Educating the Masses on Gun Trusts

By JOSEPH E. GRUBER JR.*

Gun ownership is a prevalent topic discussed throughout the United States. Whether you are a stout1 Second Amendment2 supporter, one who believes in the necessity of gun reform,3 or a bit of both,4 one important, and increasingly common5 tool for gun owners is a gun trust. Gun owners establish gun trusts as a means to avoid requirements placed on individuals transferring certain weapons.

A gun trust is a legal trust that can be created to acquire firearms and share them with trust members.6 This structure "bypasses the need to obtain

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2. U.S. CONST. amend. II.

3. About Us, COALITION TO STOP GUN VIOLENCE, http://csgv.org/about-us/ (last visited Sept. 19, 2014) ("We seek to secure freedom from gun violence through research, strategic engagement and effective policy advocacy.").


5. Erica Goode, Trusts Offer a Legal Loophole for Buying Restricted Guns, N.Y. TIMES (Feb. 25, 2013), http://www.nytimes.com/2013/02/26/us/in-gun-trusts-a-legal-loophole-for-restricted-firearms.html?pagewanted=all&_r=0 ("[A]pplications filed with the A.T.F. [Bureau of Alcohol, Tobacco, Firearms and Explosives] for transfers of restricted firearms to trusts or corporations have more than doubled in the last four years, to more than 39,000 in 2012 from about 15,000 in 2008 . . . [and] the increase was largely attributable to the growth in the number of trusts.").

6. Id. ("[Gun trusts] have gained in popularity, gun owners say, in part because they may offer protection from future legislation intended to prohibit the possession or sale of the firearms.").
law enforcement approval or even undergo criminal background checks.”

Specifically, gun trusts may be used to bypass the requirements of two key federal laws: the National Firearms Act of 1934 ("NFA") and Title II of the Gun Control Act of 1968 ("Gun Control Act"), which revised the NFA. Note that the Gun Control Act is actually codified in various areas of the U.S. Code. The NFA was ostensibly enacted as a tax statute, and can be found in Title 26 of the U.S. Code (Internal Revenue Code). Title 26 allows firearms to be transferred when the transferee is identified in prescribed application; however, if the transferee is an individual, their fingerprints and photograph are also required. This application is further defined in the Code of Federal Regulations § 479.85, where the specific requirements for the identifying documents (e.g., the size and composition of an individual’s picture) are stated. Section 479.85 further requires a certificate from a certifying official, such as the local chief of police, stating the picture and fingerprints are those of the transferee, that the certifying official believes transfer of the weapon would not place the transferee in violation of state or local law, and that the transferee will not use the firearm for any unlawful purpose.

These requirements were put in place to “curtail, if not prohibit[,]” the transfer of the firearms governed by the NFA and Gun Control Act. Gun trusts, however, can ease the burden of transferring weapons as an individual. Because the two key federal laws only apply to “individuals,” once the firearms are included as corpus of a gun trust, any person named as a trustee could have the full enjoyment of the weapons without having to provide the information required by §

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7. Id.
12. 26 U.S.C. § 5812 (2012) (“A firearm shall not be transferred unless . . . (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph.”) (emphasis added).
13. Id.
15. Id.
479.85. Further, if the trust were properly created, it would stay in existence after the initial trustee or trustees’ death, thereby, allowing any successor to avoid the requirements as well. The exchange of guns in this manner could theoretically continue in perpetuity, circumventing any future laws.

The real difficulty in drafting a gun trust depends on these successor trustee provisions. One of the main benefits of any trust is its longevity, which allows for successor trustees and beneficiaries to enjoy the trust corpus with minimal risk of infringing the law. Despite the fact that trusts can overcome the transfer requirements, certain restrictions are still placed on who can possess and receive firearms. Specifically, 18 U.S.C. § 922(g) contains a laundry list of prohibited persons who may not receive a firearm. These persons include, for example, anyone convicted of a crime punishable by greater than one year in prison, a person who is addicted to a controlled substance, and a person who has been dishonorably discharged. The trust must therefore allow for the nominating, and potential replacement, of trustees and successor trustees to ensure that a valid trustee (that is, a trustee who is not a prohibited person under § 922(g)) is available to assume control of the trust.

In 2013 the Bureau of Alcohol, Tobacco, Firearms, and Explosives (‘‘ATF’’) and President Obama have attempted to close the perceived loophole that gun trusts exploit. After his push for additional gun regulations following the high profile shootings of the past several years,
President Obama has increasingly relied on executive action in the wake of congressional opposition to such reform. To that end, the ATF submitted for executive review in August of 2013 proposed regulations to require “responsible persons” of a gun trust to complete a specified form, submit photographs and fingerprints, and submit a law enforcement certificate. When the ATF made this proposal available for public comment in September 2013, it received over 9000 responses. Initially slated to make a decision about the final rule in the spring of 2014, the ATF will now postpone any action until at least 2015, in the wake of the opposition expressed in the public comments to the proposed changes.

As posited in this Article, these trusts are extremely beneficial to any gun owner looking to share and pass down his or her collection with ease, and supporters of the trusts are not shy about letting their voices of opposition to reform from being heard. However, these trusts also raise concerns, as they can allow certain individuals to possess weapons that would otherwise be difficult, or even illegal, to possess. Regardless of one’s stance on the Second Amendment, it is important to be educated on the value of these trusts or the danger that these trusts pose to respectively take responsible advantage of them or to support new laws to disallow them.

27. Hattem, supra note 18.

28. Id.

29. Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity With Respect To Making or Transferring a Firearm, 78 Fed. Reg. 58014 (Sept. 9, 2013) (proposed rule modifying 27 C.F.R. § 479 with request for comments).

