

BATF Firearms Forfeiture Procedures and Policies: An Attorney Guide

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Revised Edition
January 30, 2009

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This guide was commissioned by Gun Owners Foundation to provide practical assistance to an attorney representing a gun owner or Federal Firearms Licensee (FFL) seeking relief from **civil proceedings** initiated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“BATF”) to effect the **forfeiture** of firearms or ammunition seized by BATF.¹

It has been prepared because, in doing their own research and analysis assisting attorneys in the field, the authors have not found any single authoritative source that provides a practicing attorney with a practical and useful overview of BATF civil forfeiture practices and policies.

The reader should keep in mind that this is not a general manual on asset forfeiture, and is not even a complete treatment with respect to firearms forfeiture. It is essentially an overview of the firearm forfeiture process vis-a-vis apparent BATF practice. As indicated below, for example, BATF seizure and forfeiture procedures themselves may differ depending upon which title of the U.S. Code — Title 18 or Title 26 — is claimed as the foundation for the BATF action. This guide does not attempt to analyze whether BATF’s procedures are correct.

I. FROM SEIZURE TO THE INITIATION OF CIVIL FORFEITURE PROCEEDINGS.

Pursuant to **18 U.S.C. Section 3051(a) and (b)**, BATF special agents are authorized to seize firearms and ammunition with or without a search warrant. (Analysis of those rules is beyond the scope of this memorandum, other than to call attention to the various statutes defining criminal offenses arising out of the possession, use, transfer, and other involvements with firearms and ammunition found in United States Code Title 18, Chapter 44 (**Ap-**

pendix A) and in Title 26, Chapter 53 (**Appendix B**).)²

If the BATF has seized firearms and ammunition pursuant to a **search warrant**, the person from whom such firearms and ammunition have been seized should be provided a **Return** containing an inventory of the property taken pursuant to the warrant.

If the firearms or ammunition has been obtained by **consent** or by **warrantless search**, the person from whom the firearms and ammunition have been seized should be provided an **inventory** of the property taken thereby.

Following the seizure, BATF’s normal practice appears to be to notify (by Certified Mail, return receipt requested) the person from whom the firearms and ammunition have been seized that “[a]dministrative forfeiture proceedings have commenced in accordance with the provisions of 18 U.S.C. § 3051(c), 19 U.S.C. §§1602-1618 and 18 U.S.C. §§ 983.” (Emphasis added.) See various BATF letters. (Certain information below has been taken from BATF letters in various cases, which are on file.)

Additionally, in the same letter BATF’s practice apparently is to state the **statutory basis** for initiating the forfeiture proceeding.

- In the case of a claimed violation of Title 18, Chapter 44, United States Code, the letter would state that the forfeitable property was used or acquired in violation of **18 U.S.C. Section 924(d)**.
- In the case of a claimed violation of Title 26, Chapter 53, United States Code, however, the letter would state that the “property was used or acquired in violation of federal law and is subject to forfeiture under **26 U.S.C. Section 5872**” and might also identify the specific statute that BATF claims to have

been violated, or at least refer to Title 26, Chapter 53, in which such a statute might be found.

In those instances where BATF is proceeding to forfeiture of the firearms/ammunition based upon a claimed violation of Title 18, Chapter 44, United States Code — usually stated as a violation of **18 U.S.C. Section 924(d)** — the letter would indicate that forfeiture would proceed in accordance with **18 U.S.C. Section 983**. See **Appendix C**.

In contrast, where BATF is proceeding to forfeiture based upon a claimed violation of Title 26, Chapter 53, United States Code, the letter would not follow either the timetable or the no-cost-bond provisions of **18 U.S.C. Section 983(a)(2)(B) and (E)**, respectively, even though the letter would indicate that BATF was proceeding to forfeiture, pursuant, in part, to 18 U.S. Section 983.

A. Forfeiture Letter Based On An Alleged Violation of 18 U.S.C. Section 924(d)(1).

Within 60 days after the seizure, BATF would send a letter, notifying the person from whom such firearms and ammunition were seized, advising such person that BATF has initiated administrative forfeiture proceedings.³ The letter would be sent by Certified Mail, return receipt requested, to the address of the premises from which the firearms and ammunition were seized, or to any other address of the person whom BATF has identified as the owner, if the seizure took place on premises other than a person's home or business.

Generally, the BATF letter would include a description of the property seized and a general statement that the property was “used or acquired” in violation of 18 U.S.C. Section 924(d) — a section of Title 18, Chapter 44, of the United States Code containing references to over 40 discrete firearms offenses,⁴ and to other offenses, the definition of which does not include a firearm or ammunition as an element

of the offense, but in the commission of which a firearm was used or intended to be used.

Most likely the letter would not identify any one of the specific offenses set forth in 18 U.S.C. Section 924(d). The list of offenses is a lengthy one, and is catalogued in Appendix A. In consultation with the client, a preliminary review of the offenses that may allegedly have been violated should be conducted, with special attention paid to the *mens rea* element attached to each listed offense⁵ and, if applicable, the standard of proof of “clear and convincing evidence” attached to the offenses named in Section 924(d)(3). See Appendix A for a description of the listed offenses catalogued according to their respective *mens rea* elements, as stated in Section 924(d)(1), and for the subsection (3) offenses for which clear and convincing evidence is required. Such a preliminary review should be undertaken before advising the client of his options.

The letter would typically advise the recipient that he has the following **three choices**:

- (a) **contest** the seizure and forfeiture by filing a claim of ownership;
- (b) **consent** to the forfeiture of the property through the administrative process and seek equitable relief from the forfeiture by filing a Petition for Remission or Mitigation of Forfeiture; or
- (c) take **no action**.

Under **option (c)** — “take no action” — the letter would advise the recipient that he need make no further contact with BATF.

Under **option (b)** — “consent to the administrative forfeiture” — presumably the recipient would be instructed to communicate that consent to BATF by letter, or by such other such means as the recipient may choose. In any event, the recipient would be instructed to submit in writing a **Petition for Remission or Mitigation of Forfeiture**. The recipient

would be referred to 28 C.F.R. Part 9, the regulations governing the form and content of such a Petition, and would be provided with a brief description of its contents and requisites, including the completion of a Net Equity Worksheet which is available from BATF. However, no forms would be supplied with the BATF letter.

Under **option (a)** — “contest the seizure and forfeiture in the United States District Court” — the recipient would be advised that he must file a **Claim of Ownership** within **35 days** of the date of the letter. A form for this purpose would be provided with the letter, along with instructions for completion and filing. **No cost bond** would be required. Additionally, there would be extensive instructions informing the recipient how he might obtain “immediate release of the seized property pending disposition of your claim in United States District Court.”

B. Forfeiture Based Upon 26 U.S.C. Section 5872.

If the forfeiture proceeding is based upon a claimed violation of a firearms offense in **Title 26**, Chapter 53, United States Code, the BATF letter would notify the recipient of the initiation of an administrative forfeiture based upon a claimed violation of **26 U.S.C. Section 5872** — not of 18 U.S.C. Section 924(d).⁶

According to 26 U.S.C. Section 5872(a) a firearm is subject to seizure and forfeiture if it is “involved in any violation of the provisions” governing firearms set forth in **Title 26**. Typically, the notice of forfeiture letter would not specify the alleged violation. In consultation with the client, it would be wise to review the possible violations, including the *mens rea* element, before counseling the client regarding his options. See Appendix B for the *mens rea* and *actus reus* elements of the firearms offenses defined in the National Firearms Act.

While the BATF letter would set out the same three options set forth in a forfeiture letter based upon 18 U.S.C. Section 924(d)(1), it would state quite different conditions governing the filing of a claim to contest the forfeiture in court.

Instead of affording the claimant 35 days within which to file a Claim of Ownership, the letter typically would state that such a claim must be filed within a time period other than the 35-day period prescribed by 18 U.S.C. Section 983(a)(2)(B). The **time period may vary**,⁷ apparently because BATF is proceeding to forfeiture pursuant to **19 U.S.C. Sections 1607 - 1609** which, unlike 18 U.S.C. Section 983(a)(2)(B), do **not** prescribe an exact timetable within which a notice of ownership must be filed.

Further, the claimant would be notified that his claim of ownership must be accompanied by a **cost bond** in the amount of 10 percent of the value of the subject property (unless he obtains a waiver to proceed in forma pauperis, as set forth in 19 U.S.C. Section 1608), thereby indicating that the no-cost-bond provision of 18 U.S.C. Section 983(a)(2)(E) does not apply.

Finally, the BATF letter would contain no advice of any procedure available to the claimant for the release of the subject property pending any civil judicial action.

II. TAKING NO ACTION OR CONSENTING TO CIVIL FORFEITURE

If no “interested” person takes action, or if all such persons expressly consent to the administrative forfeiture, BATF is free to dispose of the property as it sees fit and an aggrieved party loses whatever ownership interest he may have had in the seized property. Taking no action or consenting to administrative forfeiture does not guarantee, however, that BATF may not file criminal charges against the person from whom the firearms and ammunition were seized. By taking no action to recover the seized property, an aggrieved party apparently does not waive any right to contest the legality

of the search and seizure on a motion to suppress filed pursuant to Rule 41 of the Federal Rules of Criminal Procedure. See Section VI, below, regarding petitions for remission or mitigation.

III. CONTESTING THE SEIZURE OUTSIDE THE ORDINARY COURSE OF CIVIL FORFEITURE PROCEEDINGS.

A. Seeking Immediate Release After Forfeiture Proceedings Initiated.

According to the typical BATF letter advising a person that administrative forfeiture proceedings have been initiated with respect to seized firearms and ammunition based upon an alleged **Title 18 offense**, a person is advised that he may seek “immediate release” of such seized firearms and ammunition by complying with **18 U.S.C. Section 983(f)**. That section, in turn, requires a person to meet the following requirements:

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties with the community to provide assurance that the property will be available at the time of trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant;

(D) the substantial hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed or transferred if it is returned; and

(E) the property is not contraband, is not to be used as evidence of violation of the law, is not particularly suited for use in illegal activities, and is not likely to be used to commit additional criminal acts if returned. See 18 U.S.C. Section 983(f)(1), (2) and (8).

While this provision for release of property is backed up by a provision affording quick judicial review (if a request for release is not acted upon within 15 days), it does not appear that any person whose firearms or ammunition have been seized is likely to meet all five of the specified conditions for release, especially the fifth one. Moreover, the release option is not available to a person from whom firearms and ammunition have been seized until **after** he has filed a claim in response to the BATF letter announcing the initiation of administrative forfeiture proceedings. See 18 U.S.C. Section 983(f)(1). This means that release, even if obtainable, ordinarily could not be effected, **at the earliest**, until two or more months after the seizure.

In contrast, in a BATF letter initiating administrative forfeiture proceedings based upon an alleged violation of a **Title 26 offense**, the recipient would **not** be advised of an opportunity to seek “immediate release” pursuant to **18 U.S.C. Section 983(f)**.

B. Taking Separate and Independent Action For Return of Seized Property Before Initiation of Forfeiture Proceedings.

Subsection 2(A) of 18 U.S.C. Section 924(d) — the statute upon which BATF relies to initiate forfeiture proceedings based upon an alleged **Title 18 offense** — arguably contemplates that a person from whom the firearms and ammunition were seized may take the initiative with an “action or proceeding for the return of firearms or ammunition.” Additionally, Subsection 2(A) provides for the payment of **attorney’s fees** to the “prevailing party, other than the United States.” While it could be argued that this subsection creates a **cause of action** for the return of firearms or ammunition upon a showing that they were seized unlawfully, the Halbrook Firearms Law Deskbook appears to suggest that a source other than Section 924(d)(2) is needed to support the initiation of a separate and independent action or proceeding for the return of wrongly seized firearms or ammunition. See

S. Halbrook, Firearms Law Deskbook, Section 4:5, p. 322, n 1 (2007 Edition).

Halbrook suggests first that such a “suit could be based upon a claim of violation of Fourth and Fifth Amendment rights” as implemented in Federal Rule of Criminal Procedure 41(e) which provides, in part: “A person aggrieved by an unlawful search and seizure or by the deprivation of property without due process of law may move the district court in which the property was seized for a return of the property on the ground that such person is entitled to lawful possession of the property.” Although Halbrook does not cite Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1974), as authority for such an action, it could be argued that, if the Fourth Amendment gives rise to a cause of action for damages for violation of the rights that it protects, then it may also support a cause of action for return of the property wrongfully seized. BATF could respond that, since the property seized is subject to forfeiture, it is not “repleviable,” unless the claimant could show that BATF has failed to comply with the statutory procedures governing forfeiture proceedings, the purpose of which is to provide the sole process by which the forfeitability issue is to be decided.

Further, if the aggrieved person’s substantive claim rests upon the Fourth Amendment, BATF could argue that the action or proceeding is not contemplated by 18 U.S.C. Section 924(d)(2) because a Fourth Amendment claim arises under the Constitution, and is not, therefore, an action “for the return of firearms or ammunition **under the provisions of this chapter.**” See 18 U.S.C. Section 924(d)(2)(A) (emphasis added). Further, BATF could contend that, even if the aggrieved party had a cause of action under the Fourth Amendment, neither the limits on forfeiture contained in 18 U.S.C. Section 924(d)(1), nor the provision for attorneys fees under Section 924(d)(2), would apply.

As an alternative to a constitutionally-based cause of action, Halbrook suggests that, BATF Firearm Civil Forfeiture Procedures and Policies

independent of the Fourth and Fifth Amendments, Rule 41(e) of the Rules of Criminal Procedure creates the right to a “civil action to recover personal property” seized contrary to the Fourth and Fifth Amendments as applied through Section 924(d)(1), citing Application of J.W. Schonfeld, Ltd., 460 F. Supp. 332 (E.D. Va. 1978). Halbrook Deskbook, Section 4:5 at 322.

In Schonfeld, the district court found jurisdiction for a return of allegedly wrongfully-seized firearms based on Rule 41(e) of the Federal Rules of Criminal Procedure, buttressed, in part, by 5 U.S.C. Section 702, which provides that a “person suffering a legal wrong because of agency action ... is entitled to judicial review thereof.” See Schonfeld, 460 F. Supp. at 335, n3. While the court noted that the aggrieved party’s petition rested upon allegations that the search warrant, and its execution, were violative of the Fourth Amendment, it also noted that the government had “more than five months since the search to collect evidence and commence a prosecution,” indicating thereby that the civil action rested on more than the allegations that the initial search and seizure were unlawful. See *id.* at 335-38. Thus, Schonfeld could be read as recognizing the **right of an aggrieved person to initiate an action** for the return of seized property **if it is shown that the government did not act promptly** to bring formal charges, either by way of: (I) a timely criminal indictment or (ii) an administrative forfeiture or (iii) a civil forfeiture judicial action.

Indeed, this reading of Schonfeld, as applied to a claim for return of forfeitable property, is reinforced by a third source upon which Halbrook relies to justify an aggrieved party’s initiating an action for the return of property prior to the bringing of a forfeiture action against him. Citing United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency, 461 U.S. 555, 569 (1983), Halbrook states that “the claimant can file an equitable action seeking an order compelling the ... return of seized property.” On

closer reading of the case, however, it appears that such an action for return must be stated as an alternative to a request for “an order compelling the filing of [an appropriate] forfeiture” proceeding. See *U.S. v. \$8,850*, 461 U.S. at 569. This reading is reinforced further by the fact that the Court relied solely upon an 1817 decision in which Chief Justice Marshall observed that, if a government refuses to institute forfeiture proceedings, an aggrieved party may bring an action “to compel” the government “to proceed to forfeiture or abandon the seizure.” See *Slocum v. Mayberry*, 2 Wheat. 1, 10, 4 LEd. 169 (1817).

In sum, it is questionable whether a person aggrieved by an unlawful search and seizure of a firearm or ammunition could succeed in taking the initiative to obtain return of the seized property outside of a BATF-initiated administrative forfeiture proceeding or judicial action, unless BATF has failed to initiate such a proceeding or action within the time prescribed by law. See *Schonfeld*, 460 F. Supp. 332 (E.D. Va. 1978). Such an action would appear to be clearly warranted in a forfeiture matter based upon an alleged Title 18 firearms offense, if BATF failed to comply with the timetables and other conditions set by 18 U.S.C. Section 983(a)(1).⁸ Such an action would also appear to be available to such an aggrieved party if he wished to challenge the failure of BATF to initiate a civil judicial forfeiture proceeding within the 120 days prescribed by 18 U.S.C. Section 924(d)(1). See Part V.A. and footnote 10, below.

IV. CONTESTING A CIVIL JUDICIAL FORFEITURE ACTION.

A. Forfeiture Based on Claimed Violation of 18 U.S.C. Section 924(d)(1).

It appears to be the practice of the BATF to initiate a forfeiture — if based upon a claimed violation of 18 U.S.C. Section 924(d)(1) — according to the procedures and standards set

forth in 18 U.S.C. Section 983, the **Civil Asset Forfeiture Reform Act of 2000** (CAFRA).⁹

18 U.S.C. Section 983(a)(1)(A)(I)-(iii) provides that, if it intends to pursue forfeiture of seized firearms or ammunition, BATF may:

(I) initiate a **nonjudicial civil forfeiture** by sending “written notice to interested parties ... in a manner to achieve proper notice as soon as practicable, and in no case more than **60 days**^{10 11 12} after the date of the seizure” (emphasis added);

(ii) prior to the expiration of the 60-day period, file a **civil judicial forfeiture action** against the property, providing notice of the action as provided by law; or

(iii) prior to the expiration of the 60-day period, and in the case that BATF does not file a civil judicial forfeiture action:

(a) obtain a **criminal indictment** containing an allegation that the property is subject to forfeiture, either sending notice of a separate nonjudicial forfeiture as provided in (I) above, or

(b) **terminate** the nonjudicial forfeiture proceeding and take the necessary steps to maintain custody of the property as provided in any applicable criminal forfeiture statute.

Failure to send the notice required within the times prescribed in Section 983(a)(1)(A)-(D) requires the return of the seized firearms and ammunition (unless the firearms or ammunition is contraband or cannot be legally possessed by the person from whom seized), but such return is without prejudice to the commencement of a forfeiture proceeding at a later time.

If BATF initiates an administrative forfeiture within the statutorily-prescribed period, any person, including the person from whom the firearms or ammunition were seized, may file a claim of ownership of the seized firearms and

ammunition with BATF, but he must do so not later than the deadline set forth in a personal notice letter, which date may not be earlier than **35 days** after the date the letter is mailed. However, if such a letter is not received, the claimant must file such a claim within **30 days** “after the date of final publication of notice of seizure.” See Section 983(a)(2)(A) and (B). The claim shall:

- (I) “identify the specific property being claimed”;
- (ii) “state the claimant’s interest in such property”; and
- (iii) be made under oath, subject to penalty of perjury.” [Section 983(a)(2)(C).]

The claim need not be filed in any particular form, but BATF typically makes available a claim form with its letter of notice, as well as a description of firearms and ammunition seized. See Section 983(a)(2)(D). The claimant is not required to post any bond. Section 983(a)(2)(E).

If an aggrieved party timely exercises his option to file a claim of ownership of the seized firearms and ammunition, according to 18 U.S.C. Section 983(a)(3)(A) and (B), BATF must — **“no later than 90 days”**¹³ after a claim is filed” — either file a civil forfeiture complaint in federal district court or, before the time for filing such a complaint has expired, “obtain a criminal indictment containing an allegation that the property is subject to forfeiture and tak[ing] steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.”

If BATF fails to exercise one or the other of these prescribed options, it must “release the property pursuant to regulations promulgated by the Attorney General and may **not** take any further action to effect the civil forfeiture of such property in connection with the underlying offense.” See 18 U.S.C. Section 983(a)(3)(B).

If BATF files a civil judicial forfeiture complaint in federal district court, as provided for in 18 U.S.C. Section 983(a)(3)(A), it appears that such a complaint is governed by the Federal Rules of Civil Procedure’s **Supplemental Rules for Certain Admiralty and Maritime Claims**, except as modified by the federal rules. See, e.g., United States v. Fourteen Various Firearms, 889 F. Supp. 875 (E.D. Va. 1995). According to 18 U.S.C. Section 983(a)(4)(A) and (B), any person asserting an interest in the seized property may within **30 days** file a claim “in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims,” and **20 days** thereafter shall file an answer to the Government’s complaint for forfeiture.

The burden of proof is squarely “on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.” 18 U.S.C. Section 983(c)(1).¹⁴ 18 U.S.C. Section 924(d) itemizes the specific offenses, violation of which justifies a BATF seizure and forfeiture of firearms or ammunition.¹⁵ Further, Section 924(d)(2)(C) provides that only those firearms or quantities of ammunition named and individually used in violation of the offenses listed in Section 924(d)(1) are subject to “seizure, forfeiture and disposition.” Thus, any civil forfeiture complaint must identify the particular offense(s) upon which BATF rests its case for forfeiture, including such **specific**¹⁶ allegation(s) of the mens rea element(s) of such offense(s). See Appendix A for descriptive list of Title 18 offenses and their respective *mens rea* elements. If the complaint fails to do so, then it (I) may be defective for having failed to state a claim upon which relief can be granted, subject to a Rule 12(b)(6) motion to dismiss, or (ii) at least, may be deficient in light of Supplemental Rule (E)(2), and therefore subject to a Rule 12(e) motion to make a more definite statement.

In order to assess the adequacy of a complaint under either Rule 12(b)(6) or 12(e), the offense(s) charged in the complaint must match one or more of the offenses referred to in 18

U.S.C. Section 924(d)(1). The itemized offenses are identified and catalogued according to the definitional section and requisite **mens rea** in **Appendix A**, attached hereto. Because firearm offenses are considered **mala prohibita**, rather than **mala in se**, there is no substitute for careful reading and analysis of the statutes defining the actus reus **and mens rea** elements of each offense. Because there is no common law of firearms crimes, there is a tendency to assume that civil forfeitures of firearms are governed by strict liability. But that is not the case after the enactment of FOPA.¹⁷

It is especially important to consult 18 U.S.C. Section 921, which contains extensive definitions of the actus reus elements of many of the offenses described in 18 U.S.C. Section 922. Further, it is also essential to examine case applications of the definitional sections to specific offenses because of the various textual ambiguities contained in the statutes. Finally, it is important to review the legislative history because firearms laws generally are the product of hotly disputed legislative battles between gun control advocates and Second Amendment defenders of the right to keep and bear arms.

Additionally, any civil forfeiture complaint must be carefully scrutinized to uncover the mens rea element upon which BATF is relying. Most of the offenses merely require proof of “knowing,” but some require proof of wilfulness. If the former, then all BATF must prove to effect forfeiture is that the person knew what he was doing. If the latter, the BATF must also prove that the person knew that what he was doing was unlawful. See Bryan v. United States, 524 U.S. 184 (1998).

B. Forfeiture Action Based On 26 U.S.C. Section 5872.

Unlike a BATF letter initiating a forfeiture proceeding under 18 U.S.C. Section 924(1)(d), a BATF letter initiating a forfeiture proceeding under 26 U.S.C. Section 5872 does not follow either the timetable or the no-cost bond provisions of 18 U.S.C. Section 983.¹⁸

Specifically, a 26 U.S.C. Section 5872 letter typically would state that a claim of ownership necessary to halt the administrative forfeiture must be filed within a time period **other than** the 35 days prescribed in 18 U.S.C. Section 983(2)(B), after the date of the letter of notification of the initiation of an administrative forfeiture.¹⁹ Further, a 26 U.S.C. Section 5872 letter typically would state that the claim must be accompanied by a cost bond, whereas 18 U.S.C. Section 983(a)(2)(E) dispenses with such a bond. Although the terms of such a letter would not meet the limits imposed on a civil forfeiture based upon an allegation of a Title 18 offense, the terms contained in this letter would appear to comply with the Customs law forfeiture provisions contained in 19 U.S.C. Sections 1607 and 1608.

Apparently, under the so-called “Customs Carve-out” exception set forth in 18 U.S.C. Section 983(I),²⁰ BATF takes the position that 18 U.S.C. Section 983 applies only to forfeiture proceedings based upon firearm/ammunition offenses contained in **Title 18**, United States Code, **not** forfeiture proceedings based upon firearm offenses set forth in **Title 26**, Chapter 53, United States Code. By invoking 26 U.S.C. Section 5872(a), BATF apparently claims that “the provisions of internal revenue laws relating to searches, seizures, and forfeitures of unstamped articles” govern searches, seizures, and forfeitures of firearms in those cases where the use or acquisition of the subject firearm violates an offense contained in Chapter 53 of the federal tax code, as contrasted with a case where the use or acquisition of the subject firearm violates an offense contained in Chapter 44 of the federal criminal code. BATF could buttress its position by noting that 18 U.S.C. Section 924(d)(1), itself, states that “all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, **so far as applicable**, extend to seizures and forfeitures under the provisions of this chapter.” (Emphasis added.)

But, as the bolded phrase indicates, this reference to the Internal Revenue Code provisions does not state which of those seizure, forfeiture and disposition provisions apply. Indeed, 18 U.S.C. Section 924(d)(1) does not even state that the 18 U.S.C. Section 983 provisions concerning forfeiture apply to the firearms/ammunition offenses contained in Title 18. Yet, the BATF forfeiture letter based upon violations of offenses contained in Title 26 states that the forfeiture is proceeding in compliance with 18 U.S.C. Section 983. Why? Perhaps the reason for this reference is based upon 18 U.S.C. Section 3051, which confers upon BATF agents authority to enforce all firearms offenses — both those contained in Title 18 and in Title 26 without distinction — including authority to “make seizures of property subject to forfeiture to the United States.” See 18 U.S.C. Section 3051(a) and (b).

According to 18 U.S.C. Section 3051(c), the provisions of Customs law relating to forfeitures apply to BATF seizures “except to the extent that such provisions conflict with the provisions of section 983 of title 18, United States Code, **insofar as section 983 applies.**” (Emphasis added.) 18 U.S.C. Section 983(1)(a)(1)(A), in turn, states the general rule that Section 983 applies “in **any nonjudicial civil forfeiture proceeding** under a civil forfeiture statute,” but subsection (I) of Section 983 states that, for purposes of applying that section, the term “civil forfeiture statute ... does **not** include ... the Internal Revenue Code of 1986,” even if it contains a statute providing for the civil forfeiture of property.

Thus, even though the typical letter would claim that administrative forfeiture proceedings have been commenced in accordance with 18 U.S.C. Section 983, it appears that a BATF forfeiture letter based upon a claimed violation of a firearms offense contained in Title 26, Chapter 53, United States Code, would not contain the timetable or the no-cost bond limits imposed by 18 U.S.C. Section 983. Indeed, not only does the BATF letter depart from the 35-day notice requirement provided in Section 983(a)(2)(B) and the no-bond provision of

Section 983(a)(2)(E), but appear to dispense with the 90-day requirement of Section 983(a)(3)(A) within which judicial proceedings must be commenced (see 19 U.S.C. Section 1610), and would place quite different **burdens of proof** on the government and on the plaintiff. Compare 19 U.S.C. Section 1615 with 18 U.S.C. Section 983(c)(1). See also United States v. One Harrington and Richardson Rifle, Model M-14, 278 F. Supp.2d 888, 891 (W.D. Mich. 2003) (“[T]he government must satisfy its initial burden by demonstrating that it had probable cause to believe that the property was used in violation of law.... This burden requires ‘less than prima facie proof, but more than suspicion’.... If the government establishes probable cause, the burden shifts to the claimant to establish by a preponderance of the evidence that the property was not related to the violation of law.... If the claimant satisfies this burden, the burden shifts back to the government requiring the proffer of ‘probative admissible evidence to contest the claimant’s proof.’”)

In his Firearms Law Deskbook, Halbrook affirms that “CAFRA exempts Internal Revenue Code forfeitures (and hence NFA [26 U.S.C. Chapter 53] ones).” *Id.*, at Section 4:3, p. 312. As noted above, even though 18 U.S.C. Section 983 utilizes the term “civil forfeiture statute” to define its scope of application, subsection (I) of that Section states that the term “does not include [either] “the Tariff Act of 1930 or any other provision of law codified in title 19 [or] the Internal Revenue Code of 1986.” In plain English, this provision apparently was designed by Congress to exempt civil forfeitures of property allegedly used in violation of customs law and internal revenue law. See House Report 106-192, pp. 11²¹ and 25.²² If so, then, as 26 U.S.C. Section 7327 states, the provisions applicable to remission or mitigation of forfeitures under customs laws shall apply to forfeiture incurred or alleged to have incurred under internal revenue laws.

Notwithstanding the language of these statutes, and CAFRA’s legislative history that

apparently exempts BATF civil forfeitures of property seized for violation of offenses defined in Title 26, Chapter 53, of the Internal Revenue Code, the Halbrook Deskbook states that “it is [BATF’s] policy to be consistent and follow the CAFRA deadlines and procedures for firearms under the NFA [Title 26, Chapter 53] as well as non-NFA provisions [Title 18, Chapter 44]. Firearms Law Deskbook, Section 4:3, p. 312. But, as evidenced by two recent BATF forfeiture letters wherein BATF did not follow either the 35-day claim of ownership time period or no-cost-bond provisions of 18 U.S.C. Section 983(a)(2)(B) and (E),²³ that does not appear to be the case.

Further, there is at least one reported case wherein a federal district court asserted, without reference to CAFRA, that a BATF forfeiture complaint based upon an alleged violation of 26 U.S.C. Section 5861(d) was governed by the Customs Law procedures contained in Title 19, specifically 19 U.S.C. Section 1615. See United States v. One Harrington and Richardson Rifle, *supra*, 278 F. Supp.2d at 891.

On the other hand, two district courts applied CAFRA to Customs Service civil forfeiture actions, citing 18 U.S.C. Section 983(e)(5), which states that 18 U.S.C. Section 983 sets forth “the exclusive remedy for seeking to set aside a declaration of forfeiture under a **civil forfeiture statute**,” and Section 21 of CAFRA, itself, which states that “this Act and the amendments made by this Act shall apply to **any forfeiture proceeding** commenced on or after the date that is 120 days after the enactment of this Act,” that is, “120 days after April 25, 2000.” See Upshaw v. United States Customs Service, 153 F. Supp.2d 46, 49 (D. Mass. 2001) and United States v. Six Negotiable Checks in Various Denominations, etc., 207 F. Supp.2d 677, 682 (E.D. Mich. 2002) (emphasis added).

As the court pointed out in the Six Negotiable Checks case, the application of CAFRA not only shifts the burden of proof that would theretofore

have governed a forfeiture action, but also “precludes any reliance on hearsay, as the Government could have done in pre-CAFRA cases.” Six Negotiable Checks, 207 F. Supp.2d at 683.

In neither Upshaw nor Six Negotiable Checks did the court examine the definitional limitation in 18 U.S.C. Section 983(I) which, as noted above, appears to exempt forfeiture proceedings involving property seized pursuant to an allegation that the property had been involved in an activity that violated the Customs Act of 1930. Instead, they relied exclusively on the phrase, “in any forfeiture proceeding,” that appears in the effective date section of the bill, as enacted, as if that were dispositive of the matter. Thus, at this time it appears to be an open question whether CAFRA applies to all federal civil forfeiture “proceedings,” or whether it does **not** apply to such proceedings under the Acts listed in subsection 2 of 18 U.S.C. Section 983(I), including such proceedings initiated by BATF upon allegations that seized firearms were involved in a violation of Title 26, Chapter 53, United States Code.

V. FORFEITURE IN A CRIMINAL CASE.

In addition to **civil** forfeitures initiated under 18 USC section 924(d)(1) or 26 USC section 5872, firearms forfeiture proceedings may be instituted in **criminal** contexts. Sometimes, the government will simply proceed criminally, and there will be no civil forfeiture proceeding at all. Other times, a civil forfeiture will be instituted first, but then will be supplemented—or superseded—by a criminal forfeiture proceeding as part of a **criminal complaint or indictment**. This section V discusses more specifically the Government’s options to seek forfeiture in a criminal case.

Following the seizure of firearms or ammunition, BATF may seek forfeiture of the property seized by obtaining a criminal indictment containing an allegation that the property is subject to forfeiture, thereby giving

notice to the defendant that the Government will seek the forfeiture of property as a part of a sentence upon conviction of a criminal offense. See Rule 32.2(a), Federal Rules of Criminal Procedure (FRCrP). See also 18 U.S.C. Section 983(a)(1)(A)(iii).

A. Criminal Action Charging Violation of an Offense Defined in Title 18, Chapter 44, United States Code.

According to 18 U.S.C. Section 983(a), BATF has three options to effect forfeiture in a criminal proceeding: (1) during the 60-day period after seizure wherein BATF may file a nonjudicial forfeiture proceeding; (2) within the 90-day period after a person files a claim of ownership wherein BATF may file a judicial forfeiture proceeding; and (3) after the filing of a civil forfeiture proceeding, if done so within the statute of limitations provided for the crime charged in the indictment.

First, in the case of the 60-day period for the filing of a nonjudicial proceeding, BATF may file a criminal indictment containing an allegation that the property is subject to forfeiture BEFORE the expiration of the 60-day period. See 18 U.S.C. Section 983(a)(1)(A)(iii). If it chooses this option, then BATF must notify the person from whom the firearms or ammunition has been seized **either** that the nonjudicial civil forfeiture proceeding will be continued, **or** terminate the nonjudicial proceeding. 18 U.S.C. Section 983(a)(1)(A)(iii)(I) and (II). In the latter event, BATF is required to take steps necessary to preserve its right to maintain custody of the seized property as provided in the applicable criminal forfeiture statute.

Second, if a person files a claim of ownership thereby triggering the 90-day period within which BATF must file a judicial civil forfeiture proceeding, BATF may still file a criminal indictment containing an allegation of forfeiture of property **in lieu of** a civil judicial forfeiture action. In order to avoid having to file such a judicial forfeiture proceeding, BATF must file

such a criminal indictment with an attached forfeiture allegation within the 90-day period AFTER a claim of ownership has been filed within the 35 days required by 18 U.S.C. Section 983(a)(2). See 18 U.S.C. Section 983(a)(3)(B)(ii). If the criminal proceeding is filed in lieu of a civil judicial forfeiture action, then BATF is required to take whatever further action is necessary to maintain custody as provided in the applicable criminal forfeiture statute. 18 U.S.C. Section 983(a)(3)(C). If no civil forfeiture proceeding is filed, and no criminal indictment containing an allegation of forfeiture is returned, then the Government must release the property seized and return it to the owner and no **civil forfeiture proceeding** may thereafter be filed.

Third, according to 18 U.S.C. Section 983(a)(3)(C), however, the Government may file a criminal indictment containing an allegation of forfeiture **in addition to** a civil forfeiture proceeding. And, it appears the time within which such an indictment containing a forfeiture allegation may be filed is governed not by 18 U.S.C. Section 983, but by the “applicable criminal forfeiture statute.” See 18 U.S.C. Section 983(a)(3)(C). With respect to firearm prohibitions in Title 18, one might argue that such an indictment containing a forfeiture allegation must be filed within the 120 days from the date of “seizure,” as prescribed in 18 U.S.C. Section 924(d)(1). As noted above, however, if the Government has filed a prior civil forfeiture proceeding, whether nonjudicial or judicial, courts have generally concluded that the 120-day requirement has been satisfied. See *supra*, p. 9, n. 14. But such section is not likely to be so construed in light of the fact that application of the 120-day period would, in effect, prevent the filing of any criminal indictment containing a forfeiture allegation if a civil forfeiture proceeding has been filed in accordance with the 35-day and 90-day requirements set forth in 18 U.S.C. Sections 983(a)(2)(B) and 983(a)(3)(A), and thus, make it almost impossible for a criminal indictment containing a forfeiture to be filed **in addition to**

a civil forfeiture proceeding, as clearly contemplated by 18 Section 983(a)(3)(C).

The Seventh Circuit has ruled that the time for the filing of a criminal indictment containing an allegation of forfeiture would be governed by Section 924(d)(1)'s provision stating that "all provisions of the Internal Revenue Code of 1954 relating to seizure, forfeiture, and disposition of firearms, as defined 5845(a) of that Code, shall, so far as applicable extend to seizures and forfeitures under the provisions of ... Chapter [44 of Title 18]." See United States v. Miscellaneous Firearms, etc., 376 F.3d 709, 713 (7th Cir. 2004). Accordingly, attaching a forfeiture allegation to a criminal indictment for a violation of a firearms statute under Title 18 would appear to be governed by the 5-year statute of limitations of 19 U.S.C. Section 1621. See United States v. Ninety-Three (93) Firearms, 330 F. 3d 414, 422 (9th Cir. 2003).

But 18 U.S.C. Section 924(d)(1) would prevent the Government from proceeding to civil forfeiture if the Government fails to get a conviction on the criminal indictment containing a forfeiture allegation, because Section 924(d)(1) specifically provides that "acquittal of the owner or possessor or dismissal of charges against him other than upon motion of the Government prior to trial ... the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor in violation of law." Presumably, the seized property would be returned if, and upon the occasion that, BATF should fail in the civil judicial forfeiture action to prove by a preponderance of the evidence that the seized property had been "used in or involved in" a violation one of the several offenses inventoried in 18 U.S.C. Section 924(d)(1).

B. Criminal Action Charging a Violation of an Offense Defined in Title 26, Chapter 53, United States Code.

As noted in Part IV. B. above, under the so-called "Customs carve-out" and, as a matter of practice, BATF apparently does not adhere to the civil forfeiture provisions of 18 U.S.C. Section 983 in forfeiture proceedings based upon violations of offenses defined in Title 26, Chapter 53, United States Code. Accordingly, BATF could be expected not to comply with the time limits and other restrictions governing the institution of criminal proceedings contained in 18 U.S.C. Section 983 or in Section 924(d)(1). As also noted in Part V. B. above, however, CAFRA's Section 983 may apply even to a forfeiture proceeding based upon an alleged offense defined in Title 26, Chapter 33. If so, then the CAFRA procedural rules governing the relationship between civil and criminal forfeiture, as set forth in Part V. A. above, would appear to apply.

VI. PETITION FOR REMISSION OR MITIGATION.

According to 18 U.S.C. Section 3051, BATF agents are authorized to conduct a **summary administrative process** to effect a forfeiture of seized property, subject to the aggrieved party's filing of a **petition for remission or mitigation of such forfeiture**. See 18 U.S.C. Section 3051(a), (b) and (c). To that end, the BATF notice letter constitutes the initiation of an administrative forfeiture process, giving notice to recipients of the option of "consent[ing] to the forfeiture of the property through the administrative process and seek[ing] equitable relief from the forfeiture" by filing a **Petition for Remission or Mitigation of Forfeiture**, as provided for in 28 C.F.R. Sections 9.1-9.9.

According to 28 C.F.R. Section 9.3, a Petition for Remission or Mitigation must be filed within **30 days** of the date set forth in the notice letter and must contain the information set forth in subsection (c) of Section 9.3 (as summarized in the BATF notice letter):

- names, address, SSN or other TIN,
- name of seizing agency,
- asset i.d. number,
- date and place of seizure,
- complete description of property, and

- description of interest of petitioner, supported by documentary evidence of ownership interest.

According to 28 C.F.R. Section 9.3, once an aggrieved party files with BATF a timely and proper **Petition for Remission or Mitigation of Forfeiture**, then “the seizing agency shall investigate the merits of the petition and prepare a written report containing the results of that investigation.” See 28 C.F.R. Section 9.3(f). Upon receipt of the petition and the agency report, a “Ruling Official for the seizing agency ... shall rule on the merits of the petition [without a] hearing.” See 28 C.F.R. Section 9.3(g). There is, however, no time specified within which the BATF must investigate and prepare a written report.²⁴

- If the petition is **granted**, then the ruling would contain “the procedures the petitioner must follow to obtain the release of the property....” See 28 C.F.R. Section 9.3(h).
- If the petition is **denied**, a copy of the ruling would be sent to the petitioner with notice of a right to request reconsideration. See 28 C.F.R. Section 9.3(i).
- A **petition for reconsideration** must be filed within 10 days from the receipt of denial of the petition and must be based upon “information or evidence not previously considered that is material to the basis for the denial or presents a basis clearly demonstrating that the denial was erroneous.” See 28 C.F.R. Section 9.3(j).

According to 28 C.F.R. Section 9.5, “[t]he Ruling Official shall **not** grant remission of a forfeiture unless the petitioner establishes,” in pertinent part, the following: (i) the petitioner has a valid, good faith, and legally cognizable interest in the seized property; and (ii) “is innocent within the meaning of the innocent owner provisions of the applicable civil forfeiture statute” or is otherwise entitled to recover the seized property. See 28 C.F.R. Section 9.5(a)(1)(i) and (ii) (emphasis added).

The burden “of establishing the basis for granting a petition for remission or mitigation of forfeited property” is on the petitioner, and the Ruling Official, duty-bound to “presume a valid forfeiture[,] shall **not** consider whether the evidence is sufficient to support the forfeiture.” See 28 C.F.R. Section 9.5(3) and (4) (emphasis added).

In short, if the procedures set forth in the regulations are followed, it appears that BATF has **virtually unfettered discretion** to grant or deny the petition for remission or mitigation. As the United States Court of Appeals for the Sixth Circuit has observed:

The purpose of the remission statutes was to grant executive power to relieve against the harshness of forfeitures. The exercise of power, however, was committed to the **discretion** of the executive so that he could temper justice with mercy and leniency. Remitting the forfeiture ... constituted an **act of grace**.” [United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964) (emphasis added).]

Because the ultimate decision to remit or mitigate the forfeiture is a matter of discretion, a BATF decision not to remit or mitigate is **not reviewable** on the merits in any court, because “the Administrative Procedure Act [has] expressly exempted matters committed to the discretion of the agency.” *Id.* See also In re Sixty Seven Thousand Four Hundred Seventy Dollars, 901 F.2d 1540, 1543 (11th Cir. 1990). Furthermore, “federal courts are generally prohibited from reviewing agency forfeiture decisions even where it is alleged that the [agency] abused [its] discretion.” *Id.*, 901 F.2d at 1544. Generally, federal courts decline to exercise any jurisdiction unless the agency did not follow its own rules, failed to exercise any discretion whatsoever or in exceptional cases where equity demands intervention.” *Id.*

In sum, it appears that a petition for remission or mitigation ordinarily would have little chance for success unless the petitioner has absolutely

no involvement in the activity that gave rise to the search and seizure, and totally without culpability in relation to that activity. Such a petition opportunity would, however, provide such a person the possibility of success and an inexpensive route in an effort to recover a firearm or ammunition that otherwise might be forfeited.

ENDNOTES

1. We begin this guide with four disclaimers and one admonition.

First, this guide is an initial, and ongoing, effort based upon **limited familiarity** with BATF practices and policies, and is **not** based upon a compilation of information gleaned from a large number of attorneys with a wide-range of experience in BATF civil forfeiture matters. We would welcome input from those working in this area to help improve this effort.

Second, there appear to be **limited reported authorities**. The authors have uncovered only a few significant case opinions construing and applying the various statutory and regulatory provisions concerning the civil forfeiture of firearms and ammunition.

Third, this guide is **not to be considered legal advice**, but is offered as a working memorandum designed to assist an attorney in the undertaking of his own research and in the development of an appropriate legal strategy on behalf of his client in any particular case.

Fourth, commentary provided on the **likelihood of success** of certain legal theories is by no means a commentary on the validity of the arguments themselves.

As this guide demonstrates, representation of a client involved in a BATF forfeiture proceeding requires **careful analysis of an astonishingly complex set of statutes and regulations**. Thus, we would encourage counsel involved in such proceedings to seek help from others. To that end, Gun Owners Foundation stands ready to attempt to help aggrieved parties, upon request. Additionally, the authors have found Volume 1 of the Asset Forfeiture Defense Manual authored by Brenda Grantland, Judy Osburn and Susan Raffanti and published in 2001 by Forfeiture Endangers American Rights Foundation (FEAR) to be very helpful and innovative. While the Manual contains only one page on “firearms forfeitures,” it sets forth other valuable information, including knowledge and data related to a number of constitutional challenges that could be waged against civil forfeitures generally. Additionally, portions of Dee Edgeworth’s Asset Forfeiture: Practice and Procedure in State and Federal Courts, a September 2004 ABA publication, are available on line, and are helpful.

2. The exclusionary rule applies to the use of evidence in civil forfeiture actions, barring evidence obtained in violation of the Fourth Amendment. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965). For extensive treatment of Fourth Amendment issues in forfeiture cases, see B. Grantland, J. Osburn and S. Raffanti, Asset Forfeiture Defense Manual, Vol. 1, pp. 349-86 (Forfeiture Endangers American Rights Foundation: 2001).
3. See BATF letter, including enclosed descriptions of firearms seized and forms to be used, on file.
4. See **Appendix A**.

5. As Attorney David T. Hardy has pointed out in his comprehensive review of the Firearms Owners' Protection Act ("FOPA"), "the property whose forfeiture is sought must be linked to a knowing or willful violation." D. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective" ("FOPA Perspective"), 17 *Cumberland L. Rev.* 585, 657 (1986), available on line at <http://www.hardylaw.net/FOPA.html>.

6. See BATF letters on file. While notice of the initiation of forfeiture of firearms and ammunition may be made by certified letter within sixty days after seizure, notice of forfeiture proceedings may be made by publication at any reasonable time so long as notice is published "for at least three successive weeks in such manner as the Secretary of the Treasury may direct." See 19 U.S.C. Section 1607(a).

7. Compare BATF letter (on file) (**30 days**) with another BATF letter (on file) (**20 days**).

8. For example, one might by a Rule 41(g) motion contest the legality of a forfeiture proceeding based upon 26 U.S.C. Section 5872, arguing that the proceeding does not comply with the timetable, bonding, and release provisions of 18 U.S.C. Section 983. But the strict timetable contained in 18 U.S.C. Section 983 would probably not apply to a civil forfeiture proceeding initiated pursuant to an allegation of violation of a Title 26 firearms offense. See 18 U.S.C. Section 983(I); 19 U.S.C. Section 1607; 19 C.F.R. Section 162.45; see also Part IV.B., below.

9. See BATF letter (on file).

10. This 60-day period is extended to 90 days if the seizure of firearms or ammunition was made by state or local officials. Section 983(a)(1)(A)(iv). The 60-day period does not necessarily begin from the date of seizure, but rather from the date of determination of the identity or interest of a party if that identity or interest is not determined until after the seizure. Section 983(a)(1)(A)(v).

11. This 60-day period may be extended by a "supervisory official in the headquarters office" of BATF by 30 days if certain conditions are met. See Section 983(a)(1)(B) and (D).

12. This 60-day period may be extended by a court for additional 60-day periods if certain conditions are met. See Section 983(a)(1)(C) and (D).

13. A question has arisen whether this 90-day period, coupled with the 60-day deadline prescribed in 18 U.S.C. Section 983(a)(1)(A) and the 35 day deadline prescribed in 18 U.S.C. Section 983(a)(2)(B), conflicts with the 120-day period prescribed in 18 U.S.C. Section 924(d)(1). According to the latter section, "[a]ny action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred twenty days of [the] seizure." According to the timetable set by 18 U.S.C. Section 983(a)(1), BATF has 60 days within which to give notice of a nonjudicial civil forfeiture, an aggrieved party has 35 days within which to file his claim of ownership, and BATF has an additional 60 days within which to file a judicial civil forfeiture action or proceeding, indicating thereby that BATF has 155 days from the date of seizure to the filing of an action or proceeding for judicial civil forfeiture. According to the Halbrook Deskbook, an overwhelming majority of federal courts have concluded that a judicial forfeiture action need not be filed within the 120 days, if the government has filed an administrative forfeiture within that period. See cases cited in Halbrook Deskbook, Section 4:3, p. 315, nn. 9 and 10. Arguing from the statutory text and history, Halbrook makes a very persuasive case that the 120-day limit is not met unless a **judicial** civil forfeiture action is filed within that period. See Halbrook Deskbook, Section 4:3, pp. 312-20 and United States v. Fourteen Various Firearms, 889 F. Supp. 875 (E.D. Va. 1995) cited therein. Although not cited by the Halbrook Deskbook, United States v. Fifty-Two Firearms, 362 F. Supp.2d 1308 (M.D. Fla. 2005) also supports the position that the 120-day limit is **not** satisfied by the filing of an administrative forfeiture proceeding. This interpretation is supported by the

legislative history. See D. Hardy, “FOPA Perspective,” 17 *Cumberland L. Rev.* at 660-61.

14. If the forfeiture is based upon the theory that the property is forfeitable because it was “used to commit or facilitate the commission of an offense” — the definition of which does not include a firearm or ammunition as an element thereof — then the Government has the further burden of establishing by “clear and convincing evidence” that the person “intended to use the firearm to commit or facilitate that commission (18 U.S.C. Section 924(d)(2)(C)), and by a “preponderance of the evidence a “substantial connection between the property and the offense.” See 18 U.S.C. Section 983(c)(3).

15. A descriptive list of such offenses is provided herewith in **Appendix A**.

16. See generally discussion of impact of FOPA requiring that the firearm be particularly named and the offense individually identified. D. Hardy, “FOPA Perspective,” 17 *Cumberland L. Rev.* at 656-60.

17. *Id.* at 657.

18. See BATF letters in on file.

19. Compare the 30-day period set by one BATF letter on file with a 20-day period set by another letter on file.

20. See B. Grantland, J. Osburn, and S. Raffanti, Asset Forfeiture Defense Manual, *supra*, pp.10, 26.

21. The Civil Asset Forfeiture Reform Act “is designed to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures. [The Act] amends the rules governing all civil forfeitures under federal law except those contained in the Tariff Act of 1930 or the Internal Revenue Code of 1986.”

22. “Paragraph (8) provides definitions of terms for purposes of subsection (j). The term ‘civil forfeiture statute’ means any provision of federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.”

23. One BATF letter (dated August 4, 2006) sets a 30-day period within which a claim of ownership must be filed; the other letter (dated December 6, 2006) sets a 20-day period within which such a claim must be filed. Both require the posting of a cost bond with any such claim. See BATF letters on file.

24. If there is a delay in BATF acting upon a Petition for Remission or Mitigation, the Slocum case might provide a means “to compel” the government “to proceed to forfeiture or abandon the seizure.” See Slocum, 2 Wheat. 1, 10, 4 Led. 169 (1817).

**BATF FIREARM CIVIL FORFEITURE PROCEDURES AND POLICIES:
An Attorney's Guide**

APPENDIX A

**TITLE 18 FIREARMS OFFENSES
UPON WHICH FORFEITURE MAY BE BASED**

A. Knowing Violations of 18 U.S.C. Section 922.

1. Subsection (a)(4): Unlicensed Transportation of Specified Weapons.

Interstate or foreign transportation of destructive device, machine gun, short-barreled shotgun, or short-barreled rifle by unlicensed person, except as specifically authorized by the Attorney General.

2. Subsection (a)(6): Certain False Statements or Identification. In connection with an acquisition or attempted acquisition of a firearm or ammunition, making false statements or providing false identification likely to deceive a licensed dealer with respect to the lawfulness of a sale or other disposition of a firearm or ammunition.

3. Subsection (f): Common or Contract Carrier Shipment. Transportation or delivery by a common or contract carrier of any firearm or ammunition with knowledge or reasonable cause to believe would be in violation of Chapter 44, Title 18 of the United States Code.

4. Subsection (g)(1)-(9): Shipment, Possession, or Receipt by Ineligible Person. Firearm or ammunition: (a) shipment in interstate or foreign commerce; (b) possession in or affecting commerce; or (c) receipt which has been shipped or transported in interstate or foreign commerce, by:

(a) Subsection (1): Person convicted of a felony. Any person convicted in any court of a crime punishable by more than one year, as defined and delimited by 18 U.S.C. Section 921(a)(20);

(b) Subsection (2): Fugitive From Justice. Any person who is a fugitive from justice, as defined by 18 U.S.C. Section 921(a)(15).

(c) Subsection (3): Drug User or Addict. Any person who is an unlawful user of, or addicted to, any controlled substance as defined in 21 U.S.C. Section 802.

(d) Subsection (4): Mental Defective. Any person who has been adjudicated as a “mental defective or who has been committed to a mental institution.”

(e) Subsection (5): Illegal or Nonimmigrant Alien. Any alien who is illegally or unlawfully in the United States, or any alien under a nonimmigrant visa, except for any lawful nonimmigrant alien who meets one or more of the criteria set forth in 18 U.S.C. Section 922(y).

(f) Subsection (6): Dishonorably Discharged Veteran. Any person who has been discharged from the Armed Forces under dishonorable conditions.

(g) Subsection (7): Former United States Citizen. Any person who, having been a citizen of the United States, has renounced his citizenship.

(h) Subsection (8): Under a Domestic Violence Restraining Order. Any person subject to a court order which restrains such person from harassing, stalking or threatening intimate partner or child of such partner, and which meets conditions set forth in (A) and (C) of said subsection (8).

(i) Subsection (9): Domestic Violence Misdemeanant. Any person who has been convicted in any court of a misdemeanor crime of domestic violence, as defined by 18 U.S.C. Section 921(a)(33).

5. Subsection (h): Employee of Subsection (g) Person. Any person “who to that individual’s knowledge and while being employed by any person described in any paragraph of subsection(g) ... in the course of such employment” who receives, possesses or transports a firearm or ammunition in or affecting commerce or receives a firearm or ammunition that has been transported in interstate or foreign commerce.”

6. Subsection (i): Transporter of Stolen Firearm or Ammunition. Any person who transports or ships in interstate or foreign commerce any stolen firearm or ammunition, knowing or having reasonable cause to believe that it was stolen.

7. Subsection (j): Receiver of Stolen Firearm or Ammunition. Any person who receives, possesses, conceals, stores, barter, sells or disposes of, or pledges or accepts as a loan, any stolen firearm or ammunition, knowing or having reasonable cause to know the same to have been stolen, and which is moving as, is part of, or which has been shipped, in interstate or foreign commerce.

8. Subsection (k): Possessor of Firearm with Altered Serial Number. Any person who transports, ships, receives or possesses in interstate or foreign

commerce, or having been shipped in such commerce, any firearm, the manufacturer's serial number of has been altered, removed or obliterated.

9. Subsection(1): Unlawful Importation of Firearm or Ammunition. Any person who knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of the subsection 1 rules governing importation of firearms or ammunition.

B. Knowing Violations of 18 U.S.C. Section 924.

In addition to the above offenses identified in Section 924(d) by reference to the several subsections of Section 922, BATF is authorized to seize, and to seek forfeiture, of firearms and ammunition "involved in or used in any ... knowing violation of section 924." Section 924, in turn, provides for penalties for knowing violations of each of the Section 922 offenses referenced in Section 924(d),¹ but Section 924 also provides for penalties for knowing violation of offenses set forth in Section 922 that Section 924(d) does not expressly identify by reference to specific subsections of Section 922.² Those expressly-referenced subsections of Section 922 itemized in Section 924(d) shall not be repeated herein. Rather, the list herein shall identify only those "knowing" offenses defined in Section 922 that are not specifically referenced by a subsection of Section 922, and such other additional "knowing" offenses defined in Section 924.

1. Section 924(a)(1)(B)(2): Section 922 (q) - Possession of a Firearm in a School Zone. This offense was declared unconstitutional in Lopez v. United States, 514 U.S. 549 (1995).

2. Section 924(a)(2): Section 922(d) - Sale or Other Disposition to Ineligible Person. Any person who sells or otherwise disposes of a firearm or ammunition to a person within one of the nine categories of persons ineligible to receive such firearm or ammunition (as set forth in 18 U.S.C. Section 922(g) above), knowing or having reasonable cause to know that such person is in one or more of such categories.

3. Section 924(a)(2): Section 922(o) - Machine Guns. It is unlawful for any person to possess or transfer a machine gun (as defined in Section 921(a)(1)(23)) unless such person is specifically authorized pursuant to Section 922(o)(2)(A) or unless such person was lawfully possessed of a machine gun before the effective date of this subsection.

¹ See 18 U.S.C. Section 924(a)(1)(B) and (2).

² Compare 18 U.S.C. Section 924(d)(1) with Section 924(a)(1)(B), (2), (3), (4), (5), and (6).

4. Section 924(a)(3)(B): Section 922(m) - FFL Record Keeping. Any FFL who knowingly makes any false entry in, fails to make appropriate entry in, or fails to properly maintain, any record required by Section 923 and regulations thereunder.

5. Section 924(a)(5): Section 922(s) - Transfers Subject to Temporary Brady Bill. The NICS criminal background check having been established, this provision is no longer operative.

6. Section 924(a)(5): Section 922(t) - Transfers in Violation of Brady Bill. Any licensed dealer who transfers a firearm to an unlicensed person without first complying with the conditions established by one of the two criminal background checks authorized by Section 922(t)(1) or (3)(A), or without meeting the exceptions provided in Section 922(t)(3)(B) or (C).

7. Section 924(a)(6): Section 922(x) - Juveniles. It is unlawful for a person to sell a handgun or ammunition suitable only for a handgun to a juvenile, knowing or having reasonable cause to know, the recipient to be a juvenile or for a juvenile to possess a handgun or such ammunition, except as expressly provided for in Section 922(x)(3)(A)-(D).

8. Section 924(a)(1)(A) and (3)(A): False Statement by FFL. Any federal firearm licensee who knowingly makes false statements or representations with respect to information required to be kept in the licensee's records (*see, e.g.*, 18 U.S.C. Section 923(g)-(k)) or with respect to any application for a license (*see* 18 U.S.C. Section 923(a)-(d)) or exemption or relief from disability.

9. Section 924(a)(1)(7): Possession of Body Armor by Violent Felons. Except as provided for in subsection (b) of Section 931, any person convicted of a "crime of violence" who thereafter knowingly purchases, owns or possesses body armor, as defined by Section 921(a)(35).

C. Willful Violations of 18 U.S.C. Section 924.

While Section 924(d) refers to "knowing violations of Section 924," Section 924(a)(1)(D) appears to be a "catch-all" reference to "willful" violations of any other provision of the Gun Control Act not explicitly referenced elsewhere in Section 924. A "knowing" violation of a provision in Section 924 which explicitly requires a "willful violat[ion] of any other provision of this chapter" would presumably require probable cause of a "willful" violation, that is, a "violation of a known legal duty." *See generally* S. Halbrook, *Firearms Law Deskbook*, Section 2:5 (2007 ed.).

- 1. Section 924(a)(1)(D): Section 922(a)(1) - Engaging in Firearms Business Without a License.** Any person who is engaged in the business of importing, manufacturing, or dealing in firearms, as more fully defined in Section 921(1)(a)(3), (11), (12), (21) and (22), must have a FFL.
- 2. Section 924(a)(1)(D): Section 922(a)(2) - Transporting in Interstate or Foreign Commerce by FFL to Person Other than FFL.** Subject to the exceptions stated in Section 922(a)(2)(A) and (B), FFL may not transport a firearm in interstate or foreign commerce to any person other than an FFL.
- 3. Section 924(a)(1)(D): Section 922(a)(3) - Transporting to or Receiving in State of Residence a Firearm Obtained in Another State by a Person Other than a FFL.** Subject to the exceptions stated in Section 922(a)(3)(A), (B) and (C), any person who is not an FFL may not transport or receive a firearm in his State of residence if such firearm was purchased or obtained in another state.
- 4. Section 924(a)(1)(D): Section 922(a)(5) - Transfer of Firearm to a non-FFL Resident of Another State.** Subject to the exceptions stated in Section 922(a)(5)(A) and (B), any person who is not an FFL may not transfer or deliver to a person other than an FFL who the transferor knows or has reasonable cause to believe does not reside, or have his principal place of business, in the transferor's state.
- 5. Section 924(a)(1)(D): Section 922(a)(7) and (8) - Manufacture of Armor Piercing Ammunition.** Unless specifically authorized by the Attorney General as provided in Section 922(a)(7)(A)-(C) and 922(a)(8)(A)-(C), no person may manufacture or sell or deliver armor piercing ammunition, as that term is defined in 18 U.S.C. Section 921(a)(17)(B) and (C).
- 6. Section 924(a)(1)(D): Section 922(a)(9) - Receipt of Firearm by Person Who is Not a Resident of any State.** A person who is not a resident of any State may not receive a firearm unless such receipt is for lawful sporting purposes.
- 7. Section 924(a)(1)(D): Section 922(b) - Unlawful Sales by FFL to Person Other than FFL.** FFL (a) may not sell firearm or ammunition to person under age of 18 (Section 922(b)(1)); (b) may sell only shotgun or rifle, and ammunition for such, to a person under 21 (Section 922(b)(1)); (c) may not sell firearm to any person if such sale violates state law or local ordinance, unless knows or has reasonable cause to believe is not in violation of such state or local law (Section 922(b)(2)); (d) subject to exceptions stated in (A) and (B) of Section 922(b)(1), may not sell or deliver firearm to a person who is not a resident of, or does not have principal place of business in, the state wherein FFL resides or maintains a place of business.

8. Section 924(a)(1)(D): Section 922(b)(4) - FFL Sale or Delivery of Destructive Device, Machinegun, Short-Barreled Shotgun or Short-Barreled Rifle to Person Other than FFL. FFL may not sell destructive device, machinegun, short-barreled shotgun or rifle to any nonFFL person unless specifically authorized by Attorney General.

9. Section 924(a)(1)(D): Section 922(b)(5) - FFL Sale of Firearm or Armor-Piercing Ammunition. FFL may not sell or deliver any firearm or armor-piercing ammunition without complying with record-requirements spelled out in Section 922(b)(5).

10. Section 924(a)(1)(D): Section 922(c) - FFL Sale to Person Not Appearing at FFL Place of Business. FFL may sell or deliver firearm who does not appear personally at FFL's place of business **only if** transferee submits a sworn statement in compliance with subsections (1)-(3) of Section 922(c).

11. Section 924(a)(1)(D): Section 922(e) - Delivery of, or Cause the Delivery of, Firearm or Ammunition for Transportation by Common or Contract Carrier. No person may deliver a firearm or ammunition to, or cause such firearm or ammunition to be delivered by a common or contract carrier for transportation in interstate or foreign commerce to a person other than to an FFL, except in the case of a passenger lawfully in possession of a firearm and ammunition who places such firearm and ammunition in custody of carrier for the duration of the trip.

12. Section 924(a)(1)(D): Section 922(n) - Shipment or Receipt of Firearm or Ammunition by Person Under Felony Indictment. No person under indictment for a crime punishable by a term exceeding one year may ship or transport a firearm or ammunition in interstate or foreign commerce, or receive such firearm or ammunition that was so shipped or transported.

13. Section 924(a)(1)(D): Section 922(p) - Undetectable Firearms. No person may manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm that is nondeductible by walk-through metal detectors, unless specifically authorized by the Attorney General or excepted, as provided for subsections (2) through (6) of Section 922(p).

14. Section 924(a)(1)(D): Section 922(r) - Assembling of Nonimportable Shotgun or Rifle. No person may assemble from imported parts any semi-automatic rifle or shotgun identical to any rifle or shotgun prohibited from importation by Section 925(d)(3), except as provided for in subsections (1) and (2) of Section 922(r).

15. Section 924(a)(1)(D): Section 922(u) - Theft from FFL. No person shall steal or unlawfully take and carry away any firearm from premises of FFL or FFL inventory that has been shipped in interstate or foreign commerce.

16. Section 924(a)(1)(D): Section 922(z) - Handgun Safety Device. Except as provided in subsection (2) of Section 922(z), a FFL may not sell, deliver, or transfer any handgun to any person unless the transferee is provided with a secure gun storage or safety device, as defined in Section 921(a)(34).

17. Section 924(d)(1) - Any Other Criminal Law of the United States. Any other willful violation of a criminal law prohibiting the possession or use of a firearm as an element of the offense.

D. Clear and Convincing Evidence of 18 U.S.C. Section 924(d)(2)(C) Offense.

To seize a firearm or ammunition where the use of the firearm or ammunition is not an element of a federal criminal offense, but was “intended to be used” in committing an offense, there must be “clear and convincing evidence” of an intention to use the firearm in connection with the commission of an offense, as expressly provided for in 18 U.S.C. Section 924(d)(2)(C). Such offenses are, as follows:

- 1. Section 924(d)(3)(A) - Any Crime of Violence.** Any commission of a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or, that by its nature, involves a substantial risk that physical force may be used in the course of committing the offense. See Section 924(c)(3).
- 2. Section 924(d)(3)(B) - Any Offense Punishable Under the Controlled Substance Act or Controlled Substances Import and Export Act.** See 21 U.S.C. Section 801 et seq. And 21 U.S.C. Section 951 et seq.
- 3. Section 924(d)(3)(C) - Use of Firearm in the Commission of any Offense Described in Section 922(a)(1), (3), or (5) or Section 922(b)(3).** If the use of firearm or ammunition intended to be used is part of a pattern of activities which includes a violation of Section 922(a)(1), (3) or (5) or Section 922(b)(3).
- 4. Section 924(d)(3)(D) - Use of Firearm to Facilitate Violation of Section 922(d) - FFL Transfers to Ineligible Persons.** A violation of Section 922(b) where transferor of such firearm or ammunition uses firearm to facilitate the violation of Section 922(d).

5. Section 924(d)(3)(E) - Use of Firearm to Facilitate Violation of Section 922(I), (j), (l), (n) or Section 924(b).

6. Section 924(d)(3)(F) - Use of Firearm to Facilitate any Offense which Involves the Exportation of Firearms or Ammunition.

**BATF FIREARM CIVIL FORFEITURE PROCEDURES AND POLICIES:
An Attorney's Guide**

APPENDIX B

**TITLE 26 "NATIONAL FIREARMS ACT" OFFENSES
UPON WHICH FORFEITURE MAY BE BASED**

I. Mens Rea Requirement: All Offenses.

According to Staples v. United States, 511 U.S. 600 (1994), "to convict [a defendant] under the [National Firearms Act (NFA)], the Government [is] required to prove beyond a reasonable doubt that he knew the weapon [at issue in the case] had the characteristics that brought it within the [NFA] definition [of a firearm]." *Id.* at 602. Prior to Staples, most courts required only that the defendant know that the item at issue in the case was a firearm in the general sense, "not that it is a 'firearm' as particularly defined in the NFA." S. Halbrook, Firearms Law Deskbook, Section 6:3, p. 392, n.2. After Staples, then, before a seizure of a firearm on the ground that it violates a provision of NFA, there must be probable cause that the person from whom the alleged "firearm" is seized "know[s] the facts that make his conduct illegal." Staples, 511 U.S. at 619.

II. Actus Reus Requirements.

A. Firearm Defined — 26 U.S.C. Section 5845.

There can be no violation of any provision of the NRA if the "firearm" at issue does not fit the definition of "firearm" set forth in 26 U.S.C. Section 5845(a). Section 5845(a)'s definition of "firearm," in turn, is narrower than the definition of "firearm" contained in 18 U.S.C. Section 921(3).

Under 18 U.S.C. Section 921(3), a "firearm," means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

Under Section 5845(a), however, a "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 25 inches or a barrel of less than 18 inches in length; (3) a rifle having a barrel or barrels of 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 of less than 16 inches in length; (5) any other weapon as

defined in subsection (e)¹; (6) a machine gun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device.” Excluded from this definition is any “antique firearm” or other weapon meeting the Attorney General’s criteria of a “collector’s item ... not likely to be used as a weapon.” Machinegun, rifle, shotgun, destructive device, and antique firearm are defined in Section 5845 (b), (c), (d), (f) and (g) respectively.²

B. Offenses defined — 26 U.S.C. Section 5861.

1. Subsection (a) — Failure to Pay Occupational Tax and to Register.

Any person who engages in the business of importing, manufacturing, or dealing in firearms (as defined in 26 U.S.C. Section 5845) who knowingly fails to pay the occupational tax prescribed by 26 Section 5801 or knowingly fails to register with the Attorney General as an importer, manufacturer or dealer in such firearms is in violation of 26 U.S.C. Section 5861(a).

2. Subsection (b) — Receipt or Possession of a Firearm Unlawfully Transferred.

Any person who knowingly is in possession of, or who knowingly receives, a firearm (as defined in 26 U.S.C. Section 5845) on which the transfer tax has not been paid by the transferor, as provided for in Section 5811, and which has not been approved for transfer by the Attorney General, as provided for in Section 5812, is in violation of 26 U.S.C. Section 5861(b).

3. Subsection (c) — Receipt or Possession of a Firearm Unlawfully Made.

Any person who knowingly is in possession of, or who knowingly receives, a firearm (as defined in 26 U.S.C. Section 5845) on which the “making tax” has not been paid, as provided for in Section 5821, and which making has not been approved by the Attorney General, as provided for in Section 5822, is in violation of 26 U.S.C. Section 5861(c).

¹ Subsection (e) contains a lengthy definition of a weapon that is capable of being concealed on the person and which fires a certain kind of shot out of a certain kind of barrel or such weapon as may be readily be restored to meet the statutory criteria.

² According to United States v. Thompson/Center Arms, 504 U.S. 505 (1992), the rule of lenity applies to Section 5845's definition of firearm, resolving any ambiguity in any definition against the Government.

4. Subsection (d) — Receipt or Possession of Unregistered Firearm.

Any person who knowingly is in possession of, or who knowingly receives, a firearm (as defined in 26 U.S.C. Section 5845) which is not registered to him in the National Firearms Registration and Transfer Record is in violation of 26 U.S.C. Section 5861(d).

5. Subsection (e) — Unlawful Transfer of Firearm.

Any person who knowingly transfers a firearm (as defined in 26 U.S.C. Section 5845) without having paid the transfer tax and without having obtained approval from the Attorney General to make the transfer, as provided in Sections 5811 and 5812 is in violation of 26 U.S.C. Section 5861(e).

6. Subsection (f) — Unlawful Making of Firearm.

Any person who knowingly makes a firearm (as defined by 26 U.S.C. Section 5845) without having paid the making tax and registering the firearm with the Attorney General, as provided in Sections 5821 and 5822 is in violation of 26 U.S.C. Section 5861(f).

7. Subsection (g) — Unlawful Treatment of Identifier of Firearm.

Any person who knowingly obliterates, removes, changes or alters the serial number or other identification of a firearm (as defined by 26 U.S.C. Section 5845), as provided for in Section 5842, is in violation of 26 U.S.C. Section 5861(g).

8. Subsection (h) — Receipt or Possession of Unlawfully Treated Identifier.

Any person who knowingly is in possession of, or who receives, a firearm (as defined in 26 U.S.C. Section 5845), the serial number or other identifier having been obliterated, removes, changed or altered, is in violation of 26 U.S.C. Section 5861(h).

9. Subsection (I) — Receipt or Possession of Firearm Without Proper Identifier.

Any person who knowingly is in possession of, or who receives, a firearm (as defined in 26 U.S.C. Section 5845), that has not been identified by a serial number, as required by Section 5842, is in violation of 26 U.S.C. Section 5861(I).

10. Subsection (j) — Interstate Commerce of Unregistered Firearm.

Any person who knowingly transports, delivers, or receives any firearm (as defined in 26 U.S.C. Section 5845) which has not been registered, as provided for in Section 5841, is in violation of 26 U.S.C. Section 5861(j).

11. Subsection (k) — Receipt or Possession of Unlawfully Imported Firearm.

Any person who knowingly is in possession of, or who receives, any firearm (as defined in 26 U.S.C. Section 5845) which has been imported into the United States in violation of Section 5844 is in violation of 26 U.S.C. Section 5861(k).

12. Subsection (l) — False Entry on Required Form.

Any person who, knowing the entry to be false, makes or causes to be made any false entry on any application, return, or record required by Chapter 53 is in violation of 26 U.S.C. Section 5861(l).

III. Penalties.

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.