

Instructions on Transferring NFA and Non-NFA Firearms

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Instructions on Transferring NFA and Non-NFA Firearms

1. Is it Legally Considered a Firearm?

According to the Gun Control Act of 1968 (18 U.S.C. §921(a)(3)) a firearm is “Any weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” It also includes the frame or receiver of any such weapon, a suppressor or “silencer” and any destructive device. The term “firearm” does not include an “antique firearm”.

An “Antique firearm” is specifically described in §921(a)(16), and is a firearm manufactured before 1899 or a replica of a weapon manufactured before that time, as long as the replica does not shoot rimfire or center fire ammunition, or only shoots rimfire or conventional ammunition that is not manufactured in the U.S. and is not available in the ordinary streams of commerce. An Antique firearm also includes a muzzle loading rifle, shotgun, or pistol which is designed to use black powder and cannot use fixed ammunition. It is not an Antique if it uses a firearm frame or receiver, has been converted from something else into a muzzle loading weapon, or can be readily converted to use fixed ammo by replacing the barrel, bolt, breechblock, or any combination thereof.

If the firearm is manufactured before 1899, and based on its characteristics falls under the restrictions of the National Firearms Act of 1934, (See Section 2 below.) it is an antique if it was not designed or redesigned to use rim or center fire ammunition, or if the rim or center fire ammunition it was designed to use is “no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.” (26 U.S.C. 5845(g))

Each state may follow, add, or detract from the Federal definitions of a firearm for state law purposes. For example, Texas law basically follows the Gun Control Act, but slightly expands the definition of a replica firearm. Like the GCA, according to Texas Penal Code § 46.01(3), a replica of a firearm manufactured before 1899 is only a firearm if it uses rim fire or center fire ammunition. However, for Texas state law purposes, the ability to convert the replica to rim or center fire does not make a replica a firearm under Texas law.

If in doubt about whether a firearm is legally considered a firearm, or whether it is exempt as a qualifying antique, have the firearm inspected by a gunsmith.

2. Is it Federally Restricted Under the National Firearms Act of 1934?

The National Firearms act was passed in 1934 and codified in 26 U.S.C. §5801 et seq. Note the location of the act – Title 26, which is the Internal Revenue Code. This is basically a gun control law written into the tax code and enforced by the ATF, formerly under the Department of the Treasury, but now overseen by the Department of Justice. One of the purposes of the act was to impose a \$200 transfer tax on restricted firearms in an attempt to cut down on gangster and mob violence in the 1930’s. The amount of the tax has not changed since 1934, and in its day it was equivalent to over \$2,500.

The following firearms (sometimes referred to as “NFA,” “Title II,” or “Class 3” firearms) are restricted under the National Firearms Act of 1934 – 26 U.S.C. §5845(a).

- A. Short Barrel Shotgun:** A shotgun having a barrel or barrels of less than 18 inches in length; A weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length;
- B. Short Barrel Rifle:** A rifle having a barrel or barrels of less than 16 inches in length; 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;

- C. Any Other Weapon:** Defined in 26 USC §5845(e). E.g., pen gun, umbrella gun, camera gun, palm gun, etc. This also includes pistols designed with a smooth bore to fire a shotgun shell. It can also include a pistol with a detachable fore grip.
- D. A machinegun;** Defined in 26 U.S.C. 5845(b). This is basically a firearm that shoots multiple rounds with a single pull of a trigger. Included within the definition of machinegun is any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun. (§2.1.6 ATF Handbook, Crime Control Act of 1990 – 18 U.S.C. §921(r)). Prior to 1990 these items were legal, so it is possible something like an “Autosear” will show up.
- E. Any silencer:** Defined in the Gun Control Act of 1968 - 18 USC § 921(a)(24).
- F. A destructive device:** These include explosive devices like hand grenades, bombs, and large caliber weapons like RPG launchers and mortars. “Large caliber” refers to any weapon having a barrel diameter of more than ½”. (§2.1.8.2 ATF Handbook)

As stated above, if in doubt about the classification of a firearm, have the firearm inspected by a gunsmith. If you suspect a firearm is restricted under the NFA, you may want to hire the gunsmith to travel to the location where the firearm is stored to avoid transporting an illegal weapon.

3. Is it Registered in the National Firearms Registration and Transfer Record Under the Current Owner’s Name?

The NFRTR is a registry kept by BATFE and records the ownership of NFA Firearms. It is a criminal offense (evasion of the transfer tax) to receive or possess a firearm not registered to oneself (or to a trust of which someone is a trustee) in the National Firearms Registration and Transfer Record. Contact the BATFE to determine the registration status of an NFA firearm. Contact must be in the form of a written request verifying the identity of the inquirer. If the identity of the inquirer matches the registration record, the registration status of the firearm will be confirmed. (§3.4.3 ATF Handbook)

4. The Firearm is Contraband

NFA Firearms:

When dealing with NFA Firearms, “Contraband” is a term of art. Any firearm not lawfully registered in the NFRTR as required by the NFA is contraband and may NOT be registered and legitimized by its possessors. The firearm is permanently unlawful to possess. (§3.3 ATF Handbook, U.S. v. Freed, 401 U.S. 601 (1971))

Should an estate contain NFA firearms not registered to the decedent, these firearms are contraband that may not be lawfully possessed or transferred. Where these are found within an estate, the executor or administrator should contact his/her local ATF office and arrange for their disposal. (§9.5.3.4 ATF Handbook) NOTE: It is not legal for the administrator to possess such firearms, even while acting within his or her fiduciary capacity. The administrator would be in illegal possession of a restricted firearm.

In the case of contraband silencers and machine guns, there is no way to make them legal. The firearm should be surrendered to the nearest ATF branch for destruction or use by a governmental agency. It cannot re-enter ordinary commercial channels. (§9.14 ATF Handbook)

Firearms, except machineguns and silencers that are subject to the NFA, fall within the various definitions due to their specific features. If the particular feature that causes a firearm to be regulated by the NFA is eliminated or modified, the resulting weapon is no longer an NFA weapon. (§2.5 ATF Handbook) E.g., permanently installing a rifled sleeve in a shotgun pistol would convert it from an AOW to a regular pistol.

Someone delivering a contraband firearm to the ATF is shielded from prosecution. However, as noted above, it is important for a Personal Representative to be aware that other than while delivering a contraband firearm to the ATF, they are not shielded from criminal liability for possessing a contraband firearm, even though they may only be doing so while acting within their fiduciary capacity. If it was illegal for the original owner to possess, it is illegal for the personal representative to possess!

Non-NFA Firearms:

When referring to non-NFA firearms, the term contraband is used more loosely. A non-NFA firearm is usually only contraband in certain jurisdictions and can thus be legitimized by moving it to a jurisdiction where it is not prohibited. (See Instructions 5, 6, and 7 to determine how to legitimize a non-NFA firearm.)

5. Is the Firearm Prohibited Under Transferor's or Transferee's State Law?

For NFA Firearms, some states further restrict ownership beyond the restrictions imposed by the National Firearms Act. For example, Washington State does not allow the ownership of most machine guns which can be legally owned under federal law. Washington also bans short barrel rifles and shotguns which are legal under the NFA.

On the other hand, Texas does not impose any restrictions beyond those imposed by the NFA. Regarding ownership of NFA firearms, Texas Penal Code §46.05 basically says if it's legally owned under the NFA, you have a defense against prosecution for owning it under Texas law.

Because each state has its own laws regarding prohibited firearms, including prohibitions on firearms that are not federally regulated under the NFA, it is important to check the laws of the transferor's state to determine if possession within the transferor's jurisdiction is legal. As an example, Connecticut has a ban on "Assault Rifles" (basically defined as any "cool looking rifle") and California has restrictions on the types of "Assault Rifles" that can be possessed. (California limits rifles that look cool beyond a "maximum level of cool lookingness.") A Personal Representative or Transferor had better not transfer a cool looking rifle to a beneficiary/transferee living in Connecticut!

Specific cities (New York City, Chicago, Washington, D.C.) may have laws further restricting ownership of certain firearms otherwise legal under federal and state law. Keep this possibility in mind when determining if a firearm can be legally possessed within a particular jurisdiction.

6. Is the Transferor or Personal Representative a prohibited Person (Individually or Jurisdictionally), or Is the Transferee or Beneficiary a Prohibited Person (Individually or Jurisdictionally)?

Certain factors prohibit a person from possessing a firearm on an individual basis. According to 18 U.S.C. §922(d) et al, it is unlawful for a person to possess, or any other person to sell or otherwise dispose of any firearm or ammunition to a person knowing or having reasonable cause to believe that that person is:

- a. Under indictment for, or convicted of a felony;
- b. A fugitive from Justice;
- c. Unlawful user of, or addicted to any controlled substance. (Note, this is a federal law standard. A Colorado resident who legally uses marijuana in the state of Colorado is still prohibited from possessing a firearm under federal law.)
- d. Adjudicated as mentally defective or has been committed to any mental institution. (In an estate administration, if a beneficiary appears to be of an unsound mind, although not adjudicated mentally defective, a Personal Representative can petition the court to make

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the decision on whether a firearm should be transferred, or whether an alternate distribution should be made. This would shield the Personal Representative from a suit by the beneficiary;

- e. An Illegal Alien;
- f. An Alien who is in the United States under a non-immigrant visa;
- g. Discharged from the Armed Forces under dishonorable conditions;
- h. An Expatriate who, having been a citizen of the United States, has renounced his citizenship;
- i. Subject to a restraining order (with specific requirement as to the reason for the R.O.);
- j. Convicted of a misdemeanor crime of domestic violence. This was added by the Violence Against Women Act. The statute lists specific elements that must be part of the crime the individual was convicted of in order to constitute a disqualifying misdemeanor domestic violence conviction.
- k. Under Twenty-one years of age for NFA firearms and under 18 for Non-NFA firearms.

The Transferor's or Transferee's state laws may have additional prohibitions on possession. Check the laws of the particular city and state to determine if the Transferor or Transferee can possess a firearm.

As discussed in Instruction 5, an individual who is not prohibited individually may still be prohibited from owning a firearm within a specific jurisdiction. Some jurisdictions prohibit certain firearms that are not otherwise federally prohibited. Check the laws of the particular jurisdiction.

7. Select an Alternate Distribution Method

If transferee is a prohibited person (see Instruction 6), there may be ways to remove the prohibition through restoration of gun rights or resolution of the circumstance prohibiting them from possessing a firearm. If a beneficiary of an estate is permanently prohibited and there are multiple beneficiaries of an estate, the Personal Representative could re-allocate the assets of the estate so the firearms go to a different non-prohibited beneficiary.

Firearms can be sold under the Personal Representative's powers, and the proceeds given to the beneficiary instead of the actual firearm. As discussed above, a Personal Representative can request a court order for the sale of a firearm if the Personal Representative doesn't want liability for the decision. This would apply to the situation previously mentioned where a Personal Representative thinks someone is mentally unfit to possess a firearm, although not yet adjudicated so. Notify the court of the Personal Representative's reservations and have the court make the determination.

For larger collection, the National Rifle Association offers a Charitable Gift Annuity program where they will sell firearms without the 30% commission charged by most dealers. The proceeds are distributed to the beneficiary as an annuity. This is a good option in situations where surviving family members are not interested in keeping the firearms and would rather have the money without paying high commissions to a local firearms dealer to facilitate the sale.

If the transferee is a prohibited person jurisdictionally, have the transferee own the firearm in a Gun Trust and appoint a trustee who is outside the prohibitive jurisdiction to store the firearm. Keep in mind that the trustee must not be a prohibited person! For NFA firearms, a trust must be the owner of record in the NFRTR in order for a trustee to accept the firearm for safekeeping. The trust must allow for multi-jurisdictional ownership of NFA firearms and all NFA transfer rules must be complied with. If an NFA firearm is not owned by a trust, do not give the firearm to someone else for safekeeping! This would constitute an illegal transfer.

8. Instructions on Transferring NFA Firearms by Shipment

First, there are a few general guidelines to keep in mind with every transfer, especially when transferring from an estate:

- a. Transfers must comply with the laws of both states and with federal regulations.
- b. When a NFA firearm is to be transferred to an heir, a Form 5 must be filed by an executor or administrator, and the Form 5 must be approved by the ATF prior to distributing the firearm to the heir. The form should be filed as soon as possible. However, ATF will allow a reasonable time to arrange for the transfer. This generally should be done before probate is closed. (§9.5.3 ATF Handbook) The length of “a reasonable time” is a question of fact, and may depend on how an investigating LEO’s day has gone so far.
- c. In an estate, the Personal Representative has constructive possession of firearms even if not actual. A Personal Representative is not protected if they have actual or constructive possession of a contraband firearm. The Personal Representative is the only individual who can legally possess NFA firearms belonging to an estate.
- d. Do not drop NFA firearms off at a gun shop for sale! This is an illegal transfer. If you need the assistance of a gunsmith or gun shop, bring the firearm to the shop so they can inspect the firearm and take photos, but do not leave it in their custody unless you document the transfer with an approved Form 5. (See §§ 9.5.1, 12.6.2 ATF Handbook)
- e. In an estate, only the fiduciary can secure and possess a restricted firearm before ATF approves a transfer. Do not distribute to a beneficiary or other party for safekeeping.

Follow these steps when shipping an NFA firearm:

- a. First, Transferor submits a Form 4 request along with the \$200 tax to the ATF for a taxable transfer to an FFL dealer. The Transferor must wait for approval. Once approved, Transferor can transfer the firearm to the FFL dealer.
- b. FFL Dealer will submit a Form 3 request to transfer to another FFL Dealer in the Transferee’s jurisdiction. Once approved, FFL will ship the firearm to the second dealer.
- c. Second dealer submits a Form 4 request with \$200 tax to the ATF for a taxable transfer to the Transferee. Second dealer must wait for approval. Once approved, FFL can transfer possession of the NFA firearm to the Transferee.

It is important to note that because shipping an NFA firearm will involve two Form 4 transfers and one Form 3 transfer, it will cost \$400 in taxes plus shipping and FFL fees, and take 12-24 months to process. It is much simpler if the Transferee takes personal delivery of the restricted firearm. In an estate, since personal delivery to a beneficiary would be a Form 5 transfer, the transfer tax can be avoided when making personal delivery to a beneficiary.

9. Instructions for Shipping Non-NFA Firearms

The Gun Control Act of 1968 (18 U.S.C. 922(a)) makes it unlawful to ship a firearm person to person, or from licensed firearm dealer to a person. (This restriction was congress’ response to President Kennedy being assassinated by Lee Harvey Oswald, who used a mail order rifle to carry out the assassination.) An exception is made when a licensed dealer returns a firearm by shipment to an owner after repairs. Under the GCA, a Transferor cannot ship a firearm directly to a Transferee. The Transferor must ship the firearm to the Transferee’s local FFL dealer. The Transferee would then receive possession from the local FFL after passing the NICS (National Instant Criminal Background Check System).

10. Is Transferee a Lawful Heir?

Whether the Transferee is a lawful heir determines whether the transfer is a taxable Form 4 transfer or a non-taxable Form 5 transfer. The ATF looks to state law to determine if someone is a lawful heir under a will, trust, or the state laws of intestacy. (§9.5.3.1 ATF Handbook) According to an unpublished opinion

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by the ATF, a transfer from a Grantor trust to Descendant's trust is a taxable Form 4 transfer; an entity cannot be the heir of another entity.

11. Submit ATF Form 5 for Tax Exempt Transfer

If transferee is a lawful heir, the transfer of the firearm is considered an involuntary transfer and is not subject to the \$200 tax. (§9.5.3 ATF Handbook) The Personal Representative should submit a Form 5 and wait for the ATF to approve the transfer. Once approved, the Personal Representative can deliver the NFA firearm to a beneficiary who takes delivery in person. See Instruction 8 if beneficiary will not take personal delivery.

12. Submit Form 4 With Transfer Tax

Any transfer of an NFA firearm to a non-heir transferee or heir who is not taking personal delivery is subject to the \$200 transfer tax. An ATF Form 4 must be submitted to the ATF along with the \$200 tax payment prior to transferring the firearm. Once the transfer is approved, the Transferor can deliver the NFA firearm to the Transferee who takes delivery in person. See Instruction 8 if Transferee will not take personal delivery.

13. Distribute to Transferee

NFA Firearms:

Before beneficiary or other transferee takes possession of an NFA firearm, all forms must be approved by the ATF and kept with the firearm.

Non-NFA Firearms:

The only prerequisite to transfer non-NFA firearms is that the Transferee must not be a prohibited person and the firearm must not be prohibited in the Transferee's jurisdiction (see Instructions 5 and 6). When dealing with Non-NFA firearms, at the time of actual transfer of possession, the Transferor should have the Transferee sign ATF Form 4473. This form includes an affidavit that the Transferee signs stating that the Transferee is eligible to purchase firearms under federal law. This helps shield the Transferor from liability for unknowingly transferring a firearm to a prohibited person.

Penalties for Violating the NFA or GCA

Violation of the NFA or GCA carry serious penalties and should not be taken lightly! Many violations do not require a culpable mental state. Thus, there is a real risk of committing an "Accidental Felony" based on illegal transfer or possession of a firearm.

Penalties for a violation of the NFA do not require a culpable mental state and constitute a felony punishable with up to 10 years in prison or a \$250,000 fine, forfeiture of all firearms, and permanent loss of the right to own a firearm. (§15.1 NFA Handbook) In addition, any vehicle, vessel or aircraft used to transport, carry, convey, conceal, or possess a firearm in violation of the NFA can be seized and forfeited. (18 U.S.C. §179.182)

The GCA generally requires a culpable mental state. Felony violations of the GCA are subject to the same punishment as violations of the NFA. (§15.2 NFA Handbook)

Conclusion

If in doubt when dealing with the transfer, possession, or ownership of a firearm, consult with an attorney who is experienced in this area of state and federal law. Federal gun laws provide extreme penalties for even accidental violations.

