January 15, 2016 and becomes effective on July 13, 2016, 180 days after publication.

Trusts and LLCs are the most common legal tools used in planning for a private gun collection, and the Rule is a concern in both drafting and administration. Rule 41F amends 27 CFR part 479 for trusts and legal entities (partnerships, associations, companies, and corporations). It adds some definitions, procedures, and clarifies some issues. It purports to clarify which persons involved with a trust or legal entity must provide documentation and undergo a background check when an application to make or receive an NFA firearm is made by the trust or legal entity.

Practitioners should note that the NFA regulates six types of firearms including machine guns, destructive devices, sound suppressors (commonly referred to as “silencers”), short-barreled rifles, short-barreled shotguns, and “any other weapons”, a subcategory further defined by the NFA. Non-NFA or “conventional” firearms, i.e., handguns, rifles and shotguns are not regulated by the NFA but instead by Title I of the Gun Control Act, (also known as State Firearms Control Assistance 18 U.S.C. Chapter 44). Title I was the “original” Gun Control Act prior to incorporation of the NFA as Title II of the GCA.

It is important to note that a firearms trust may possess both kinds of firearms – conventional and NFA. However, this Rule only impacts those trusts that possess NFA firearms. One must also consider that State law may further regulate both kinds of firearms.

### **Here is a summary of the main features of Rule 41F**

As mentioned above, Rule 41F deals with NFA firearms, and it only applies after its effective date. Its effect on trusts is limited to the time of filing an application, which remains a bit obscure in application.

- First, the Rule revises the definition of person and adds a definition for “*responsible person*.”
- As to unlicensed entities in general (trusts, partnerships, associations, companies (including LLCs) or corporations), a responsible person (RP) is “*...any individual who possesses, directly or indirectly, the power or authority to direct the management and policies of the trust or entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or legal entity.*”

- As to a trust, a responsible person includes “...those persons with the power or authority to direct the management and policies of the trust” including “...any person who has the capability to exercise such power and possesses, directly or indirectly, the power of 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.”

Note that the second bullet point above states “any individual” while the third states “those persons.” Importantly, the definition of “person” includes specified entities under each Title of the Gun Control Act.

While the scope of the definition of “responsible person” in the context of modern trust planning is somewhat unclear, the term will most certainly mean a grantor and trustee. It could mean a trust protector or advisor or even a beneficiary if the person holds the powers stated. Generally, though if a beneficiary is not also appointed as a trustee, the definition should not apply.

The definition is being interpreted very broadly according to ATF sources, and attempts to draft around the definition appear to create risk for practitioners and clients alike. The real issue is who is serving in a capacity that meets the definition of a Responsible Person at the time of filing an application.

Firearms trusts should be reviewed and modified as necessary to define the roles and powers of specific parties to the trust to clarify which of those parties are “responsible persons” for purposes of Rule 41F.

- *Second, each responsible person of a trust or legal entity must complete ATF Form 5320.23 and submit it to ATF along with photographs and fingerprints when the trust or legal entity applies to make an NFA firearm (Form 1) or receive an NFA firearm as transferee (Form 4 or 5.) In addition, each responsible person must undergo a background check performed by NFA Branch.*

Previously the rules concerning fingerprints, photographs, and law enforcement certification did not apply to trusts or other entities. Rule 41F places trusts and other entities on equal footing with individual applicants so that the same documentation is required for NFA firearms transfers, while collecting federal tax revenues from applications to make or transfer NFA firearms. Also, if an entity were to change its name or form (such as a corporation changing over to an LLC) this would likely be a transfer requiring documentation.

Attentive administration of persons who are RPs is recommended prior to filing an application. Forms should be provided with a firearms trust to allow for removal of unnecessary Responsible Persons prior to filing. Appointments can be made or renewed at a future time when necessary. Under Rule 41F there is no requirement to update ATF when a trustee (or other responsible party) is added or removed. The documentation requirement arises only upon the filing of a new application to make or transfer an NFA firearm. It is unclear if documentation is required for a new appointment made immediately after filing but prior to approval.

- *Third, the chief law enforcement officer (or “CLEO”) certification for individuals is replaced with a CLEO notification for both individuals and entities. Under the Rule, the applicant maker or transferee, “...including each responsible person for a trust or legal entity” “...provides notice to the CLEO in the jurisdiction where the NFA firearm will be principally maintained that an application is being submitted to ATF.*

Certification by the CLEO is eliminated. This feature of the Rule is intended to simplify and expedite the process of approval for making or transferring NFA firearms. This provision would, however, require that all responsible persons be disclosed to the CLEO of the jurisdiction where the firearm will be kept. To this end, it is advantageous to have as few “responsible persons” under the trust as possible at the time the application is submitted.

- *Fourth, a trust or other legal entity with an approved application in the preceding 24 months may certify “no change” in certain documentation previously submitted.*

This will certainly be advantageous to firearms trust clients who acquire and dispose of NFA firearms from time to time, reducing the amount of paperwork and additional expense for new firearms. RPs would still submit documentation, the transfer tax would still be paid, but entity documentation previously provided for an application approved within the preceding 24 months would not need to be provided. Providing a “Certificate of Trust” might be advisable.

- *Finally, a new section in ATF’s regulations clarifies the possession and transfer of firearms registered to a decedent. Essentially a person authorized under state law to administer an estate may possess an NFA firearm during administration. Because a trust continues to exist until terminated, a change in trustee is not a “transfer” under the NFA. Transfer of a decedent’s NFA firearm may be made on a tax-exempt basis (Form 5) to a beneficiary of the estate or trust, or on a taxable basis (Form 5) to any other person. A beneficiary can include a named entity such as another firearms trust.*

The new Rule will provide a measure of confidence and protection for personal representatives and executors by clarifying that taking custody of firearms in administration does not constitute unlawful possession. It also provides for tax-exempt (NFA) transfer to a lawful heir from the decedent’s estate or trust. A lawful heir can include an individual or an entity.

## **Gun Trust planning**

In the context of firearms trust planning, it’s worth remembering that a trust not only continues beyond the death of the settlor for administration but could continue on as a common trust for beneficiaries. If there is no change in identity or if this is not a “transfer” then no documentation would be required. However, if distribution is made to a lawful heir or into separate trust shares, documentation of responsible parties and a copy of the trust would likely be required along with filing of the Form 5.

Failure to address the new issues raised by Rule 41F will expose owners of firearms trusts to the risk of committing a new kind of accidental felony, i.e. related to a failure to document an RP. Firearms trusts must be reviewed – and likely revised – to clarify the roles of parties involved and whether or not they are RPs. If new NFA applications are made following implementation, it might be advisable to limit the number of “responsible persons” as defined by Rule 41F to avoid substantial paperwork or risking liability for unlawful transfer of an NFA firearm. The legal consequences of failing to comply with the NFA can be severe, including fines of up to \$250,000 and up to 10 years in prison, as well as confiscation of the firearm(s) involved.

Key actions to consider for firearms trusts necessitated by Rule 41F include:

- Reviewing and revising the roles and authorities of trustees, trust protectors, and beneficiaries to identify and/or limit the number of “responsible persons” under the Rule.
- Defining the terms “person” and “responsible person” within the firearms trust to assist trustees in proper administration of the trust.
- Reexamining the role and powers of trust protectors to determine whether they will be responsible persons subject to the provisions of Rule 41F.
- Reviewing the procedural mechanisms and the conditions under which a trust protector serves in order to provide flexibility when needed while avoiding unnecessarily documentation requirements.
- Managing the number of “responsible persons” prior to submitting an application to make or transfer an NFA firearm after July 13, 2016 in order to comply with law and limit the amount of documentation required.
- Considering powers granted to trustees and others under a firearms trust, if and when to appoint trustee-beneficiaries to possess and enjoy trust property with limited powers, and if and when to limit the duration of such appointments to avoid the necessity of removing trustees when a new application is filed.

Since Rule 41F becomes effective in July 2016, attorneys with firearms trust clients have an immediate opportunity to educate clients and to amend firearms trusts as necessary. It is important to act quickly to address this Rule to be in front of the issue. Failing to act quickly may erode client confidence and ultimately may expose clients to delays with applications or even liability arising from an accidental felony by providing incomplete documentation.

### **The Gun Docx® Trust Advantage**

Rule 41F underscores the importance of having a carefully drafted gun trust that is part of a comprehensive system addressing firearms. 41F is directed solely at NFA Firearms, and it is a relatively small of a complex regulatory scheme in both federal and state law that imposes many additional regulations and restrictions on transfer and transportation of every type of firearm.

A properly constructed gun trust instructs the gun owner in how to lawfully share and enjoy firearms – both conventional and NFA – without committing an accidental felony by an innocent but technically unlawful transfer. And a Gun Docx trust is not “a one size fits all” form; There are three editions designed with options to fit the budget and specific needs of any gun owner, whether a new gun owner or a gun owner with a multi-million dollar collection.

What 41F dramatically highlights is the role of trust management using a well-written trust. This is where the Gun Docx trust shines and is unique in the marketplace. Ancillary documents and helpful guidance ensure proper administration.

Forms are included for appointment and removal of trustees and beneficiaries, trust funding, and accounting for trust assets while maintaining privacy.

Simply put, a Gun Docx Trust is the best way for a private gun owner to enjoy and pass on valued firearms while complying with increasingly complex gun laws.

For more information on WealthCounsel: [information@wealthcounsel.com](mailto:information@wealthcounsel.com) or call us: (888) 659-4069 #819

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