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Statutory Federal Gun Registry Prohibitions and ATF Record Retention Requirements

On April 11, 2022, the Attorney General signed a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) final rule, Final Rule 2021R-05F, that includes a provision requiring gun dealers to retain transaction records for the entirety of their licensed activities, as opposed to the last 20 years of those activities. These records are to be submitted to ATF whenever dealers go out of business.

Four provisions of statutory law prohibit a national registry of most, but not all, modern firearms. Two of these prohibitions set limits principally on ATF, while the other two set limits on the Federal Bureau of Investigation (FBI).

Final Rule 2021R-05F has raised questions about ATF record retention practices. Some gun rights advocates and Members of Congress contend that this rule exceeds ATF's legal authority and could be in contravention to two ATF-related registry prohibitions.

GCA-NFA Firearms Recordkeeping

Two major federal statutes regulate commerce in and possession of firearms: the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). The statutes assign implementation and enforcement responsibilities to the Department of Justice (DOJ), which in turn delegated these duties primarily to ATF, with the exception of the GCA background check provisions, which are administered by the FBI. The GCA requires anyone who engages in the business of manufacturing, importing, or dealing in firearms to be federally licensed. These licensees are known collectively as federal firearms licensees (FFLs).

All firearms that are capable of accepting self-contained, commercially available ammunition are regulated under the GCA, in addition to certain devices (e.g., silencers) that also fall under the GCA definition of *firearm*. Under the NFA, a subset of GCA-regulated firearms (e.g., machine guns, short-barreled shotguns, silencers) deemed to be particularly dangerous are further regulated. The NFA imposes occupational taxes on FFLs who manufacture, import, and deal in NFA firearms, taxes on unlicensed persons making NFA firearms for themselves, and taxes on NFA firearms transfers to and among unlicensed persons.

ATF maintains a centralized registry of NFA-regulated firearms held privately by unlicensed persons and publicly by nonfederal law enforcement agencies. This registry, the National Firearms Registration and Transfer Record (NFRTR), does not include records on firearms held or controlled by the U.S. government. Congress prohibited the transfer of machine guns manufactured after May 19, 1986, to civilians, but machine guns lawfully registered for

civilian transfer prior to that date remain transferable. There are no similar tax or registration requirements for GCA-regulated firearms that do not fall under the purview of the NFA. Several states do have licensing/permitting regimes that serve as the basis for state gun registries. Under the GCA, Congress authorized a decentralized system of recordkeeping allowing ATF to trace a firearm's chain of commerce, from manufacturer or importer to dealer, and to the first retail purchaser of record. FFLs are required to maintain firearms transaction records for a minimum of 20 years under previously promulgated ATF regulations, and to submit a minimum of 20 years of their most recent transaction records to ATF whenever they go out of business (27 C.F.R. §478.129). Final Rule 2021R-05F, which became effective on August 24, 2022, expanded this record retention to cover the entirety of an FFL's licensed activity.

Permanent ATF Appropriations Limitation

For 34 years, FY1979 through FY2012, Congress attached a proviso to the annual ATF appropriations that blocked a Carter Administration proposed rule, and any similarly proposed rule, that would have required FFLs to submit quarterly reports on firearms sales and dispositions. For FY2012, a word of futurity, "hereafter," was included in this proviso, which indicates it too is intended to apply permanently (H.Rept. 112-284, p. 240). This proviso reads:

Provided, That no funds appropriated herein or hereafter shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of Justice, the records, or any portion thereof, of acquisition and disposition of firearms maintained by federal firearms licensees.

(Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 609.)

Firearms Owners' Protection Act (FOPA), 1986

Under 18 U.S.C. §926, the Attorney General is authorized to prescribe the rules and regulations necessary to carry out the GCA. Section 6 of FOPA amended Section 926 to prohibit a registry of firearms, firearms owners, or firearms transactions. The pertinent language of Section 926 reads:

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any

political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation.

(P.L. 99-308, May 19, 1986, 100 Stat. 449, 459.)

Brady Handgun Violence Prevention Act, 1993

Under the Brady Act, Congress amended the GCA by requiring FFLs to initiate a background check on any prospective unlicensed customer seeking to acquire a firearm from them through a sale, trade, or redemption of firearms exchanged for collateral (18 U.S.C. §922(t)). The FBI facilitates these background checks through the National Instant Criminal Background Check System (NICS). Subsection 103(i) of the Brady Act prohibits the establishment of a registration system of firearms, firearms owners, or firearms transactions or dispositions with any records generated by NICS, except for records on persons found *ineligible* to receive or possess firearms. It reads:

No department, agency, officer, or employee of the United States may—(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

(P.L. 103-159, November 30, 1993, 107 Stat. 1536, 1542.)

NICS Record Destruction Within 24 Hours

For nine years, FY2004 through FY2012, Congress included a general provision in the annual DOJ appropriations bill that required the FBI to destroy within 24 hours background check records on persons who are found *eligible* to receive and possess firearms. For FY2012, Congress inserted a word of futurity, “hereafter,” in this provision, which indicates it is intended to apply permanently (H.Rept. 112-284, p. 269). It reads:

Sec. 511. Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for—(1) the implementation of any tax or fee in connection with the implementation of subsection 922(t) of title 18, United States Code; and (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate

subsection (g) or (n) of section 922 of title 18, United States Code, or State law.

(Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 632.)

2016 GAO Audit of ATF Recordkeeping

The Government Accounting Office (GAO) audited ATF in 2016 to examine its compliance with the agency-related registry prohibitions described above. While raising issues with some ATF systems, GAO found ATF's Out-of-Business Record Imaging System (OBRIS) in compliance with these prohibitions. For firearms tracing, OBRIS can be searched and its records retrieved manually by FFL number, firearm serial number, and other descriptors, but it was not electronically searchable by name or other personally identifying information (PII) (See GAO Report GAO-16-552).

ATF Collection of Transaction Records and Final Rule

A January 2022 ATF fact sheet indicated the bureau had collected 54.7 million firearms transaction records in 2021 from FFLs who had gone out of business. Responding to a congressional inquiry, ATF later reported November 2021 holdings of nearly 921 million out-of-business records, 94% of which were computerized, as of November 2021. When ATF digitizes records, they are turned into images that cannot be detected using optical character recognition and can only be accessed for firearm tracing. Every trace requires ATF to review each FFL record and are only accessed to complete these requests. Under Final Rule 2021R-05F, record retention requires FFLs to maintain their Firearms Transaction Records (Form 4473) until they discontinue licensed activity. It allows for paper records older than 20 years to be stored at a warehouse that is subject to inspection. Alternatively, these forms can be stored electronically in an ATF-accessible, read-only format and with a minimum of one electronic access point for every 500 Forms 4473 executed over the previous year. ATF maintains that its revised record retention requirements are authorized and instrumental for firearms tracing.

Other provisions of Final Rule 2021R-05F (1) address case law concerning ATF rulings about split firearm frames and receivers, (2) amend marking requirements for silencer frames and baffles, (3) more closely regulate kits from which fully functional firearms might be assembled, and (4) require FFLs who own or acquire privately made firearms (PMFs) as part of their business inventories to mark and serialize those firearms. The provisions regarding PMFs have been deemed unlawful by the U.S. Court of Appeals for the Fifth Circuit, but the Supreme Court's August 8, 2023, order allows the ATF rule to remain until the Supreme Court issues its ruling on appeal. This appeal is to be heard on February 28, 2024, but a decision may not be handed down until June 2024. Currently, unlicensed individuals may make firearms for personal use and are not required to mark and serialize them like firearms manufactured for commerce.

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