



NATIONAL ASSOCIATION
FOR GUN RIGHTS

NEA/FAQ

• National Firearms Act Frequently Asked Questions •

by James O. Bardwell, Esq.

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National Association for Gun Rights
P.O. Box 1776 · Loveland, CO 80539
nationalgunrights.org

Federal Gun Control Laws

Gun control at the Federal level in the USA is a 20th century creation. The first broad Federal gun control law in the USA was called the National Firearms Act, enacted in 1934. It was loosely modeled on gun control laws enacted in Great Britain after World War I. In 1938 a second law, the Federal Firearms Act was passed. Broadly speaking, the NFA created controls on certain firearms that Congress claimed were the preferred tools of gangsters. The law was based on Congress' enumerated taxing power under the Constitution. At the time the general legal thought was that the Federal government had limited powers under the Constitution, and one power it lacked was the general police power, a power that was left to the states. Therefore the NFA was modeled as a tax law, on the Federal anti-drug laws that were also premised on taxing narcotics, to create a de-facto ban. The U.S. Supreme Court had already upheld the drug laws, so the drafters of the NFA figured structuring the gun ban as a "tax" would also insulate it from a claim that banning guns was outside the enumerated powers of Congress.



National Association for Gun Rights President Dudley Brown with a "dealer sample" Thompson M1A1.

The Federal Firearms Act covered all firearms, and created a system of licenses to deal in firearms across state lines, and began the ban on possession of firearms by certain persons convicted of crime.

In the time since 1934 of course, all pretense of the Federal government having limited, enumerated powers under the Constitution has been dropped. The narcotics laws based on the taxing power were repealed in 1970, and replaced with the bans we see today. Today's Federal gun control laws do not seek to have any real connection to the enumerated powers the Federal government is supposedly limited to.

These two laws were amended from time to time until 1968, when both laws were repealed and re-enacted, with major changes. The 1968 versions of these laws, with tweaks that have been made since then, are the core of Federal gun control laws in the USA. The 1968 law renamed the revised version of the Federal Firearms Act the Gun Control Act, and kept the name of the National Firearms Act the same. Title 2 of the 1968 law is the National Firearms Act (codified at sec. 5801 et seq.). Title 1 is the Gun Control Act, (U.S.C. . sec. 921 et seq.).

These two laws overlap to an extent, with certain firearms being regulated by both laws, and all firearms being regulated by at least one of the laws. Title 1 firearms include almost any device that can discharge at least one shot by means of an explosive (including rifles, shotguns and handguns), silencers, and firearm frames or receivers. A few items are exempt; firearms made before 1899,

and muzzle loading firearms. Most NFA weapons are also title 1 firearms. Title 2 weapons are NFA weapons. NFA weapons are also sometimes called class 3 weapons, because a class 3 SOT (see below) is needed to deal in NFA weapons.

These weapons may also be further regulated by states or localities, and while these weapons can be legally owned under Federal law, some states and localities further regulate ownership or prohibit it (see below). The NFA Branch of ATF administers the taxation of the guns, and the registration of them in the National Firearms Registration and Transfer Record (NFRTR).

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NFA Firearm Definitions

The NFA only covers certain weapons defined as: machine guns, firearm mufflers or silencers (sometimes called sound suppressors, although that is not what the law calls them), short barreled shotguns, short barreled rifles, destructive devices and “any other weapons”. Exactly what these weapons are is defined in the law, as well as in court cases interpreting the law.

A machine gun is any gun that can fire more than one shot with a single pull of the trigger, or the receiver of a machine gun, or a combination of parts for assembling a machine gun, or a part or set of parts for converting a gun into a machine gun. A gun that is called fully automatic is a machine gun. A gun that is called semi-automatic is one that will only fire one shot with each trigger pull, and is not included in this definition.

A semi-automatic gun will typically automatically reload the chamber with a new cartridge each time the gun is fired, but the mechanism then stops, and the trigger has to be pulled again to fire another shot. A fully automatic gun will (so long as the trigger continues to be activated by the user) continuously load and fire until it exhausts its ammunition supply. That is the essential difference between a semi-automatic gun and a machine gun. The two types may externally appear identical, and often it is possible to have two versions of the same gun, one of which can fire automatically and one which cannot. This visual similarity feeds gun control advocates who confuse, either deliberately or out of ignorance, fully automatic firearms with semi-automatic firearms.

A silencer is any device for muffling the gunshot of a portable firearm, or any part or parts exclusively designed or intended for such a device (see discussion below).

A short barreled shotgun is any shotgun (which is defined as a shoulder fired, smooth bore firearm) with a barrel of less than 18 inches or an overall length of less than 26 inches, or any weapon made from a shotgun falling into the same length parameters.

A short barreled rifle is a rifle (which is defined as a shoulder fired, rifled bore firearm that is not a machine gun) with a barrel length of less than 16 inches, or an overall length of less than 26 inches, or any weapon made from a rifle falling into the same length parameters (like a pistol made from a rifle). In measuring barrel length you do it from the closed breech to the muzzle, see 27 CFR sec. 479.11. To measure overall length do so along, "the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore." 27 CFR sec. 479.11. On a folding stock weapon you measure with the stock extended, provided the stock is not readily detachable, and the weapon is meant to be fired from the shoulder.

A destructive device (DD) can be two basic categories of things. It can be an explosive, incendiary or poison gas weapon, like a bomb or grenade. It can also be a firearm with a bore over 1/2 inch, with exceptions for sporting shotguns, among other things (see discussion below). I call the second category large bore destructive devices. As a general rule only this second category is commercially available.

Any other weapons (AOW's) are a number of things; smooth bore pistols, any pistol with more than one grip, (but see below) gadget type guns (cane gun, pen gun) and shoulder fired weapons with both rifled and smooth bore barrels between 12 inches and 18 inches in length, that must be manually reloaded (see discussion below).

These definitions are simplified, to see if a specific gun is a title 1 or 2 firearm one needs to refer to the specific definition under the statute(s), and possibly consult with the Technology Branch of ATF. There is also case law on the issue of whether a specific item falls into one of these categories. In addition, as a general rule, a parts kit, i.e. all of the parts to assemble an NFA firearm, whether a parts kit is specifically included in the statute or not, is usually considered to be the same as the assembled firearm.

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Owning Or Making An NFA Weapon

It is illegal for anyone to have possession of an NFA weapon that is not registered to them in the NFRTR. It is also not possible for anyone, except government entities, to register an existing NFA weapon that is not registered, except within 24 hours after one is made by a class 2 NFA manufacturer. An individual otherwise able to own any gun under Federal law can receive and own any NFA weapon. The process starts by having the seller/transferor of that firearms submit ATF Form 4, "Application for Tax Paid Transfer and Registration of Firearm" to transfer the weapon to the buyer. Once the transfer is approved by ATF the seller delivers the firearm and the approved transfer paperwork to the buyer/transferee.

ATF cannot legally approve a transfer where Federal, state or local law would be violated by the transferee possessing the weapon in question, see U.S.C. sec. 5812(a)(6) . Persons who are not licensed under the Gun Control Act to be in the

business of dealing in, manufacturing or importing firearms (called a Federal Firearms License, or FFL) may only purchase an NFA weapon from a dealer or individual within their own state of residence. If the weapon is located out of state it must be first transferred to a class 3 dealer within the buyers state, before the final transfer to the purchaser. C&R FFL holders (type 03) may purchase C&R NFA guns from out of state dealers and individuals. Type 01 FFL holders, who are not also qualified to deal in NFA weapons, that is are not SOT taxpayers (see below) may purchase any fully transferable (no dealer samples, see below) NFA weapon, from an out of state source. If the FFL holder is also an individual person (as opposed to an FFL holder that is an artificial entity, like an LLC or corporation), he must submit fingerprints, photograph, and the law enforcement certification.

With limited exceptions, transfer of an NFA firearm to someone not licensed to be the business of dealing in, manufacturing or importing such firearms involves paying the transfer tax, which is \$200 for all NFA weapons, except AOW's for which the tax is a mere \$5. Unserviceable firearms are exempt from the transfer tax, as are transfers from a governmental entity. Flesh and blood transferees also have to get one of several specified local chief law enforcement officers to sign the form (see below on the law enforcement certification for more information), submit their fingerprints in duplicate, and attach photos of the transferee to the form. While the transfer tax is levied by law on the transferor (seller), in practice the transferee (buyer) is expected to pay the tax.

A person can also "make" any NFA weapon, except for machine guns (see below), by filing ATF Form 1, "Application to Make and Register a Firearm", and paying the \$200 making tax, which applies to all of these weapons, including AOW's. You may not make the proposed weapon until the Form 1 is returned to you approved. The law enforcement certification, photo and fingerprint requirements outlined above for transfers also apply to Form 1's. Artificial entities, such as limited liability companies, trusts and corporations, including corporate type 01 FFL holders, need not do the certification, photo and fingerprint. Any of the forms listed, and the fingerprint cards, are available for free from ATF.

Additionally the maker or manufacturer of any NFA weapon, including an individual making one on a Form 1 must mark the receiver or barrel of the weapon with the maker's name and city and state. NFA Branch can grant exemptions from this for DD's and for weapons which are too small to be physically marked. ATF has created a Form, ATF Form 3311.4 to request a variance for the marking requirements. If the firearm does not already have a serial number the maker must also mark one on the frame or receiver of the firearm. If the NFA firearm is being made from an existing, non-NFA firearm that already has a serial number the existing number should be used.

Once the transfer or making is approved, the original of the paperwork should be kept in a safe place. I suggest a safe deposit box. ATF can legally demand to see the form (see below on your 4th amendment rights). On a tax paid transfer, ATF puts a tax stamp, like a postage stamp (or like the one that caused the American colonists to take up arms), on the document. Once it is used/canceled you cannot get another.

ATF can supply a copy of the form should you lose one, but is not unheard of for ATF to have no record in the NFRTR of a weapon registered to you. Having the paperwork can avoid a lot of hassles. Every effort should be made to not lose it.

Additionally, if the gun in question is a machine gun, not having the paperwork can lead to being charged with a violation of U.S.C. sec. 922(o), the ban on possessing machine guns made after May 19, 1986. Four of the federal circuit courts of appeals (U.S. v. Just, 74 F.3d 902 (CA8 1996), U.S. v. Gravenmier, 121 F.3d 526 (CA9 1997), U.S. v. Gonzales, 121 F.3d 928 (CA5 1997) and U.S. v. Franklyn, 157 F.3d 90 (CA2 1998)) that have addressed the issue have ruled that sec. 922(o) prohibits possessing all machine guns, and it is an affirmative defense to such a charge that the weapon was legally possessed before it took effect. In such a case it is up to the defendant to prove an affirmative defense, although by a lower evidentiary standard than the government needs to prove to show a criminal violation (usually preponderance of the evidence versus beyond a reasonable doubt). It is not up to the government to prove the weapon was not registered, for a charge under sec. 922(o), at least according to the appeals courts that have considered the question. If you don't have the paperwork, and it isn't in ATF's registry you can have a serious problem. Although not required, it is likely ATF will check the NFRTR, even though they don't have to prove non-registration, they don't want someone to wave a registration form in their face during a trial.

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Taxpayer Privacy

The transfer or making paperwork is nominally a tax return, just like the IRS Form 1040. The purpose of the registration and the registry is keeping track of who owes the tax and who has paid the tax. Taxpayer privacy laws (26 USC sec. 6103) apply to all ATF transfer or making forms. ATF takes the position that they may not discuss a pending transfer with anyone but the taxpayer, unless the taxpayer gives permission for ATF to discuss it with another party. They claim that the taxpayer on a tax paid transfer is the transferor (seller), as he is responsible for the tax by law. This also serves to allow ATF to refuse to discuss why a transfer is taking so long with the party who is most interested in that question, the transferee (buyer). However, in another context (releasing information under the Freedom of Information Act) ATF has decided that as to a Form 4, the tax form is a joint return between the transferor and transferee (see the 1980 memo re Auto Ordnance Corp. FOIA request). The transferee should be entitled to the information about the status of the application on the same basis as the transferor. Current versions of ATF Form 4 have a place for the transferor to mark that it is OK (or not OK) for ATF to discuss information on the transfer with the transferee.

These taxpayer privacy restrictions do not apply to disclosure of the transfer or making form by other persons who might have access to it, a local LE chief who provided the certification, for example, and retained a copy of the form. Nor do they apply to a court ordered disclosure by anyone who might have a copy (buyer or

seller for example), by subpoena or similar measure. They also do not prevent ATF from releasing limited information about the initial registration of an NFA firearm to the party to whom the firearm is currently registered, via a request under the Freedom of Information Act. Generally registration or transfer documents released under FOIA will have personal identifying information about the transferor or transferee redacted from the released copy.

The NFA law also prohibits the use of NFRTR information obtained from natural persons (only) for any law enforcement purpose except prosecutions for making a false statement on a transfer form (26 U.S.C. sec. 5848). Other tax laws prohibit the release of transfer information by the Feds, as a tax return, except for certain narrow law enforcement type circumstances. See 26 USC sec. 6103. The Feds may not legally disclose whether someone has a registered NFA firearm, or not, to any state or local law enforcement agency or personnel. In spite of this, ATF does regularly do this.

However, as most NFA weapons are also regulated by the GCA, purchases from a dealer in NFA weapons requires the completion of the standard 4473 form, as well as dealer bound book records, and this source of information is not so similarly restricted. ATF may release this information to local law enforcement for a host of law enforcement purposes. See 18 U.S.C. sec. 923(g)(1)(D).

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Transfer and Making Tax Exemptions

Law enforcement, states, and local governments are totally exempt from the making and transfer (either to or from) taxes, but must comply with the registration requirements. While the NFA only specifically provides that there is no transfer tax due when the U.S. government is the transferee, (26 U.S.C. sec. 5852(a)), or a state governmental entity (26 U.S.C. sec. 5853(a)), ATF has made up an exemption from the transfer tax where any U.S. or state governmental entity is the transferor, see ATF Chief Counsel Opinion numbers 20023 and 20400. Opinion 20023 has been released via FOIA, ATF refuses to release number 20400, claiming it is privileged attorney-client work product. Abuses of this tax exemption, as in transferring guns through governmental entities so as to avoid transfer taxes, have been successfully prosecuted. See *U.S. v. Fleming*, 19 F.3d 1325 (CA10 1994).

Federal government agencies, the U.S. military, and National Guard are exempt from all of the registration or tax requirements.

There is no tax on transfers to anyone of a weapon that is unserviceable. Making a weapon unserviceable means it is permanently altered so that it cannot work, and is not readily restorable. For example a gun can be made unserviceable by welding the chamber closed, and welding the barrel to the receiver or frame. An unserviceable weapon is sometimes called a DEWAT, for DE-activated WAR Trophy (see below).

There is no tax on a transfer to a lawful heir from the owner's estate. Lawful heir just means someone named in a will to get the weapons, or a person entitled to inherit under the applicable intestacy laws if there was no will, or the will did not apply. The heir must be able to own the weapon under state and federal laws. The heir will have to do all the other steps of a transfer to an individual, except that ATF has said they would not require the LE certification. Unless the heir is also a class 3 SOT he may not inherit pre-86 dealer sample NFA firearms or post-86 machine guns (and would also need the police demo letter for the post-86 machine guns, see below). A weapon to an heir may also be transferred interstate directly to the heir, if need be; the gun need not be transferred to a dealer in the heir's state, if the deceased owner resided in another state.

Special (Occupational) Taxpayers (SOT's) under the NFA are exempt from some of the making or transfer taxes. All SOT's may transfer weapons between themselves tax free. However a transfer between an unlicensed individual and a SOT will require the tax. And unless one has a class 2 SOT, there is a making tax on making an NFA weapon, except for making by or on behalf of a government entity. Sole proprietor SOT's need not get the law enforcement certification for any transfer, except DD's (unless they have the appropriate FFL), even for their own personal collection, although in that case they should pay the \$200 transfer tax. They also need not attach a photo to the transfer paperwork, nor submit fingerprints. However, since 1994 fingerprints and photographs have been required with FFL applications. If one plans to engage in business in NFA weapons, one needs to be a SOT, just as one needs the FFL if they plan to engage in the business of dealing, making, or importing regular firearms.

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The Classes of SOT Holders

Class

- 1 - Importer of NFA firearms.
- 2 - Manufacturer of NFA firearms.
- 3 - Dealer in NFA firearms.

A class 1 or 2 SOT may also deal in NFA firearms. A class 3 SOT costs \$500 a year, due each July 1. A class 1 or 2 SOT costs \$1,000 a year, except that SOT's who did less than \$500,000 in gross receipts in business the previous year qualify for a reduced rate of \$500 per year, also due July 1. One must also have the appropriate FFL to engage in the specific activity, as well as the SOT. This is because most NFA weapons are also title 1 weapons, and thus both the law regulating title 1 weapons (the GCA) and title 2 weapons (the NFA) must be complied with. As with the privacy of Registry information and transfer information, SOT status is also protected tax information, and ATF will not release lists of SOT holders, as they will of FFL holders.

A Class 2 SOT can make, tax free, machine guns, silencers, short rifles, short shotguns or AOW's. A Class 2 can also have weapons transferred to him tax free, by other SOT's. He also has to have a type 07 or type 10 FFL. He does not need to ask prior permission of ATF to make a weapon, he would notify ATF of its making within 24 hours after its making by filing Form 2 with ATF. He could also import foreign made NFA weapons, for R&D use. To import a machine gun (only) a Class 2 would additionally need a letter from a governmental entity able to own the weapon requesting a demonstration. A weapon imported by a Class 2 SOT for R&D must be exported or destroyed when the R&D is completed. A weapon imported for sale to a government entity by a Class 1 SOT (that is not a machine gun) would be considered in the same category as a pre-86 dealer sample machine gun. To import for sale to government entities you need a Class 1 SOT.

A sole proprietor SOT may keep any NFA weapon he has after surrendering his SOT, as his personal property, except post-86 machine guns, discussed below. If ATF thinks, based on the number of weapons retained and the timing, that your SOT status was used to evade the transfer taxes, they may demand transfer or making taxes on all or some of the guns. Conceivably you could also be prosecuted for tax evasion.

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Additional Regulations Of Certain Weapons

Destructive devices are treated differently, in terms of being in the business of importing, manufacturing or dealing in them. One must have a special FFL, (type 9, 10 or 11, to deal, make or import respectively) and also be the appropriate SOT to make one tax free or deal in them. But anyone can make them on a Form 1, tax paid.

Machine guns are also treated differently. In 1986, as part of the Firearm Owners' Protection Act (FOPA, P.L. 99-308), Congress prohibited individuals from owning machine guns, and made it an affirmative defense that the machine gun was registered before the act took effect (which was May 19, 1986). See 18 U.S.C. sec. 922(o) for the codification of this provision of the law. Thus as an individual you can only legally own a machine gun that was registered before that date. Any registered after that date (regardless of when they were made) can only be owned by SOT's, law enforcement, and government entities. A SOT may not keep these machine guns after surrendering his SOT. In order to transfer one of these machine guns, the SOT must have a request from an agency able to own one for a demonstration. A class 2 SOT can make machine guns for research and development purposes, or for sale to dealers as samples, or for sale to government entities. These are commonly called post-86 machine guns. This restriction is why machine gun prices have risen so much, and why they are so expensive now. This provision has been challenged in court multiple times on a number of different bases, and every challenge has been unsuccessful. At this point I believe this law will never be overturned in court. Further challenges in court are futile. This situation can only be reversed by repealing the law in Congress. That may well be an uphill battle, but that is also the reality of the situation.

On top of the FOPA machine gun restrictions, any NFA weapon imported into the U.S. after the Gun Control Act took effect (end of 1968) cannot be transferred to an individual. See 26 U.S.C. sec. 5844. They can be transferred to SOT's, although without any written police demonstration request, and kept by the SOT after surrendering his SOT. These are sometimes called "pre-86 samples", or "dealer samples", although the term dealer sample can be used to refer to either a post-86 machine gun or to any NFA weapon imported after 1968.

Transporting NFA Firearms

If you are transporting or moving the weapons within your state of residence, either temporarily or permanently, there are no Federal law requirements. It makes sense that you keep a photocopy of the registration paperwork with the gun. In many states this is essentially a requirement, due to state law. In many states, state law bans all or some NFA weapons, and exempts from the ban only those NFA firearms possessed in compliance with Federal law. In such a state you need the federal paperwork to be legal under state law. If you were a SOT you should keep a copy of your proof of being an SOT with the paperwork when you move the guns around. But an individual who surrenders his SOT can still have weapons that will be registered on a Form 2 or Form 3 legally, so not having a copy of the SOT with such paperwork proves nothing. You need not ask ATF for permission when you move to a new address within the same state, nor are you required to advise them of your new address. ATF asks that you do this, but there is no legal requirement, and no legal penalty for failing to do so.

To move weapons between states, whether temporarily or permanently, two rules apply. An individual must get permission from ATF to move machine guns, short barreled rifles, short barreled shotguns or destructive devices between states (or to temporarily export them outside the USA) before doing so. This includes taking them somewhere to shoot them, or when permanently changing residences. There is a form called a 5320.20, and ATF will always approve them, and fairly quickly, assuming the purpose (generally stated) for the movement is legitimate, and the destination state allows the weapon in question. A licensed dealer can move weapons interstate at will, no permission is needed. But while the few states that otherwise prohibit some or all NFA weapons have exceptions for SOT's, or FFL's, a few do not, and thus the dealer must make sure he will not be breaking any laws. An unlicensed individual need not ask permission to move AOW's or silencer's interstate, again watch the laws at the target state. Having the approved 5320.20 form for a suppressor or AOW's can avoid hassle while traveling. Lots of folks who think they know something about the NFA don't know you only need permission for interstate movement of some NFA weapons. ATF will approve a 5320.20 for suppressors and AOW's; they will approve a 5320.20 for an FFL also, even if he doesn't need it by law. A C&R FFL holder can move C&R NFA guns interstate without a 5320.20. See 18 U.S.C. sec. 922(a)(4) for the statute imposing the 5320.20 requirement.

A Lost Or Stolen NFA Firearm

A lost or stolen NFA firearm can be a real problem. It can be a very expensive loss, as well as endangering the continued lawfulness of owning NFA firearms, both at a state and federal level. Contrary to what you might hear, machine guns and silencers are very rarely used in crimes, compared to regular handguns, rifles and shotguns. A significant source of machine guns used in crime are stolen firearms, from law enforcement, the military and civilian collectors. A crime spree with a stolen NFA firearm can lead to restrictive state or local legislation, as well as local law enforcement refusing to continue providing the law enforcement certification needed for transfers to individuals. Safeguarding NFA firearms is not required, but seems to me to be extremely prudent, both to preserve the firearm, as well as its continued legal ownership. Reporting the theft of an NFA weapon to law enforcement is the only way to even have a chance at recovering the gun, and preventing its use (or further use) in crime. I think reporting its theft is a good idea. Below is what is required, as opposed to what is necessarily a good idea.

ATF has made up a rule, 27 CFR sec. 479.141, that requires the owner of a lost or stolen NFA weapon to make a report “immediately upon discovery” to ATF including the name of the registered owner, kind of firearm, serial number, model, caliber, manufacturer, date and place of theft or loss and “complete statement of facts and circumstances surrounding such theft or loss.” However Congress has passed no law authorizing ATF to make such a requirement, and at a 1984 Congressional hearing then ATF Director Stephen Higgins admitted there is no penalty for not complying. See “Armor Piercing Ammunition and the Criminal Misuse and Availability of Machine guns and Silencers”, Hearings Before the Subcommittee on Crime of the Committee of the Judiciary House of Representatives, Ninety-Eighth Congress, Second Session, May 17, 24 and June 27, 1984, Serial No. 153, G.P.O. 1986, page 129. Congress has not changed the law in this regard since this testimony.

However, if one is a FFL holder, one is required by law to report the theft or loss to both local law enforcement and ATF. Since 1994, 18 U.S.C. sec 923(g) requires, “(6) Each licensee shall report the theft or loss of a firearm from the licensee’s inventory or collection within 48 hours after the theft or loss is discovered, to the Secretary and to the appropriate local authorities.”

ATF has created rules to implement this requirement, and they are a little more specific, and a little more onerous:

27 CFR Sec. 478.39a Reporting theft or loss of firearms. Each licensee shall report the theft or loss of a firearm from the licensee’s inventory (including any firearm which has been transferred from the licensee’s inventory to a personal collection and held as a personal firearm for at least 1 year), or from the collection of a licensed

collector, within 48 hours after the theft or loss is discovered. Licensees shall report thefts or losses by telephoning 1-800-800-3855 (nationwide toll free number) and by preparing ATF Form 3310.11, Federal Firearms Licensee Theft/Loss Report, in accordance with the instructions on the form. The original of the report shall be forwarded to the office specified thereon, and Copy 1 shall be retained by the licensee as part of the licensee's permanent records. Theft or loss of any firearm shall also be reported to the appropriate local authorities. Sec. 478.129 Record retention. * * * *
* (b) Firearms transaction record, statement of intent to obtain a handgun, reports of multiple sales or other disposition of pistols and revolvers, and reports of theft or loss of firearms. * * * * * Licensees shall retain each copy of Form 3310.11 (Federal Firearms Licensee Theft/Loss Report) for a period of not less than 5 years after the date the theft or loss was reported to ATF.

This reporting requirement only applies to FFL holders; that is folks licensed by ATF to make, sell, import or collect guns. This does not include folks who just own an NFA weapon.

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Repairs To NFA Weapons

While it is illegal for anyone to have possession of an NFA firearm that is not registered to them, ATF has carved out an exception for getting the guns repaired. In two writings of general circulation and availability, ATF has stated permission from them is not required in this situation. In ATF's "Federal Firearms Regulations Reference Guide," ATF P 5300.4 (01-00), on page 141, ATF writes: "(15) May a licensed gunsmith receive an NFA firearm for purposes of repair?" "Yes, for the sole purpose of repair and subsequent return to its owner. It is suggested that the owner receive permission from ATF for the transfer by completing and mailing ATF Form 5 to the NFA Branch and receive approval prior to the delivery. The gunsmith should do the same prior to returning the firearm." "Only the face of the form need be completed in each instance. ATF Form 5 may be obtained from the Bureau of ATF, NFA Branch, Washington, DC 20226, (202) 927-8330." (Emphasis added). This discussion was present in past editions of this publication as well. Recently, similar advice was added to ATF's Internet Web page, at <https://www.atf.gov/press/releases/2000/02/021800-openletter-nfa-repair-of-firearms.html>

Repair of NFA Firearms

February 18, 2000

The National Firearms Act (NFA) Branch has received numerous questions concerning the repair of NFA firearms. The Bureau of Alcohol, Tobacco and Firearms (ATF) does not consider the temporary conveyance of an NFA firearm to a gunsmith for repair to be a "transfer" under the terms of the NFA. Thus, an ATF Form 5 application is not required.

PLEASE BE AWARE THAT OTHER DISPOSITIONS, SUCH AS DEMONSTRATION OR SALE, ARE TRANSFERS AS DEFINED IN THE NFA AND MUST BE COVERED BY AN APPROVED APPLICATION TO TRANSFER AND REGISTER. TRANSFERS WITHOUT APPROVAL ARE VIOLATIONS OF FEDERAL LAW. ANY FIREARM INVOLVED IS SUBJECT TO SEIZURE AND FORFEITURE AND THE PARTIES TO THE TRANSFER ARE SUBJECT TO CRIMINAL PENALTIES OF UP TO 10 YEARS IMPRISONMENT.

In order to avoid any appearance that a transfer has taken place, ATF strongly recommends that a Form 5 application be submitted for approval prior to conveying the firearm for repair. ATF believes this will provide protection to the parties involved as it will document the repair of the firearm and help ensure that a “transfer” did not take place. In addition, an approved Form 5 will assist Federal firearms licensees in establishing that their possession of the firearm is lawful.

Accordingly, Item I5 in the ‘Questions and Answers’ section of ATF Publication 5300.4, Federal Firearms Regulations Reference Guide 2000, suggests that the owner obtain permission for the ‘transfer’ of the NFA firearm by submitting a Form 5 application and that the gunsmith do the same for the return of the firearm.

Federal firearms licensees must record the acquisition and disposition of the firearm as required by Part 179, Title 27, Code of Federal Regulations.

One need not be an SOT to have NFA weapons transferred to him for repair. One does need to have a type 01 FFL to work as a gunsmith though. When submitting an optional Form 5 for repair, one checks the “Other” box in item 1, type of transfer, writes in “repair” next to the box, and submits a letter detailing what is to be done with the transfer in general terms, e.g. “The purpose of this transfer is to have [the weapon] refinished.” The back of the form, with the certifications and photograph need not be completed. The turnaround time on Form 5’s for this purpose seems to be at least a few weeks, or a minimum wait of a month or two, to transfer it to the ‘smith and back. There is no transfer tax due.

Additional rules pertain to repair of machine guns made after May 19, 1986 (post-86 machine guns). In ATF Ruling 2014-1, ATF decided that any transfer of a post-86 machine gun, including for repair or refinishing must be only to a licensed manufacturer, and must be pursuant to a request from a government entity (i.e. it requires a LE demo letter). It is not clear why giving a post-86 machine gun to another licensee for work is a transfer, whereas the same act with an NFA firearm is not a transfer, nor is it clear why gunsmiths can work on NFA firearms, but only licensed manufacturers can work on post-86 machine guns. What is clear is that 18 USC 922(o) prohibits virtually all post-86 machine guns, period, and all non-governmental making or dealing in such firearms is by virtue of ATF rules and grace, so ATF can place whatever restrictions on the leniency they are showing on this issue. In short, whatever ATF authorizes non-governmental parties to do with post-86 machine guns is meant to facilitate governmental entities in using/possessing/repairing these particular guns. Anything which does not further that goal is going to be suspect.

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Penalties For NFA Violations

A conviction for a violation of the NFA will result in a felony conviction, punishable by up to ten years in prison, and/or a \$10,000 fine. See 26 U.S.C. sec. 5871. The non-mandatory U.S. Sentencing Guidelines ordinarily require prison time, even for a first offense with no prior criminal record, however various mitigating and aggravating factors can raise or lower the possible sentence range for a first offense.

The statute of limitations on violations of the NFA is three years. See 26 U.S.C. sec. 6531. The statute of limitations does not begin to run on possession offenses until the possession stops. As long as you possess the contraband item, you are in danger of being prosecuted.

In addition any NFA weapon EVER transferred or registered in violation of the Act is subject to civil forfeiture. See 26 U.S.C. sec. 5872. A forfeiture proceeding is separate from any criminal prosecution, and a resolution of a criminal proceeding in favor of the defendant will not preclude a forfeiture action. See *U.S. v. One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984). While the GCA was amended in 1986 to legislatively repeal *Eighty-Nine Firearms* (18 U.S.C. sec. 923(d)(1)), ATF has argued, and courts have agreed, that the protections in the GCA as to forfeiture do not apply to forfeitures of NFA weapons. See, for example, *U.S. v. One DLO Model A/C .30-06 Machine Gun, etc.*, 904 F.Supp. 622, n. 10 (N.D. Ohio 1995).

A violation of 18 U.S.C. sec. 922(o) of the GCA can also bring up to a ten year prison sentence, and or a \$10,000 fine. Again, prison time is likely, even on a first offense. Using a machine gun or a silencer in a crime of violence or drug crime can result in a sentencing enhancement of thirty years, even if there is no NFA prosecution. See 18 U.S.C. sec. 924.

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Additional Info Sources

A good source of information is the ATF publication “Federal Firearms Regulations Reference Guide” ATF P 5300.4. It, along with many other ATF publications, can be viewed on the ATF web site, www.atf.gov, or ATF can supply you a copy on paper or on CD. As required by the GCA (18 U.S.C. section 921(a)(19)), ATF also publishes a compilation of state laws, “State Laws and Published Ordinances-Firearms”, ATF P 5300.5. To obtain forms, or the books on paper or on CD, use the form at <https://www.atf.gov/content/distribution-center-order-form> or phone them at (703) 870-7526.

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Handy ATF Phone Numbers

NFA Branch: (304) 616-4500 - This is the office that handles all transfers of NFA weapons, and maintains the Registry.

NFA Branch FAX: (304) 616-4501 - You can fax Form 2's and 3's in, Form 5 transfers for repair, 5320.20's and probably others as well. Check with NFA Branch to be sure your faxed form will be acceptable and see ATF Ruling 89-1. Certain forms can also be submitted via the Internet, although this capability is just starting and the rollout has been rocky.

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Obtaining The Law Enforcement Certification

As noted above one administratively imposed requirement for an NFA transfer to an individual is a certification from a chief law enforcement officer with jurisdiction over where you reside. This (and the cost of the gun) is what usually keep interested, and otherwise qualified, persons from obtaining one. Some states have addressed this problem with laws requiring a certain official provide the signoff within a certain timeframe if the person requesting it is otherwise legally able to possess the firearm in question. At this time states with these laws include: Tennessee (T.C.A. sec. 39-17-1361), Alaska (A.S. Sec. 18.65.810), Utah (HB 373 (2014)), Kentucky (House Bill 128 (2014)), Kansas (House Bill 2578 (2014)), Oklahoma (HB 2461, (2014)) and Arizona (House Bill 2535 (2014)).

This certification is not really a big deal for the chief law enforcement officer (CLEO) making it, and it DOES NOT expressly or impliedly make the CLEO legally responsible for the weapon or the transferee's use or misuse of it. There are no successful lawsuits against a CLEO for signing the certification for a gun that was criminally misused. That is, in my opinion, a spurious excuse for not signing. There is even one case addressing this issue that I am aware of, Searcy v. City of Dayton, 38 F.3d 282 (CA6 1994). The estate of a drug dealer murdered by an off duty Dayton, Ohio, police officer with his personally owned "Mac-11" machine gun sued the city that employed the cop. One of the grounds for suit was the police chief's having signed the transfer paperwork for the murder weapon. The court held that the claim should have been dismissed by the trial court. Without a showing by the plaintiff that somehow the act of signing was negligent (under Ohio law) and led to the harm (murder) complained of, there was no cause of action. Signing the form was not negligent in itself, nor was it a reckless or wanton act, as the trial court claimed the plaintiff could try to prove at trial. The case against the chief of police was later dismissed by the trial court. Although this case is only directly binding on federal courts in the area covered by the 6th circuit, and need not bind any state courts, the court recognized what common sense, and the certification say, the person signing

does not open himself up to any liability by doing so.

The Searcy case is something to which you can point a CLEO who claims to refuse to do the signoff because of liability. Incidentally Stephen Halbrook, a leading lawyer in gun rights cases, and a longtime lawyer for the NRA, as well as an author, says in his Firearms Law Deskbook (published by Clark Boardman Callaghan) that this case is the only instance of a registered machine gun being criminally misused by its registered owner he is aware of.

The process outlined below is what the law and ATF regulations contemplate as the way to get a signoff, if you need one.

Step 1: You ask the following persons if they would sign; the local chief of police (if any), the local sheriff, the local district (prosecuting) attorney, the chief of the state police, and the state Attorney General. The CLEO can delegate the signing duty, for his convenience, if he wishes. Ask that they refuse in writing, if that is what they will do. You may be surprised, one might sign. That list of persons comes from 27 CFR sec. 479.85, which is the regulation that created the law enforcement certification requirement for Form 4. 27 CFR sec. 479.63 is the companion regulation for Form 1's. The requirement is NOT in any statute passed by Congress. Although not listed, and ATF will NOT designate federal officials as also acceptable (see below) other persons whose certification has been acceptable in the past include; local U.S. Attorney's, local federal judges, local U.S. Marshals, and local supervising F.B.I. agents. Other local federal law enforcement agents might also work.

It is helpful, in general, to quote the certification text for the CLEO, or provide a copy of the form. That way they know what you are asking them to certify. For a Form 4 it reads, "I certify that I am the chief law enforcement officer of the organization named below having jurisdiction in the area of residence of (name of transferee). I have no information that the transferee will use the firearm or device described on this application for other than lawful purposes. I have no information indicating that the receipt and/or possession of the firearm described in item 4 of this form would place the transferee in violation of State or local law."

Step 2: Copy the refusal letters, and send the copies to the NFA Branch of ATF. Some CLEO's may refuse to even provide a response in writing. Just indicating that the CLEO refused to sign, and also refused to provide a written response, should be sufficient. Ask ATF to designate other persons whose signature would be acceptable, as the ones listed in the regulation would not sign. They are required to do this by the same regulation, it is the 'safety valve' for when none of the designated persons will sign. ATF will almost certainly say that they will accept the certification of a state judge who has jurisdiction over where you live (same as the chief, D.A. and sheriff in step 1, they have to have jurisdiction over where you live, although the regulation doesn't say that, just the Form 4) and who is a judge of a court of general jurisdiction, that is a trial court that can (by law) hear any civil or criminal case. No limit as to dollar amount in civil cases, or type of crime in criminal cases. No small claims court or traffic court type judges, in other words. ATF's web site says, at <http://www>.

atf.gov/firearms/faq/national-firearms-act-firearms.html#necessary-le-certifications

Q: What law enforcement officials' certifications on an application to transfer or make an NFA weapon are acceptable to ATF?

As provided by regulations, certifications by the local chief of police, sheriff of the county, head of the State police, or State or local district attorney or prosecutor are acceptable. The regulations also provide that certifications of other officials are appropriate if found in a particular case to be acceptable to the Director. Examples of other officials who have been accepted in specific situations include State attorneys general and judges of State courts having authority to conduct jury trials in felony cases.

[27 CFR 479.63 and 479.85]

Step 3: Let's assume the judges refuse. Get back to ATF, Send them copies of the rejection letters, if any, and ask that they accept a letter of police clearance, or a police letter saying you have no criminal record/history with them, in lieu of the certification, together with your certification that you are OK, and that the weapon would be legal for you to have where you live. They will either respond OK, or with more persons to try. If you reach the point where they will not accept the police clearance letter, and not designate someone who has not turned you down, you can sue, if the certification is for a Form 1, or the transferor (seller) on a Form 4 can sue.

There are several cases on this issue. The first is *Steele v. NFA Branch*, 755 F.2d 1410 (CA11 1985), where the 11th circuit federal appeals court said a person trying to transfer a gun to one who was otherwise eligible to own the gun, but could not get the certification from anyone acceptable to ATF, could sue to force the transfer without it. In the *Steele* case (the plaintiff was a potential transferor in a Form 4 transfer) had not asked everyone acceptable to ATF, as well as not alleged, as part of his case, that the potential transferee was otherwise eligible by law to own the weapon, and the case was disposed of on those grounds. Note that the version of the regulation creating the certification requirement, reproduced in the footnotes of the *Steele* case, has a different list of acceptable persons. After some were named as defendants in the *Steele* case (including the then U.S. Attorney for the Miami, FL., area, Janet Reno, later anti-gun Attorney General during the reign of Pres. Clinton), all the federal law enforcement officials listed (U.S. Marshals and U.S. Attorney's) were removed from the regulation, supposedly at their request. See Federal Register, October 15, 1985, 50 Fed.Reg. 41680. Correspondence from ATF indicates they will never designate any Federal officials as other "acceptable persons" either.

The *Steele* decision was followed in the case *Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996), in which a transferee, not transferor, sued over non-approval of a Form 4 without the certification. Again *Westfall* did not ask everyone listed in the regulation. Again his case was thrown out for lack of standing. The court said they could not tell if the reason he couldn't get the gun was an illegal requirement, the signoff, or his own failure to try and get a signoff. Finally, a concerted industry effort to overturn

the CLEO requirement resulted in failure in the case *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002). In that case the D.C. Circuit Court of Appeals decided that the CLEO signoff requirement was within ATF's power to make rules under the NFA, in spite of some strong arguments against that. One end result of the O'Neill decision, besides further cynicism about the courts refusal to rein in ATF, was an explosion in persons using revocable living trusts to avoid the LE signoff.

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Other Avenues to NFA Ownership

While it was uncommon when I first wrote this FAQ, today persons obtaining NFA firearms as an individual, and going through the CLEO signoff hurdle seem to be the exception, not the rule. Even where local law enforcement is willing to provide the signoff, many persons are choosing to set up a revocable living trust, and have that trust be the party to whom the firearms are registered. As an artificial entity the trust is not required to get the LE signoff, and the trust documents outline who is permitted to possess the firearms registered to the trust. Additionally ATF is currently processing transfers to a trust much more quickly than they process transfers to individuals. Certainly the trust route makes a lot of sense for persons who cannot obtain the signoff due to the political positions of local law enforcement. They are also being aggressively marketed by attorneys as the best way to own NFA firearms.

In 2013 ATF issued a Notice of Proposed Rulemaking <http://www.gpo.gov/fdsys/pkg/FR-2013-09-09/html/2013-21661.htm> which proposed to require that the individual persons who would possess an NFA firearm that would be registered to a trust have to obtain the law enforcement certification that was required of individual transferees. This proposal was pretty clearly a knee jerk reaction by an anti-gun presidential administration to the numbers of persons avoiding the LE signoff roadblock. It did not account for a huge number of practical problems, such as individuals as trustees who resided in a different place than the trust, where the NFA firearms were legal where the trust was located, but illegal where the individual resided, or situations where beneficiaries of the trust might be minors. The Notice generated a great deal of comments, some with a great deal of thought put into them. As of this writing ATF has put off any action on the amended rules until 2015.

There are solutions to the law enforcement certification problem besides a trust. They all require persistence, but less work than being a legitimate NFA dealer, in my opinion. Becoming a licensed dealer is one solution though. Another solution is to be incorporated. If you are already the owner of a corporation, as part of your business (doctor, lawyer or architect for example) your corporation can buy NFA weapons, and the photo, police signoff and fingerprints are not needed. The corporation might be buying weapons for an investment, or for security, or for another good reason. You could incorporate yourself just to get NFA weapons also, although you should talk to a lawyer or another knowledgeable person about the downsides of maintaining

a corporation before just doing it, as well as any income or other tax consequences in your location. As the weapons are registered to the company, and not the owner of the company, they will have to be transferred out, tax paid (unless the transfer is otherwise exempt from the tax, i.e. from a government entity, or for an unserviceable weapon), if the corporation is ever dissolved. As corporate assets, creditors might get them in the event of bankruptcy of the corporation, or a judgment against the corporation. In my opinion the best thing is to have the weapons owned and registered to the person who actually owns them, and not an intermediary. I also am aware that in some areas of the country the artificial entity route may be the only way to own NFA weapons, as a practical matter. Also be aware that corporations and other artificial entities have no 4th amendment right against self- incrimination, and the restrictions the NFA law places on the use of information provided to ATF under the Act (26 U.S.C. sec. 5844) only apply to information provided by natural persons, not artificial entities. You are giving up some of the privacy provided by law to flesh and blood people when you acquire your guns through an artificial entity.

Pretending you live in a jurisdiction where the CLEO will sign, when you do not, may be tempting, but cannot be recommended. ATF has prosecuted for this, claiming that putting a bogus address on the form is submitting false information to the feds, in violation of 26 U.S.C. sec. 5861(l). See U.S. v. Muntean, 870 F.Supp 261 (N.D.Ind. 1994), for a case of such a prosecution. However, it is possible to have more than one place you live, and it is permissible to obtain NFA weapons at an address, when you are actually living there. For example, if you have a summer home, you may get NFA weapons when you are living there, and have the CLEO for that place do the signoff. During the rest of the year, when you live elsewhere, you may obtain the weapons at the second home.

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NFA Weapons and the 4th Amendment

The myth that owning an NFA firearm means ATF can enter your home at any time for any reason is certainly one of the most persistent falsehoods about owning NFA firearms. It is simply not true. Someone who is not licensed to be in the firearms business, that is neither a FFL nor SOT, but only owns weapons regulated under the National Firearms Act, may only be compelled to show an ATF agent upon request the registration paperwork, that is the Form 1, 2, 3, 4, 5 or whatever else might have been used to register the weapon. See 26 U.S.C. sec. 5841(e). ATF has no right to compel you to produce the weapon. As always the Fourth amendment applies, and ATF may not enter your home or other place of storage of the NFA weapon, nor seize the weapon, without a warrant, or without falling under an exception the Supreme Court has created to the operation of the Fourth amendment, or without your consent.

On the other hand when one gets a Federal Firearms License, the law allows the ATF to inspect your records and inventory once every 12 months without any cause, and at any point during the course of a bona fide criminal investigation (18 U.S.C. sec. 923(g)). They may inspect without warning during business hours. The only

modification of the above pertains to the C&R FFL (type 03) where ATF must schedule the inspection, (C&R FFLholders do not have business hours) and they must have the inspection at their office nearest the C&R FFL holders premises, if the C&R FFL holder so requests. ATF may look around the licensed premises for other weapons not on your records. This means they take the position that if your licensed premises are your home they may search it, as part of the annual compliance inspection. The constitutionality of the warrantless “administrative search” of licensees provided for in the Gun Control Act has been upheld by the U.S. Supreme Court, see U.S. v. Biswell, 406 U.S. 311 (1972). Biswell was partially overturned by Congress legislatively, through 1986 changes to the requirements for a warrant under the GCA, but the administrative search provisions remain.

In addition, if one is also a SOT, ATF claims to have the right to enter onto your business premises, during business hours, to verify compliance with the NFA. Their regulation to that effect is found at 27 CFR sec. 479.22. The regulation is apparently based upon 26 U.S.C. sec. 7606:

7606. Entry of premises for examination of taxable objects.

(a) Entry during day.

The Secretary may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary may enter them while so open, in the performance of his official duties.

(c) Penalties

For penalty for refusal to permit entry or examination, see section 7342.

26 U.S.C. sec. 7342 provides for the penalty for a refusal to permit entry under section 7606:

7342. Penalty for refusal to permit entry or examination.

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit \$500.

ATF claims this right extends to examining your business records, and firearms. This would only apply to your NFA firearms, although they could presumably examine other

guns to make sure they were not NFA firearms, and subject to the law. This right of entry is not subject to the controls found in the GCA, noted above, as the legal basis for the search is not found there. So they could claim a right to do this sort of search once a month, or once a week. I am not aware of any current abuse of the authority under this section. While the regulation made by ATF only applies this authority to SOT's, the statute itself is not so limited. At least one court case has suggested this power is available to search an FFL holder who is not an SOT. (U.S. v. Palmer, 435 F.2d 653 (CA1 1970)).

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Amnesties For Unregistered NFA Weapons

As part of the new and revised 1968 National Firearms Act, there was one amnesty where folks could register any NFA weapons. Registration was done on ATF Form 4467. It nominally was open from November 2, 1968 to December 1, 1968, although the paperwork backlog went on for a while after. ATF also permitted servicemen and other persons who could show they were overseas during the amnesty period, and that the weapon they sought to register was in the U.S. during the amnesty period, to register those weapons well after the amnesty period. The number of firearms ATF reports as having been registered during the 1968 amnesty goes up every year such statistics have been reported, since 1989 or so; however in 1975 ATF reported over 60,000 firearms registered during the amnesty, far more than they have reported since they began releasing annual statistics on NFA registrations. According to 1995 numbers, 57,216 weapons were registered on Form 4467 ("Registration of Certain Firearms during November of 1968"), which was the amnesty registration form. This would have included weapons newly subject to registration, when they had not been before, like DEWAT's and destructive devices, as well as unregistered firearms that should have always been subject to the NFA, and been registered before, and were not.

There was also a registration period after the enacting of the first NFA, from July 26, 1934 up to September 24, 1934. Anyone in possession of an NFA weapon as of the July 26 date was supposed to register it, even if they no longer had it, on Form 1 (Firearms) in duplicate, with the local IRS office. No tax was due. This was not really an amnesty though, as the weapons were legal to have before the law was passed, at least under federal law. Before the changes to the NFA in 1968, a Form 1 was for a flat out registration of an existing gun, no tax. Form 1A was for a tax paid making, in the way we understand a Form 1 now. Under various rules unregistered weapons were permitted to be registered, until 1971 or so.

Some states had prohibited or regulated some NFA weapons before 1934. In fact the Uniform Machine Gun Act, which provided for registration of machine guns, adopted in a few states (Connecticut, Virginia., Maryland, Arkansas, Ohio and South Dakota) was developed with the support of the National Rifle Association, partly in an attempt to forestall the sort of regulation the feds ultimately adopted

in 1934. As always, compromise brings no relief - history has repeated that lesson over and over in the gun control context.

Before the NFA was changed in 1968, one could register unregistered existing weapons, however it meant you were admitting to possessing an unregistered weapon. In fact the law required it, which was a reason the U.S. Supreme Court used in gutting the mandatory registration scheme of the pre-68 NFA in *Haynes v. U.S.*, 390 U.S. 85 (1968). (It violated the 5th amendment right against compelling self-incrimination.) However if there was no criminal intent to the possession (which tended to be demonstrated by attempting to register the weapon) then the Alcohol and Tobacco Tax Division of the Treasury Dept. would accept the application to transfer the weapon, or to register it. ATF generally sent an investigator to check out what was going on, and if deemed appropriate, to help the applicant fill out the Form 1. The Alcohol, Tobacco and Firearms Division of the IRS (created out of the 1968 GCA, it became the Bureau of Alcohol, Tobacco and Firearms on July 1, 1972) continued this practice off and on until 1971, with the transferor instead of the transferee admitting to possessing an unregistered weapon, when applying to transfer it.

The U.S. Supreme Court, in the case *U.S. v. Freed*, 401 U.S. 601 (1971), decided the amended NFA made existing unregistered weapons unregistrable, even voluntarily. The provisions mandating registration of existing (illegally possessed) weapons were removed from the NFA in 1968, among other changes.

The 1968 Gun Control Act authorized the Secretary of the Treasury to conduct additional amnesties (P.L. 90-618) at his discretion, provided each is not longer than 90 days, and are announced in the Federal Register. There has never been one. ATF officials have stated they will never declare another Amnesty, because it would supposedly ruin all prosecutions in progress at the time, as well as increase the number of NFA guns overnight, because people will make guns that don't exist now, to register them.

In early 1994, ATF decided (in ATF Rulings 94-1 and 94-2) that three models of 12 gauge shotguns, the USAS 12, Striker 12, and Street Sweeper, were destructive devices, owing to their non-sporting character, and having a bore over 1/2 inch, as all 12 gauge shotguns do. ATF required owners of these guns to register them, as NFA weapons. This was not exactly an amnesty, as the weapons were not NFA weapons when made. This decision, as to the Striker 12 in particular, was upheld in a court challenge in the case *Demko v. U.S.*, 44 Fed.Cl. 83 (Ct.Cl. 1999). By ATF Ruling 2001-1, ATF ended the amnesty for these shotguns as arbitrarily as it began, effective 5/1/2001. Any existing models not registered now are unregistrable contraband, insofar as ATF is concerned. Further making of these shotguns is not banned, and the Striker 12 is still in production, although subject to the restrictions of the NFA. At this time the manufacturer has a policy of only selling the firearms to government entities.

In all likelihood 18 U.S.C. sec. 922(o), the ban on civilian possession of machine guns registered after the law took effect, or never registered, precludes an Amnesty (as provided for under existing law) for machine guns. You could register a machine

gun at a hypothetical amnesty, and comply with the NFA, but you would still be in violation of sec. 922(o), because the gun would have been registered after that law took effect. The penalties are the same under either law. One could register all other categories of NFA guns at an amnesty that was declared under section 207(e) of the P.L. 90-618. Congress would probably need to pass a law providing for an Amnesty, and override sec. 922(o) in that manner.

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Machine Gun Sears and Conversion Parts

The definition of “machine gun” in the NFA (26 U.S.C. sec. 5845(b)) includes a part or parts to convert a gun into a machine gun. These parts are called registered sears, as well as “conversion kits”.

Note that conversion parts are not included in the definition of “firearm” under the Gun Control Act, one of the few things that is a firearm under the NFA, but not the GCA. Thus the purchaser of a conversion part from an FFL need not do a 4473 form, unlike other NFA weapons. Of course the host gun, if purchased from an FFL, will require the 4473 form. This reading of the law is based on opinion letters from ATF, and the definition of “firearm” under the GCA, which requires it be able to expel a shot. However, at least one judge has decided that somehow the definition of “firearm” in the GCA “incorporates” the definition of “machine gun” under the GCA (even though the law doesn’t say that) and that a machine gun conversion part is a “firearm” under the GCA as well as the NFA. I think the judge is clearly wrong, even ATF reads the law better than that, but the point is to be careful. The case is *U.S. v. Hunter*, 843 F.Supp 235 (E.D. Mich. 1994), and see also the same judge’s second opinion in the same case, at 863 F.Supp. 462 (E.D. Mich. 1994). As the U.S. dropped that prosecution, and the defendants were not convicted, there was no review of that determination by an appeals court.

In every case, the conversion part(s) are installed into a semi-automatic gun, and without converting the semi-auto gun’s receiver to machine gun specification, the new part(s) will allow the gun to fire as a machine gun. If the registered conversion part breaks or wears out it cannot be replaced, only repaired, if possible. BATF considers replacing it with a new part to be the new manufacture of a machine gun, and a civilian could not own it, as it would have been made after the effective date of 18 U.S.C. sec. 922(o). This wear/breakage thing is also true of the receiver on a gun where that is the registered part, but in general the receiver is less subject to wear or breakage than a small part, like a sear. Being larger, a receiver may also be easier to repair. The sear conversion will most likely not be just like the factory machine gun version; it will be working in the semi-auto version of the gun. A registered receiver conversion can (and should, but isn’t always) be mechanically identical to the original full auto version of the gun, and factory spare parts may be used. Some sear conversions require altered parts, in addition to the registered sear.

A conversion sear that does require alteration to the host gun's receiver is not legally a conversion part, and is not able to be registered as such. Some were permitted by ATF, in particular AK-47 "sears" that required a hole be drilled in the gun's receiver, like a regular receiver conversion of the semi-auto AK. Such "sears" in the hands of innocent buyers were left on the Registry, with the requirement that they were not to be removed from the host gun. However any in the possession of the persons who made and registered them were disallowed, and removed from the Registry. See *Vollmer v. Higgins*, 23 F.3d 448 (D.C.Cir. 1994) for mention of the AK sears. Also see FFLNewsletter, Summer Issue 1988, Bureau of Alcohol, Tobacco and Firearms, page 2, Washington, D.C.

Some examples of conversion parts; a SWD Auto Connector (for AR rifles), an AR-15 drop-in auto sear, an HK sear, as made by Fleming Firearms, J.A. Ciener, and S&H Arms, among others, a AUG sear as made by F.J. Vollmer and Qualified Manufacturing, an FN-FNC sear, as made by S&H, an M-2 conversion kit for the M-1 carbine, registered by many manufacturers, a slotted UZI machine gun bolt, made by Group Industries and many others, or a Ruger 10/22 trigger pack, as made by John Norrell. There are also sears to convert Glock and Beretta 92 pistols into machine guns, but I believe all of them are post-86 manufacture, and thus unavailable to civilians.

As the sears do turn the host gun into a machine gun, the host gun is no longer regulated as a semi-automatic rifle, and is not subject to 18 U.S.C. sec. 922(r) (ban on domestic assembly from imported parts of an unsporting semi-auto rifle or shotgun), for example. As long as the sear is in there you may also have the barrel cut down to below 16 inches; a machine gun is not also a short barreled rifle.

However, if the sear is removed and placed into a second gun, the first gun is no longer a machine gun, and must comply again with the laws regulating it as a semi-automatic rifle. If the sear in question is an AR-15 drop-in auto sear, the gun needs to also have the M-16 internal parts needed for the sear removed as well, lest it be induced to fire more than one shot at a time, as was done in the *U.S. v. Staples* case.

NFA Branch desires that folks who install sears into guns where the sear is not very accessible, HK style guns in particular, tell them the make, model and serial number of the gun into which the sear is installed, and put this information on the Form 4. This makes it easier on anyone inspecting the gun, as they do not have to open the gun up to see the sear, if they know that gun is the one with the sear in it. This is called "marrying" the sear to the gun. It is especially useful when the host semi-auto has been modified so as to make it potentially illegal without the sear, like putting a shoulder stock on an HK SP-89 pistol, or cutting the barrel of an HK-94 to less than 16 inches. You may "divorce" the two, but don't do that if the host gun will end up an unregistered short barreled rifle, or other unregistered NFA weapon. This marriage info is in box 4(h) on the Form 4, so anyone who looks at the paperwork can see the sear is in that gun; local law enforcement, for instance.

If the gun is a sear conversion you may not alter the receiver to full auto configura-

tion, in particular you may not install a push pin lower on your HK. You may alter a push pin lower shell to accommodate your clip-on trigger pack, so it looks authentic, but don't alter the receiver. You may also alter one of the MG burst packs to fit on your semi-auto receiver, provided it is also modified internally so it no longer just uses the MG trigger pack with the original MG trip. Making an unaltered MG trigger pack fit the semi-auto is making a new conversion device; some registered HK conversion parts are MG trigger packs modified to fit right on the semi-auto receiver. This is an area with a variety of items registered; many in the frenzy of registration after the 1986 making ban was being passed into law, but before it went into effect.

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DEWATs

By definition a DEWAT is an unserviceable gun that has an intact receiver, thus, as the law is construed, it is a machine gun. Before the 1968 amendments to the NFA a receiver, in and of itself, was not regulated as a machine gun. In 1955 the ATT decided that a gun that was a registered war souvenir (or for a time, a contraband unregistered gun) could be removed from the coverage of the NFA if it was rendered unserviceable by steel welding the breech closed, and steel welding the barrel to the frame. All this was to be done under the supervision of an ATT inspector. See Revenue Ruling 55-590. The gun became a wall hanger, ornament, like parts sets now. This was not the same as an unserviceable gun, which was still subject to the NFA, but exempt from the transfer tax. These steel welded guns were DEWAT's. DEWAT stands for DEactivated WAR Trophy; it was regularly done for servicemen who wished to bring home NFA weapons as war souvenirs. It was also done to WWI and WWII era guns imported as surplus by companies like ARMEX International, and Interarmco, and then sold through the mail in ads in gun magazines. The glory days before 1968. A DEWAT must now be registered to be legal, there is no longer a legal difference between a DEWAT and an unserviceable weapon.

A DEWAT machine gun transfers tax free, as a "curio or ornament", on a Form 5. To be a DEWAT, a gun should have a steel weld in the chamber, and have the plugged barrel steel welded to the frame or receiver. Having said that, a gun may be registered as unserviceable and not be de-activated in this manner. It may have cement or lead in the barrel, or a piece of rod welded, soldered or brazed in the barrel. Despite the repeated warnings from ATT, apparently DEWATs were made or imported that did not have steel welds. And a weapon registered as "unserviceable" before 1968 was not held to these standards. One (ostensible) reason machine gun receivers were redefined as machine guns in 1968, thus bringing DEWATs under the NFA regulation, was that folks were regularly and easily making their DEWATs live guns w/o complying with the law. Some barrel plugs were so poor they would fall out with little coaxing.

To re-activate the gun, ATF requires you file a fully completed Form 1 (i.e. you get the gun on a Form 5, including the law enforcement certification, photo and fingerprints. You have to do all that again for the Form 1), and pay the \$200 tax the gun was

exempt from before. Then when that is returned approved you can install a replacement barrel, or get the weld out of the barrel, if possible. In the alternative, a Class 2 manufacturer may re-activate the gun, and file a Form 2 reflecting the gun is now live. ATF considers re-activating to be manufacturing, and requires the re-activator to mark the gun with his name and address, whether done on a Form 1 or Form 2. If you sent your DEWAT to a Class 2 to make live he would have to transfer it back to you on a fully completed Form 4, as a tax paid transfer. These procedures are not in the NFA law nor the regulations. They are apparently based in part on the Revenue Rulings that created the DEWAT program in the 1950's. As a DEWAT was not a NFA firearm, before 1968, requiring the making tax made sense then as you were making a machine gun out of something that was the equivalent of a door stop, legally. Now that is not true, the DEWAT is a machine gun, and no making tax should attach, as you are not "making" anything, merely changing the gun from unserviceable to serviceable.

Folks who are around NFA guns for very long will find there are still a lot of DEWAT guns that were never registered during the Amnesty, and are now contraband unregistered machine guns. Folks have them in closets, up over the mantle... The only safe course is to abandon an unregistered NFAweapon to law enforcement.

Some persons selling guns with a dummy or display receiver will call them a DEWAT out of ignorance or a desire to defraud. These guns, which have a partially machined metal part meant to resemble a receiver or perhaps a plastic part meant to resemble a receiver, are not DEWATs and are not regulated by the NFA. They are incapable of functioning as a firearm or even being reworked to function as a firearm, and are for decoration.

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Any Other Weapons

An AOW's is:

...any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12" or more, less than 18" in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any weapon which may be readily restored to fire. Such term shall not include a pistol or revolver having a rifled bore, or rifled bores, or weapons designed, made or intended to be fired from the shoulder and not capable of firing fixed ammunition.

26 U.S.C. sec. 5845(e).

Thus the question to be answered in deciding if a weapon is an AOW's would be, does it fit into any of the three categories below:

1) Is the weapon both not a pistol or revolver, and capable of being concealed on the person?

2) Or is it a smooth bore pistol or revolver? Examples of this include the H&R Handy-Gun, or Ithaca Auto-Burglar gun. This does not include weapons made from a shotgun. That would be a short barreled shotgun. The receiver of a smooth bore pistol, in order to be an AOW's, must not have had a shoulder stock attached to it, ever. The shoulder stock attachment deal on a very few H&R Handy Guns, together with a stock, will make them into a short barreled shotgun.

3) Or is it a combination gun, a shoulder fired gun with both rifled and smooth barrels between 12 inches and 18 inches long, and which has to be manually reloaded? Examples of this include the M-6 military survival gun, with a single shot barrel in .22 Hornet, and a companion .410 shotgun barrel, as well as most models of the Marble's Game Getter.

Weapons that fit the first category above are commonly called gadget guns; pen guns, stapler guns, cane guns, alarm clock guns, flashlight guns, the list of objects is pretty long. A few have been removed from the scope of the law because their collector status makes them unlikely to be misused; original Nazi belt buckle guns for example. See the C&R list for these.

ATF has made the decision that a handgun (but not a machine gun, since a machine gun is not also an AOW's. This is based on the gun a) being concealable on the person, and b) not meeting the definition of a "pistol" in the regulations promulgated under the NFA, since they say a pistol has a single grip at an angle to the bore. However, at least one federal magistrate has decided that if the grip is added later, the gun is not "originally designed" to be fired by holding in more than one grip, and thus putting a second grip on a pistol does not make it an AOW's. ATF does not regard the decision as binding. The case is U.S. v. Davis, Crim No. 8:93-106 (D.S.C. 1993) (Report of Magistrate, June 21, 1993). The prosecution was dismissed at the request of the Government before any review of that determination by the trial judge. The 9th Circuit Court of Appeals agreed, in the unpublished decision United States v. Fix, 4 F.App'x. 324 (9th Cir.2001). On the other hand, the 6th circuit Court of Appeals rejected this line of reasoning, and held that a Romarm Draco pistol outfitted with a second pistol grip was an AOW's in the case U.S. v. Black 739 F.3d 931 (CA6 2014).

By the same thinking ATF has decided that "wallet" holsters for small guns, from which the gun can be fired, and which disguise the outline of the gun, are AOW's. This would affect, for example, the North American Arms mini-revolver and the wallet holster NAA used to sell for the gun, as an accessory. Or the wallet holster Galco used to make for the Beretta model 21 pistol. ATF seems to be thinking that the grip has disappeared, and thus it fits into the first category.

In all likelihood, the wallet holster decision was an outgrowth of calling the combination of a briefcase from which the gun can be fired, and the gun, an AOW's. The cases were usually meant for the SMG version of the gun, which was fine, but could accommodate

the semi-auto pistol version of the MAC, or HK MP5K as well, and that combo of the case and semi-auto pistol was considered the AOW's.

27 CFR sec. 179.11 - pistol. A weapon originally designed, made and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having: a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and b) a short stock designed to be gripped by one hand at an angle to and extending below the line of the bore(s). The term shall not include any gadget device, any gun altered or converted to resemble a pistol, any gun that fires more than one shot without manual reloading, by a single function of the trigger, or any small portable gun such as: Nazi belt buckle pistol, glove pistol, or a one-hand stock gun designed to fire fixed shotgun ammunition.

There is also a revolver definition, but it does not add anything except a provision for guns with revolving cylinders, rather than permanent chambers.

Note that this definition is only in the rules for the NFA, and not the GCA. It is designed to interact with the AOW's definition. For example even though this definition excludes such things as the .410 T/C Contender pistol from the pistol definition, it is also not an AOW's as it has a rifled bore. And it is also a handgun under the GCA. The NFA statute does not define "pistol" or "revolver".

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Destructive Devices

26 U.S.C. sec. 5845(f) "The term destructive device means

- 1) any explosive, incendiary or poison gas
 - A) bomb
 - B) grenade
 - C) rocket having propellant charge of more than four ounces
 - D) missile having an explosive or incendiary charge of more than one-quarter ounce
 - E) mine, or
 - F) similar device

2) any type of weapon by whatever name known which will, or may be readily converted to, expel a projectile by the action of a explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and 3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device although originally designed for use as a weapon, which is

redesigned for use as a signaling, pyrotechnic, line throwing, safety or similar device; surplus ordnance sold, loaned or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685 or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate 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.”

Secretary in the above refers to the Secretary of the Treasury, unless it says otherwise. The fee for the FFL to deal in DD's is \$1000 a year (type 09), and one must also be a special taxpayer, add another \$500 or \$1000 a year. Making them requires a different \$1000 a year FFL (type 10), although an individual may make them on a Form 1, tax paid (\$200). Transfers require the whole routine just like full-autos; a Form 4, \$200 tax, a law enforcement sign-off, pictures and fingerprints.

Most class 3 dealers don't have the \$1000 a year FFL to deal in DD's. Note that antiques are excluded. Thus the definition of an antique NFA firearm is important.

26 U.S.C. sec. 5845(g) “Antique firearm.-The term ‘antique firearm’ means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replicas thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.”

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Examples of what is a DD and what is not

Muzzle loading cannon - NOT, as it is an antique design, unless it has some special features allowing breech loading.

Explosive grenade - is a DD

Molotov cocktail - is a DD

M-79 or M-203 40mm grenade launcher - is a DD

Smooth bore 37mm projectile launcher – as made, it is not a DD. It is not even a title 1 firearm. This item falls under the “not a weapon” (signaling device) exception. Generally a large bore device for which no anti-personnel ammo has ever been made will NOT be a DD. This used to be true of the 37mm guns. However, according to ATF, some folks have started making anti-personnel rounds for these guns, and ATF has ruled that possession of a 37mm launcher and a bean bag or rubber shot or similar round is possession of a DD, and at that point the launcher needs to be registered. Put

another way, before you make or buy anti-personnel rounds for your 37mm launcher, register it as a DD. The rounds themselves, not being explosive, incendiary or poison gas, are not regulated in themselves either. It is just the two together. See Ruling 95-3.

40mm grenade for an M-79 or M-203 - is a DD.

Non-explosive 40mm practice ammo - not a DD. Commercial making of it would require a type 10 FFL though, as although the ammo is not itself classified as a DD, making ammo for a DD requires the FFL.

Non-sporting 12 gauge shotgun - is a DD, because it has a bore over 1/2 inch, and is not exempted unless it meets the “sporting use” test. Check out the case Gilbert Equipment Co., Inc., v. Higgins, 709 F. Supp. 1071 (D. Ala. 1989) for how the sporting use test has been re-interpreted from what it meant when the law was enacted to having ATF be arbiters of what is “sport”.

Flame Thrower - not a DD, nor even a firearm. Unregulated as to possession, under federal law. Great way to clear snow off the driveway.

Japanese Knee Mortar - A DD. Even though there is no available ammo for it, explosive or otherwise, and hasn't been since 1945, because anti-personnel ammo was made for it in the past, it is a weapon. As it has a bore over 1/2" and isn't sporting, it is a DD.

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Sound Suppressors (Silencers)

While the statute calls these devices “silencers” or “mufflers”, the US NFA industry term is “sound suppressor”, as the word silencer has been given a negative connotation, and because it is inaccurate, as these devices do not eliminate all sound from firing a gun. However you can point the folks who get all high and mighty about the use of the word “silencer” to this definition; it is the legal term.

18 U.S.C. sec. 921(a)(24) The term ‘firearm silencer’ or ‘firearm muffler’ means any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

As can be seen this covers improvised sound suppressors, and component parts of a sound suppressor. There is no threshold level of sound reduction for something to fall under this definition. ATF used to require the device “appreciably” lower the sound (see Revenue Ruling 57-38). In general recoil compensators and flash hidere do not fall under this definition, but some designs could fall into the category. As with any borderline device the thing to do is to get a written opinion from the Technology

Branch of ATF.

Note that the silencer definition applies only to devices for firearms, i.e. powered by an “explosive”. An air gun silencer is not covered. But if it can be used on a firearm it would be. Thus an airgun silencer permanently attached to the airgun, or too flimsy to be used on a firearm, is exempt. Airguns with permanently mounted silencers are available on the US market, and are not regulated by the NFA. Likewise, since antique guns, as defined in the GCA, are not “firearms”, a silencer for such a gun is not, or should not be, covered. Perhaps one fitted permanently to a pre-1899 gun?

This law was rewritten in 1986 to include parts. Before the revision vendors would sell parts sets consisting of the internal components for a Sionics style silencer for the MAC M10 machine gun, and other, separate vendors would sell threaded tubing suitable for installation of these parts. Before assembling them a purchaser was supposed to file ATFForm 1 to get permission to make the silencer, but that did not always happen. ATF eventually started an investigation, seized customer lists and started a prosecution of some of the vendors. In the end they had their cases thrown out of court, and instead ATF got Congress to rewrite the law. Unfortunately there was no amnesty for persons who possessed these parts to register them – they went from not being covered by the law, to being covered by the law and unregistrable contraband overnight. For the most part this was probably not a big deal practically speaking, but a few companies had sold silencers that came with multiple baffle stacks for different calibers. The legal status of these is not clear. ATF has allowed multiple end caps for silencers, treating them as thread adapters that are not necessarily dedicated silencer parts.

While probably not 100% accurate, a description of this parts issue is found in a very anti-gun article written by author Erik Larson for the January 1993 issue of The Atlantic magazine, entitled The Story of a Gun: <http://www.theatlantic.com/magazine/archive/1993/01/the-story-of-a-gun/303531/>

One episode in particular illustrates the lengths to which the company [SWD] was willing to go. In January of 1983 [Wayne and Sylvia] Daniels invited two men, Joseph Ledbetter and James Travis Motes, to their home to make the men a proposition. Ledbetter and Motes had installed air-conditioning in the RPB offices and electrical wiring in the S. W. Daniel headquarters. The Daniels suggested that they diversify into the business of making the outer tubes for silencers. S. W. Daniel would make the internal parts. The two companies would advertise in the same gun publications and travel to the same gun shows. By selling only parts, both would stay on the right side of federal law requiring registration of completed silencers. Indeed, no law barred the sale of silencer parts. In the eyes of the law, however, any consumer who merely took delivery of both internal parts and tubes would automatically possess a completed silencer—a felony if the silencer was unregistered. But again, that was the consumer’s worry.

Wayne Daniel went so far as to give Ledbetter and Motes a gauge to guide them in fashioning the tubes, and an advertising layout that S. W. Daniel had used earlier to sell a line of completed registered silencers to approved buyers through Shotgun

News, a thick tabloid often referred to as the gun owner's bible.

Ledbetter and Motes founded L & M Guns and began selling their tubes through Shotgun News and at gun shows around the country. The Daniels, meanwhile, began advertising their internal-parts kits and displaying them at the same gun shows. On at least one occasion the two companies found themselves facing each other across an aisle.

The ATF began an investigation after a detective with the Mono County, California, sheriff's office discovered an unregistered silencer during a search. The investigation quickly gained momentum. At one point an ATF special agent, Peter Urrea, posed as the president of the Widow Makers Motorcycle Club and ordered silencer components from L & M Guns. He also said he had a criminal record. The components were sent, no questions asked.

The investigation widened to include machine-gun flats sold by S. W. Daniel and L & M. Urrea continued buying silencer parts and machine-gun kits from S. W. Daniel, L & M, and a third company, La Vista Armaments, of Louisville, Kentucky, and won a warrant to search S. W. Daniel headquarters. On July 19, 1984, ATF agents raided the company, seizing firearms, components, and, most important, customer lists and shipping records.

The ATF used the seized records to launch some 400 individual investigations relating to arms trafficking and illegal possession of restricted weapons. In June of 1985 ATF agents arrested the Daniels and, using an experimental tactic, charged them with conspiracy to sell illegal silencers. (By now the Daniels had divorced, but they had continued to have a close working relationship.) Later, in formal court arguments, they would claim that they were simply trying to fill a valid need for replacement parts for silencers owned by legitimate users.

The ATF's investigators found a rather different story. All in all, from November of 1983 to July of 1984, the government charged, S. W. Daniel had mailed some 6,000 silencer and machine-gun kits. Only four buyers had bothered to register the devices. When the ATF ran the customer lists through the FBI's National Crime Information Center databank, it found that more than fifty customers had prior criminal records or were believed to be involved in drug peddling and other forms of organized crime. Posing as IRA gunrunners, Mexican narcotics smugglers, and assorted ne'er-do-wells, undercover ATF agents were welcomed by international arms traffickers, narcotics smugglers, and assorted ne'er do-wells, among them a New York group that accepted an order for some \$15.6 million worth of silencer-equipped machine guns, hand grenades, and rocket-propelled grenades. A confidential ATF report noted that the leaders of the group "were dealing directly with Sylvia and Wayne Daniel... for the purchase of the machine guns and silencer kits." Agents also arrested an Oregon man who had provided machine-gun lower receivers to the Order, the group that had assassinated Alan Berg.

"There are literally thousands of persons now in the United States and probably

outside the United States who have a fully operable silencer which is not registered to them and which is possessed unlawfully,” Brian C. Leighton, an assistant U.S. attorney assigned to the case, wrote in a pretrial statement. “It was incredibly easy for these people to receive the silencer; they merely had to order the internal-parts kit from SWD and order a tube from one of the many tube distributors—all of whom advertised in Shotgun News.” These were “assassin-type weapons,” he said, and posed “a definite danger to the community.”

As the case approached the trial phase, however, the government found itself compelled to admit that no law forbade the sale of the silencer components sold by S. W. Daniel. Indeed, federal law expressly excluded silencer parts from ATF regulation. The Daniels pleaded guilty to a misdemeanor. They were sentenced to six months’ probation and forced to pay \$900 in taxes and fines, but because they had escaped felony charges, they were allowed to retain their federal firearms license.

The investigation had not cowed the Daniels. On May 1, 1985, Wayne Daniel placed an ad in Shotgun News headed “Now It’s Happening in AMERICA” featuring a large photograph of Hitler and Mussolini. The ad recounted the ATF’s raid on S. W. Daniel and listed the names and home cities of the agents involved. “The uniforms of this new ‘Gestapo’ may not be taylorred [sic] and bear the eagle and swastika on the sleeve, rather they choose to wear a business suit or sport jacket and slacks from the racks of a cut rate department store—but their purpose is the same, they want total control and YOU, as an American citizen, DISARMED!”

The agents named in the ad, among them Earl Taylor, demanded that Daniel retract the advertisement. He refused. In a handwritten letter he said, “I am at a complete loss of words perhaps from bending over laughing.”

The agents filed a private libel suit against Wayne Daniel and Snell Publishing, the publisher of Shotgun News. Taylor says, “It was, by God, to let them know that they couldn’t do that to law-enforcement officers who were doing their mandated duty.”

The court ruled in the agents’ favor and ordered Wayne Daniel to pay each agent \$1,000 in damages, but found Snell not liable.

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Short Barreled Rifle

A short barreled rifle (SBR) is defined in the law as:

26 U.S.C. sec. 5845(a) * * * * (3) a rifle having a barrel or barrels 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; * * *

The NFA law also defines “rifle”:

26 U.S.C. sec. 5845(c) “The term ‘rifle’ means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned or made or remade to use the energy of an explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

Thus you can see why a machine gun is not also a short barreled rifle; definitionally, a machine gun is not a rifle. And you can see why a barrel is not subject to regulation, or registration, in itself. It is a barrel, it cannot discharge a shot. A receiver alone is also not a short barreled rifle; a short barreled rifle is only a complete weapon that fits into the length parameters outlined.

ATF takes the position that this definition includes any combination of parts from which a short barreled rifle can be assembled. And they said this included a set of parts with dual uses. In the Supreme court case of U.S. v. Thompson/Center Arms Co., 504 U.S. 505 (1992) ATF said a set consisting of a receiver, a 16”+ barrel, a pistol grip stock, a shoulder stock, and a barrel less than 16 inches long was a short barreled rifle. The idea of the kit was that you needed only one receiver, and you could have both a rifle and pistol in one gun. While making a pistol out of a rifle is making a short rifle, ATF has approved of converting a pistol into a rifle, and then converting it back into a pistol, without “making” a short barreled rifle when it is converted back into a pistol; that was not an issue. See, for example Revenue Rulings 59-340, 59-341 and 61-203. T/C made one set on a Form 1, then sued for a tax refund, claiming the set was not a SBR, unless it actually was assembled with the shoulder stock, and short barrel, something they instructed the purchaser of the set not to do. The Supreme Court disagreed with ATF, and agreed with Thompson/Center.

The Court said that a set of parts was not a short barreled rifle, unless the only way to assemble the parts was into a short barreled rifle. As this set had a legitimate, legal, use for all the parts it was OK. However they also approved of lower court cases holding that the sale by one person, at the same place, of all the parts to assemble an AR-15, with a short barrel, was sale of a SBR, even if they weren’t assembled together at the moment of the bust, and had in fact never been assembled. See U.S. v. Drasen, 845 F.2d 731 (CA7 1988). A similar conclusion was reached by the 11th circuit in U.S. v. Kent, 175 F.3d 870 (CA11 1999). This was because the only use for the parts in that case was a SBR. If the person in that case also had a registered M-16, then there would be a legitimate use for the SMG barrel, and there shouldn’t be a problem. And the Court agreed, of course, that a fully assembled rifle with a barrel less than 16”, or an overall length of less than 26” was also subject to registration. Although it was not addressed in the case, the rule is that an otherwise short barreled rifle that is very easily restored to firing condition (readily restorable); e.g., one missing a firing pin, but for that pin one may substitute a nail or other common object, is also subject to the law.

ATF issued a Ruling that restates these ideas.

See <http://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-2011-4.pdf>

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General Info on NFA Weapons

Key to Abbreviations

AOW - Any Other Weapon

ATF - Bureau of Alcohol, Tobacco, Firearms & Explosives

ATT - Alcohol and Tobacco Tax Division of the IRS, the pre-1968 administrators of the NFA

C&R - Curio And Relic

CFR - Code of Federal Regulations

DD - Destructive Device

FET - Federal Excise Tax

FFL - Federal Firearms License

GCA - Gun Control Act

NFA - National Firearms Act

SOT - Special (Occupational) Taxpayer

U.S.C. - United States Code

DEWAT - De-Activated War Trophy

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