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July 23, 2014
By e-mail to
OIRA_submission@omb.eop.gov

Bureau of Alcohol, Tobacco, Firearms, and Explosives
United States Department of Justice
99 New York Avenue NE
Washington, D.C. 20226

Re: *Federal Register,* Vol. 79, No. 120 (June 23, 2014)
OMB Number 1140-0100
Gun Owners of America, Inc. and
Gun Owners Foundation Comments on:
Bureau of Alcohol, Tobacco, Firearms, and Explosives
Report of Multiple Sale or Other Disposition of Certain Rifles

Dear Sirs:

Our firm represents Gun Owners of America, Inc. ("GOA") and Gun Owners Foundation ("GOF"). GOA is a national membership educational and lobbying social welfare organization, devoted to protecting and defending firearms rights across the country. GOA was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOF is a nonprofit, educational, and legal defense organization, defending the Second Amendment to the United States Constitution and encouraging compliance with the rule of law in the administration of federal and state firearm regulations. Incorporated in Virginia in 1983, GOF is exempt from federal income tax under IRC Section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

Pursuant to the above-referenced June 23, 2014 request[1] by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), Department of Justice ("DOJ"), GOA and GOF submit these comments on the proposed requirement that:

> Federal Firearms Licensees ["FFL's"] … report multiple sales or other dispositions whenever the licensee sells or otherwise

[1] http://www.gpo.gov/fdsys/pkg/FR-2014-06-23/pdf/2014-14561.pdf.

> disposes of two or more rifles to the same person at one time or within any five consecutive business days with the following characteristics: (a) Semi-automatic; (b) a caliber greater than .22; and (c) the ability to accept a detachable magazine. This requirement will apply to [FFLs] who are dealers and/or pawnbrokers in Arizona, California, New Mexico and Texas.

This is not the first time ATF has addressed this issue. ATF submitted a substantially similar prior Notice on April 15, 2014.[2] That April 15 notice, however, was significantly broader than the current Notice.

- First, the prior Notice applied to every FFL in the country, not just those in the border states.

- Second, the prior Notice did not require a multiple sale to be made "to the same person."

In apparent concurrence with our clients' comments submitted on June 16, 2014, the current Notice has been significantly scaled back.[3] However, in apparent disagreement with our prior comments, the current Notice still lies outside the clear intent of Congress that reports on sales of multiple firearms be confined to handguns only, as prescribed by 18 U.S.C. § 923(g)(1)(A) and (3)(A). *See* prior GOA/GOF Comments at Appendix pp. 4-5.

In this letter, we resubmit GOA/GOF's opposition to the current Notice and its extended reporting requirement. Also, we submit the following additional comments.

COMMENTS

I. The Proposed Multiple Sales Reporting Requirement Violates The Firearms Owners' Protection Act of 1986.

It is the habit of ATF to rely primarily — if not exclusively — on the Gun Control Act of 1968 ("GCA") as the legal basis upon which it exercises its regulatory and enforcement powers.

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[2] http://www.gpo.gov/fdsys/pkg/FR-2014-04-15/pdf/2014-08381.pdf.

[3] *See* prior GOA/GOF Comments attached hereto as Appendix, pp. 2-4, http://www.lawandfreedom.com/site/firearms/GOA%20GOF%20Comments%20ATF%20Multiple%20Rifle%20Sales.pdf.

Rarely, if ever, does ATF acknowledge that, 18 years after Congress enacted the GCA, Congress enacted the Firearms Owners Protection Act of 1986 ("FOPA") to limit the GCA. As one firearms law expert has pointed out, "the impact of FOPA on existing firearms laws can scarcely be overstated:"[4]

> Every significant aspect of [GCA], from the purpose clause to penalties is affected to a greater or lesser degree. [*Id.*]

In enacting FOPA, Congress sought to rectify two major shortcomings in GCA, which made necessary:

- "additional legislation to **correct** existing firearms statutes and enforcement policies," and

- "[the **reaffirm[ation]** of the intent of Congress, as expressed in Section 101 of [GCA], that [i] 'it is **not the purpose** of this title to place any **undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms … for any … lawful activity**, and [ii] "that this title is **not intended** to **discourage** or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." [Pub. L. 99-308, 100 Stat. 449, 18 U.S.C. Section 921 (Notes) (emphasis added).]

Indeed, FOPA's corrective and reaffirming measures were necessary, Congress explained, to secure "the rights of [American] citizens:

- "to keep and bear arms under the second amendment to the United States Constitution;"

- "against illegal and unreasonable searches and seizures under the fourth amendment;"

- "against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment;" and

- "against unconstitutional exercise of authority under the ninth and tenth amendments…. [*Id.*]

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[4] David Hardy, "The Firearms Owners' Protective Act: A Historical and Legal Perspective," 17 *Cumberland L. Rev.* 585, 627 (1986).

Before passage of FOPA, ATF registered with Congress its strong opposition to passage of any corrective legislation that would limit its enforcement and regulatory powers. ATF submitted to Congress a critical assessment of FOPA's various provisions, supporting only six proposed corrections, while opposing 18.

Among the 18 corrections that ATF opposed — and most pertinent here — was the following:

> *Records in the Custody of the Government*. The bill provides that licensees' reports to the Government and out-of-business records may not be kept by the Secretary at a central location. The requirement to decentralize the storage of such records is totally unnecessary, and from an administrative standpoint is costly and burdensome. [Assessment by Bureau of Alcohol, Tobacco and Firearms of [FOPA], 4 U.S.C.C.A.N. at 1344-45 (99th Cong., 2d Sess. 1986).]

The Senate Committee on the Judiciary, however, flatly rejected ATF's push for a centralized record keeping system. Instead, the Committee supported amending the record requirement provision in GCA section 923(g)(1):

> Under proposed Section 923(g)(1) licensed dealers … continue to be required to maintain records pursuant to regulations prescribed by the Secretary. Such licensees are **only** required to report to the Secretary concerning such records where **explicitly required** by [FOPA]. This would include, for instance, **multiple sales reports** and certain informational reports used in connection with tracking. [Committee on the Judiciary S. Rep. 98-583 at 15 (98th Cong. 2d Sess. Aug. 1984) (emphasis added).]

Then, in a summary paragraph, the Committee made it clear that this change to GCA was intended by Congress to limit — not expand or even permit — the regulatory and enforcement powers of ATF beyond express provisions of FOPA:

> The **multiple sales,** out of business records, and tracing provisions, which, in certain respects, codify existing regulations, were included in the Committee amendment to achieve an appropriate balance between legitimate law enforcement needs and the Committee's determination to **substantially restrict the circumstances under which inspections are authorized**. This, in turn, reduces the potential for unwarranted intrusions into the business affairs of law-abiding licensees. [*Id.* at 18 (emphasis added).]

Indeed, the Judiciary Committee Report further stressed that "[i]t is the intent of the Committee that these **reports** [on] **multiple sales** … will be kept by the Secretary in a **non-centralized** fashion…." *Id.* (emphasis added). Additionally, the Judiciary Committee Report:

> emphasize[d] that, notwithstanding any other provision of law, the authority granted under 18 U.S.C. 923(g)(3)(4)(5), as well as that contained in paragraph (1) as amended, are **not to be construed to authorize … use of the information gathered … to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions**. [*Id.* (emphasis added).]

The legislative history of FOPA makes it abundantly clear that records of firearm sales were generally intended to be kept only by FFLs, and only for a limited period of time. Congress enacted limited exceptions for examination at compliance inspections, or pursuant to bona fide criminal investigations. Additionally, ATF was given authority to keep (but not to use for general purposes) in a decentralized fashion the records of out-of-business FFLs, along with reports of multiple **handgun** sales.

ATF now, without any supporting statutory authority, and contrary to the clear intent of Congress, has taken it upon itself to demand information regarding multiple sales of many **rifles**, without any particularized suspicion of a violation of any law. The proposed reporting requirement both violates federal law and constitutes an unconstitutional usurpation of legislative power — power that is vested by Article I, Section 1 of the Constitution in the Congress of the United States.

II. The Proposed Reporting Requirement Violates the Constitutional Policies Embraced by Congress in FOPA.

In open defiance of FOPA's legislative findings and history, as well as the statutory text, the ATF, in its requirements in the current Notice evades, rather than complies with, the findings undergirding FOPA. As noted above, FOPA was enacted into law to "correct existing firearms statutes and enforcement policies" so that they conform to the Second, Fourth, Fifth, Ninth, and Tenth Amendments to the Constitution. Contrary to that express policy, ATF has chosen an unconstitutional process to amend FOPA, expanding FOPA's multiple handgun sales reporting requirement to encompass rifles, and discriminating against certain FFLs and their clientele.

According to the Second Amendment, the right to keep and bear arms belongs to "the people" without exception, not just to the people who happen to live outside the four southwestern border states. *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008) ("[T]he Second Amendment right is exercised individually and belongs to all Americans.").

The proposed multiple sales reporting requirement, however, discriminates against residents in Arizona, California, New Mexico, and Texas, infringing upon their liberty to acquire Second Amendment protected firearms for lawful purposes. ATF's rifle reporting requirement discourages Americans in the border states from purchasing multiple rifles at the same time.

The right to keep and bear arms encompasses the ability to acquire arms. *See*, *e.g.*, Ill. Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014). ATF's rifle reporting requirement infringes the Second Amendment principle that the right to keep and bear arms belongs equally to the four targeted states as well as to the residents of the other 46 states and District of Columbia.

As for the Fourth Amendment, the proposed rifle reporting requirement enables ATF to bypass the "reasonable cause" and "warrant" requirements of Section 923(g)(1)(A). All that ATF is required to do is issue a "demand letter" under Section 923(g)(5)(A). Instead of a particularized letter to a specific individual FFL, as contemplated by the plain language of Section 923(g)(5)(A), ATF has lumped a whole array of FFLs together, and issued a blanket demand letter requiring numerous FFLs to fork over their records. This kind of invasive action smacks of the hated "writ[s] of assistance … used in the enforcement of the acts of trade … enabl[ing] royal officers to search any house or ship, to break down doors, open trunks and boxes, and seize goods at will." *See* Sources of Our Liberties at 304 (R. Perry & J. Cooper, eds, ABA Foundation, Rev. ed.: 1978).

Additionally, the rifle reporting requirement is based upon a now discredited doctrine that freedom from unreasonable searches and seizures protects only a reasonable expectation of **privacy**. *See* United States v. Biswell, 406 U.S. 311 (1972).[5] On the contrary, according to United States v. Jones, 132 S.Ct. 945 (2012) and Florida v. Jardines, 133 S.Ct. 1409 (2013) the Fourth Amendment foremost protects private property — not privacy. Any lack of expectation of privacy in a closely regulated business like firearms cannot subtract the interest that an FFL has in protecting his property interest in his business sales records. Under the proposed reporting requirement, ATF seeks to empower itself to obtain certain multiple rifle sales records by demand letter, unsupported by probable cause or even reasonable suspicion, and without any proof of a superior property right. This is unreasonable *per se*, and violates the property right of the individual in his business records, along with the right of anonymity of the firearm owner expressly protected by FOPA.

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[5] *See* Charles Whitebread, Criminal Procedure, p. 127 (Foundation Press: 1980).

III. The Proposed Reporting Requirement is the Product of an Unlawful Claim of Absolute Prerogative Power.

The proposed multiple sale reporting requirement is "administrative lawmaking [of] precisely the sort of extralegal governance that constitutional law was designed to prohibit." *See* Philip Hamburger, Is Administrative Law Unlawful? at 31 (Univ. Chi. Press: 2014). The process by which the requirement becomes binding law on the covered FFLs sidesteps the "constitutional requirements for the election of lawmakers, for bicameralism, for deliberation, for publication of legislative journals, and for a veto." *Id.* at 29.

Indeed, ATF has not even complied with the administrative rulemaking process set forth in 18 U.S.C. Section 926(a). Instead, it has chosen a process that is totally detached from Section 926(a), even though that process would permit ATF to make "rules and regulations" — but "only" if they are objectively "necessary." Apparently, ATF would evade even that limitation on its powers.

In sum, the entire process ATF has used in the past and is continuing to use in the current Notice is to rule by "proclamation" — as if ATF has the prerogative and absolute power of an ancient English monarch. *See* Hamburger at 35-39.

CONCLUSION

For the reasons stated both herein and in the earlier Comments in the the attached Appendix, the proposed Notice, extending the multiple rifle sales reporting requirement, should be withdrawn and the plan abandoned.

Sincerely yours,

/s/

Herbert W. Titus

HWT/sgt

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June 16, 2014
By e-mail to
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Bureau of Alcohol, Tobacco, Firearms, and Explosives
United States Department of Justice
99 New York Avenue NE
Washington, D.C. 20226

Re: *Federal Register,* Vol. 79, No. 72 (April 15, 2014)
OMB Number 1140-0100
Gun Owners of America, Inc. and
Gun Owners Foundation Comments on:
Bureau of Alcohol, Tobacco, Firearms, and Explosives
Report of Multiple Sale or Other Disposition of Certain Rifles.

Dear Sirs:

Our firm represents Gun Owners of America, Inc. ("GOA") and Gun Owners Foundation ("GOF"). GOA is a national membership educational and lobbying social welfare organization, devoted to protecting and defending firearms rights across the country. GOA was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOF is a nonprofit, educational, and legal defense organization, defending the Second Amendment to the United States Constitution and encouraging compliance with the rule of law in the administration of federal and state firearm regulations. Incorporated in Virginia in 1983, GOF is exempt from federal income tax under IRC Section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

Pursuant to the above-referenced request by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), Department of Justice ("DOJ"), GOA and GOF submit these comments on the proposed requirement that:

> Federal Firearms Licensees ["FFL's"] … report multiple sales or other dispositions whenever the licensee sells or otherwise disposes of two or more rifles within any five consecutive business days with the following characteristics: (a) semi automatic; (b) a caliber greater than .22; and (c) the ability to accept a detachable magazine.

COMMENTS

1. The ATF Notice Misstates the Nature of the Proposed Regulations.

In the *Federal Register* notice, the DOJ/ATF claims that the information collection approval it seeks is an "**Extension without change** of an existing collection." (Emphasis added.) This is false. The current information collection approval differs in two major respects from the one that ATF seeks to "extend."

> First, the existing information collection approval concerns multiple rifle sales "to the same person at one time or during any five consecutive business days." *See* 76 *Fed. Reg*. at 24058. The proposed "extension" of that information collection approval concerns multiple rifle sales by the same FFL, without regard to whether such sales are made to the same person. *See* 79 *Fed. Reg*. at 21285.
>
> Second, the existing information collection approval applies the multiple rifle sale report requirement "only to [FFLs] who are dealers/and or pawnbrokers in Arizona, California, New Mexico and Texas." *See* 76 *Fed. Reg*. at 24058. The proposed "extension" of that information collection concerns multiple rifle sales without regard to where an FFL is located. *See* 79 *Fed. Reg*. at 21285.

Purporting to act under the authority of the Paperwork Reduction Act of 1995, the DOJ and ATF have submitted what they have denominated an "information collection request" to the Office of Bureau and Management ("OBM"). In fact, however, the request submitted is not just an information collection request, but rather appears to be a subterfuge for implementing a proposed rule or regulation, the purpose of which is:

> to require Federal Firearms Licensees to report multiple sales or other dispositions whenever the licensee sells or otherwise disposes of two or more rifles, within five consecutive days with the following characteristics: (a) Semi automatic; (b) a caliber greater than .22; and (c) the ability to accept a detachable magazine.

Conspicuously omitted from this official notice are either of the two limits appearing in the April 2011 notice which required (a) that the multiple sale or disposition be "to the same person," and (b) that the multiple sale or disposition be made by FFLs "who are dealers and/or pawnbrokers in Arizona, California, New Mexico and Texas." Not only would the current proposal to extend the reporting requirement appear to be unauthorized by statute, but such proposal appears also to be expressly forbidden, as discussed *infra*.

2. The ATF Request is not Just an Information Collection Request under the Paperwork Reduction Act of 1995.

According to 5 C.F.R. § 1320.1, the purpose of an Information Collection Request concerns matters of internal management and budget, "designed to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared, and disseminated by or for the Federal government." Such a request is submitted to OMB for a "determination whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions [and] whether the burden of the collection of information is justified by its practical utility." *See* 5 C.F.R. § 1320.5(e). "To obtain approval of a collection of information," the agency must "demonstrate that it has taken every reasonable step to ensure that the collection of information" is "least burdensome," "not duplicative," and "has practical utility," including minimal costs so long as it does not "shift[] disproportionate costs or burdens on the public."

The ATF request is decidedly not only an Information Collection Request. Instead, as stated in the notice, it is a proposed rule or regulation that, if approved, would "**require**" **all** FFLs, not just those located in a certain geographic area in the United States, to report to ATF **all** of certain rifle sales … not just when multiple rifles are sold to the same person, but whenever the FFL sells more than one rifle to anyone. This does not resonate as a housekeeping request concerning matters of government office efficiency or public information disclosure. Otherwise, the "purpose" of the "information collection" notice would surely have read: "The purpose of this information collection is **to extend the existing requirement of Federal Firearms Licensees to report multiple sales**…." In fact, the proposed information collection appears to serve an additional purpose, to extend the existing requirement to cover more sales and more FFLs, and thereby to provide continuing "cover" for what would otherwise be an unauthorized and forbidden ATF reporting requirement regulating multiple sales of certain semiautomatic rifles.

Previously, in April 2011, ATF published a Federal Register notice requiring FFLs in certain border states to report multiple sales of rifles by the same buyer within a five-day period. That rule was challenged in both the U.S. Courts of Appeals for the District of Columbia Circuit and Fifth Circuit. In each brief filed by ATF in both cases, the Government relied on that 2011 "information collection" notice to support its claim that it may require **certain** FFL's to report **certain** multiple sales.[1] Both briefs implied that the OMB information collection notice was part of a process designed to formulate an ATF regulation to combat the flow of firearms into Mexico, and that the notice satisfied the procedural requirements

[1] *See* Brief for the Appellees, NSSF, Inc. v. Jones, pp. 16-23, No. 12-5009, U.S. Court of Appeals for the District of Columbia; Brief for the Appellee, 10 Ring Precision, Inc. v. Jones, pp. 14-17, No. 1250742, U.S. Court of Appeals for the Fifth Circuit.

governing ATF rulemaking. Indeed, ATF succeeded in convincing both courts of appeals that its information collection program in the border states was an integral and necessary step in the regulatory process, culminating in the express reporting requirement of multiple rifle sales by certain FFLs. *See* NSSF, Inc. v. Jones, 716 F.3d 200, 205-06 (D.C. Cir. 2013); 10 Ring Precision, Inc. v. Jones, 722 F.3d 711, 716-17 (5h Cir. 2013).

The current April 2014 "information collection request" seeks to extend the ATF authority to require reporting of certain rifle sales. In its Supporting Statement, the ATF refers to firearms trafficking along the southwest border of the United States with Mexico. *See* ATF Supporting Statement at 1 and 3. Unlike its April 2011 notice, however, the proposed reporting requirement is neither limited to multiple sales of certain rifles to one buyer, nor limited to certain FFLs located in the states bordering on Mexico. Rather, as written, the proposed reporting requirement would apply to multiple sales generally and to FFLs no matter where geographically located. This extension of the report requirement appears to be supported by ATF's reference in its Supporting Statement to the generally applicable multiple sales reports of handguns. *See* ATF Supporting Statement at 1-2.

Surely, Congress did not create the OMB information collection request process to allow ATF to implement and enforce the Gun Control Act of 1968 or the Firearm Owners Protective Act of 1986. Rather, Congress appointed the Attorney General and established ATF to implement and enforce those two acts, including the implementation and enforcement of record- keeping and reporting requirements. *See* 18 U.S.C. § 923. Before changing its requirements for reporting of multiple sales by FFLs, ATF must publish a proposed rulemaking and engage in the notice and comment process in accordance with18 U.S.C. § 926(a). Any action short of that process would be *ultra vires*.

3. The ATF Request to Require FFLs to Report Certain Sales of Rifles to ATF is Unauthorized, Even Forbidden.

Although 18 U.S.C. § 926(a) provides that the Attorney General may "prescribe … rules and regulations," his authority is limited to "**only** [such] rules and regulations as are **necessary** to carry out the provisions of this chapter." (Emphasis added.) To exercise this authority, the Attorney General would have had to provide 90 days public notice to afford interested persons an opportunity to comment and to be heard (§ 926(b)), neither of which occurred here. Even then, the proposed rule, as stated in OMB No. 1140-0100, is unauthorized, even forbidden, by 18 U.S.C. §§ 923(g)(1)(A) and (3)(A).

18 U.S.C. § 923(g)(1)(A) authorizes the making of such rules and regulations as are needful to ensure that FFL's "maintain such records of … sale of firearms **at his place of business** for such period and in such form, as the Attorney General may … prescribe." (Emphasis added.) That same subsection, however, provides that such licensed dealers "**shall not** be required to submit to the Attorney General **reports and information** with respect to

such records and the contents thereof, **except as expressly required** by this section." (Emphasis added.)

According to the OMB notice, the:

> purpose of this information request is to **require** [FFL's] to **report** multiple sales or other dispositions whenever the licensee sells or disposes of two or more **rifles** within five consecutive business days with the following characteristics: (a) semiautomatic; (b) a caliber greater than .22; and (c) the ability to accept a detachable magazine." [Emphasis added.]

In the "Justification" section of its Supporting Statement, ATF admits that the proposed requirement is necessary because the one expressly provided for by law is limited to handguns:

> **No similar requirement exists for long guns**, regardless of the caliber, gauge, or suitability for sporting purposes. As a result, individuals can purchase dozens of rifles at one time without ATF being informed of the sale. This distinction is a product of the fact that, at the time the multiple sale reporting requirement was debated in Congress, handguns, not long guns, were considered far more likely to be diverted to illicit purposes within the United States. [ATF Supporting Statement at 1 (emphasis added).]

Undeterred by this congressional limitation, ATF extends the same requirement to rifles, claiming that authority is "derived" from 18 U.S.C. § 923(g)(5). Thus, in its information- collection submission to OMB, ATF states that "[t]he authority to require FFLs to submit record information concerning multiple sales or other disposition of certain rifles derives from 18 U.S.C. § 923(g)(5)," which gives ATF the authority to issue certain limited demand letters. But the language of § 923(g)(1)(A) states unequivocally "that dealers shall not be required to submit to the Attorney General reports and information with respect to such records and the contents there except as **expressly required** by this section" (emphasis added), which would include the demand letter authority conferred upon the Attorney General by § 923(g)(5).

"Expressly" means that the Attorney General has no authority to extend the multiple sales reporting policy governing handguns to certain rifles, unless there is a provision in the statute that specifically permits it. By conceding that the Attorney General's authority to extend the handgun multiple sales policy to certain rifles is only "derived" from his demand letter authority, ATF admits that Attorney General's authority under § 923(g)(5) to extend the reporting requirement to rifles is derivative, secondary (not original), and therefore is merely deduced or inferred, not express.

Even ATF implicitly recognizes that the "express exception" language of § 923(g)(1)(A) cannot be satisfied by reference to § 923(g)(5)'s demand letters alone. To fill

in the gap, ATF would misuse the OMB "information collection" process to infuse itself with the "express" authority it needs in order to augment what is missing in § 923(g)(5). This is circular reasoning, an impermissible bootstrapping of the first order, and should be repudiated, not embraced.

4. The ATF Request Would Open the Door to a National Registry of Firearms in Violation of 18 U.S.C. § 926(a).

In litigation in both the Fifth and District of Columbia Circuits, FFLs contended that the current reporting requirement, as applied to multiple sales **to the same person** and to FFL's in **certain states**, violated 18 U.S.C. § 926(a)'s prohibition of the creation of a national gun registry. In pertinent part, that section reads:

> No … rule or regulation 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 political subdivision thereof, nor that any system of registation of firearms, firearms owners, or firearms transactions be established.

Both courts of appeals ruled that there was no violation of this provision, because ATF was enforcing the reporting requirement by demand letter, not by rule or regulation, and that the demand letter "seeks only to obtain a narrow subset of information relating to a specific set of transactions — the sale of two or more rifles of a specific type to the same person in a five day period — from a specific set of FFLs – FFLs in four border states who are licensed dealers and pawnbrokers." *See* 10 Ring at 722. *See also* NSSF at 213-14.

But the information collection notice herein is not similarly limited to certain FFLs or certain buyers. According to the notice the reporting requirement extends to all FFLs and all sales. According to the ATF, once the OMB information collection is approved, then the Attorney General could claim authority under § 923(g)(5) to issue demand letters to any or all FFLs by notifying that they are required to report multiple sales of rifles that fit the description set forth in the OMB information collection notice.

Although ATF may proffer verbal assurances that no such effort is being taken, or even contemplated, particularly in light of the agency's track record, such assurances mean nothing. Indeed, President Obama has publicly announced that he would do everything in his power to strengthen the enforcement of federal gun control laws, with particular attention to an opportunity to act without Congress. If this information collection request is granted, all the President need do is instruct the Attorney General to issue a demand letter addressed to all FFLs that sales of two or more semiautomatic rifles within any five-consecutive-day period must be reported to ATF. Many, if not most, rifles sold by FFLs are semiautomatic, accept

detachable magazines, and are in a caliber greater than .22. Moreover, many, if not most, FFLs sell more than one rifle within a five-day period.

On June 10, 2014, following yet another school shooting, this one at a high school in Oregon, the White House announced that it was "always" looking for opportunities to act "administratively, unilaterally using [the President's] executive authority to try to make our communities safer."[2] Citing the recent ban on semiautomatic weapons in Australia, the President chided Congress for not taking similar action in the United States.[3] While a divided Congress currently stands in the way of such a national firearms registry, there is no reason to believe that this President would not take advantage of that division to implement such a registry by issuance of a series of demand letters issued by the Attorney General.

CONCLUSION

In the Gun Control Act, Congress gave express authority for ATF to collect information relating to the multiple sales of handguns. ATF was also given very limited authority to investigate and issue demand letters to certain FFLs regarding purchases of rifles. At first, ATF used that authority sparingly, limited to certain investigations of specific buyers or specific FFLs. *See, e.g,* R.S.M. v. Bradley, 254 F.3d 61 (4th Cir. 2001) Then later, ATF began to issue these demand letters more generally, to those FFLs who had a checkered past or sold the highest number of guns that turned up in crimes. *See* Blaustein v. Bradley, 365 F.3d 281 (2004). For these reasons, ATF has been allowed some leeway by the courts. Then, beginning in 2010, ATF began to demand even more information, issuing demand letters to every FFL in the border states for every multiple sale of rifles. Again, the courts were compliant, permitting ATF that authority. *See* 10 Ring, *supra*; NSSF, *supra*. Now, ATF appears to be laying the groundwork to demand the same information from every FFL in the country, and moreover not limited to when the same person buys more than one rifle, but when the FFL himself sells more than one rifle.

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[2] F. Lucas, "White House: Obama Looking to Act 'Administratively, Unilaterally' on Guns," The Blaze, June 10, 2014, http://www.theblaze.com/stories/2014/06/10/white-house-obama-looking-to-act-administratively-unilaterally-on-guns/.

[3] *See* D. Harsanyi, "If You Want to Ban Guns, Just Say So," June 11, 2014, http://thefederalist.com/2014/06/11/if-you-want-to-ban-guns-just-say-so/.

Through a policy of incremental steps, ATF is seeking to accomplish through back channels what it may not do directly. For these reasons, ATF's so-called "information collection" is a proposed regulation in disguise, violates the statutory prohibition on the creation of a national gun registry, and should be withdrawn.

Sincerely yours,

/s/ Herbert W. Titus

Herbert W. Titus

HWT:vb