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March 20, 2015

Ms. Helen Koppe  
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**COMMENTS OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA  
ON ATF COLLECTION OF INFORMATION REQUIRING SELECTED  
FIREARM DEALERS TO REPORT ACQUISITIONS OF  
FIREARMS FROM NONLICENSEES**

Dear Ms. Koppe:

On behalf of the National Rifle Association of America, Inc., the following comments are submitted in regard to the Notice published as Report of Firearms Transaction—Demand 2, OMB No. 1140-0024, 80 F.R. 2972 (Jan. 21, 2015).

**Introduction: ATF Demand Letter Requiring FFLs With  
Certain Traces to Report Firearms Received from Non-FFLs**

The information collection is conducted through ATF Form 5300.5, revised April 2013.<sup>1</sup> It consists of a Report of Firearms Transactions requiring federal firearms licensees (FFLs) who receive the subject demand letter to report the following:

Trade Name  
Federal Firearms License Number  
Reporting Period  
Acquisition Date  
Name of Manufacturer and/or Importer  
Type of Firearm (pistol, revolver, shotgun, rifle, etc.)  
Model of Firearm  
Firearm Serial Number  
Caliber or Gauge of Firearm

The Paperwork Reduction Act Notice on ATF Form 5300.5 states in part:

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<sup>1</sup> <http://www.atf.gov/sites/default/files/assets/Firearms/FirearmsIndustry/f-5300-5-report-of-firearms-transactions.pdf>.

The information collection documents transactions of firearms for law enforcement purposes. ATF uses the information to determine that the transaction is in accordance with law and regulations, and establishes the person(s) involved in the transaction. The information requested is mandatory by statute 18 U.S.C. § 923(g)(5) and 27 C.F.R. § 478.126. The estimated average burden associated with this collection of information is 30 minutes per respondent or recordkeeper, depending on individual circumstances.

Neither the Notice nor Form 5300.5 states which FFLs must file the form, the criteria for how they are selected, or which firearms must be reported. In response to a request for that information, the Firearms Industry Programs Branch, ATF, provided the following explanation: “The Demand 2 Program requires FFLs with 10 or more traces with a time to crime of 3 years or less in a calendar year to submit an annual report followed by quarterly reports of used firearms acquired by the FFL. FFLs on the Demand 2 Program use the ATF Form 5300.5, Report of Firearms Transactions to report the used firearms they acquired during the specified reporting period.”<sup>2</sup> While not mentioned in the email, the actual demand letters refer to used or secondhand firearms as any firearms received from nonlicensees.

The following explains, first, that requiring licensees to report acquisitions based on tracing data violates appropriations acts enacted by Congress that reject reliance on such data as unreliable. Second, requiring records of acquisition of firearms received from nonlicensees to be reported is not within ATF’s demand letter authority and violates provisions of law limiting traces to criminal investigations and prohibiting registration. Third, the Notice substantially underestimates the burden on the licensees required to prepare the reports.

#### **I. REQUIRING LICENSEES TO REPORT ACQUISITIONS BASED ON TRACING DATA VIOLATES APPROPRIATIONS ACTS THAT REJECT RELIANCE ON SUCH DATA AS UNRELIABLE**

The proposed collection of information is unnecessary for the proper performance of the functions of the agency, and the information will not have practical utility. The Report of Firearms Transactions at issue requiring FFLs to report acquisitions of firearms from nonlicensees pursuant to a demand letter originated in 2000. In appropriations riders, Congress repudiated the defective methodology used in ATF tracing studies that formed the basis of how FFLs were selected for the demand letters.

“In February 2000, the Bureau published a comprehensive report, *Commerce in Firearms in the United States*, that contains much of the data and analysis the Bureau relied on in determining which FFL dealers should receive its demand letter.” *Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281, 285 n.5 (4<sup>th</sup> Cir. 2004). “Based on this data, the Bureau sent demand letters to the approximately 450 FFL dealers identified as having ten crime guns with a time-to-crime of three years or less.” *Id.* at 285. The letter claimed that this number of traces with a short “time-to-crime” could indicate “illegal firearms trafficking” or that a dealer is “selling a

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<sup>2</sup> Email from [fipb-informationcollection@atf.gov](mailto:fipb-informationcollection@atf.gov) dated February 26, 2015.

high volume of secondhand guns used in crime,” but added that the data did not mean any recipient of the letter had violated any law or regulation. *Id.*

While the above decision upheld the demand letter, Congress rejected the basis for the demand letter and the decision by repudiating ATF’s misuse of trace data. The Consolidated Appropriations Act, 2004, § 630, P.L. 108–199, 118 Stat. 3 (2004), provided:

(a) Tracing studies conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives are released without adequate disclaimers regarding the limitations of the data.

(b) The Bureau of Alcohol, Tobacco, Firearms, and Explosives shall include in all such data releases, language similar to the following that would make clear that trace data cannot be used to draw broad conclusions about firearms-related crime:

(1) Firearm traces are designed to assist law enforcement authorities in conducting investigations by tracking the sale and possession of specific firearms. Law enforcement agencies may request firearms traces for any reason, and those reasons are not necessarily reported to the Federal Government. Not all firearms used in crime are traced and not all firearms traced are used in crime.

(2) Firearms selected for tracing are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.<sup>3</sup>

The above has been consistently reenacted in identical language, most recently in the Consolidated & Further Continuing Appropriations Act, 2013, § 514, P.L. 113-6, 127 Stat. 198, 271-72 (2013). The only difference is that the 2013 enactment made the provision permanent by

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<sup>3</sup> It was already well known that “a law enforcement officer may initiate a trace request for any reason. No crime need be involved. No screening policy ensures or requires that only guns known or suspected to have been used in crimes are traced.” Congressional Research Service, *Report for Congress; “Assault Weapons”: Military Style Semiautomatic Firearms Facts and Issues, 1992*, Appendix B, at 66. That report explained further (*id.* at 70):

For example, a trace may be conducted on a firearm found at the residence of a suspect though the firearm itself is not associated with a criminal act. Traces may also be requested with respect to abandoned firearms, those found by chance, those seen by officers for sale at gun shows or pawn shops, or those used by suicide victims. In addition, traces may be requested with respect to firearms seized pursuant to an investigation not directly related with a violent criminal offense, such as tax evasion or a technical violation of the Gun Control Act provisions.

adding the italicized clause: “*For fiscal year 2013 and thereafter*, the Bureau of Alcohol, Tobacco, Firearms and Explosives shall include in all such data releases, language similar to the following that would make clear that trace data cannot be used to draw broad conclusions about firearms-related crime . . . .”

According, Congress disavowed ATF’s “tracing studies” for failure to recognize the “limitations of the data,” and instructed ATF to “make clear that trace data cannot be used to draw broad conclusions about firearms-related crime.” The rhetorical term “crime gun” really means “traced gun,” and “time-to-crime” really means “time-to-trace.” As the enactments declare, such misleading phrases fail to recognize that “not all firearms traced are used in crime,” and that “sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.” It is noteworthy that the formula of ten traced guns in three years was mechanically applied to the highest volume dealers, who would have more traces, as well as low volume dealers, who would have fewer traces.

Accordingly, Congress repudiated the basis for the demand letters requiring the Report of Firearms Transactions at issue and the basis of the decisions in *Blaustein & Reich* and in a subsequent case upholding the demand letters.<sup>4</sup> Both decisions rested on the same type of defective tracing studies denounced by Congress without reflecting any awareness of the enactments. ATF’s continued use of the demand letters disregards the clearly-stated will of Congress.

## **II. REQUIRING RECORDS OF ACQUISITION OF USED FIREARMS TO BE REPORTED IS NOT WITHIN ATF’S DEMAND LETTER AUTHORITY AND VIOLATES PROVISIONS OF LAW LIMITING THE SCOPE OF DEMAND LETTERS AND PROHIBITING REGISTRATION**

Since the basis of the demand letter in misinterpreted tracing data has been disowned by Congress, the two judicial decisions upholding it cannot be sustained.<sup>5</sup> The demand letter is inconsistent with several interrelated statutory provisions.

1. ATF’s authority to issue a “demand letter” is limited to “record information required to be kept by this chapter [Chapter 44].” 18 U.S.C. § 923(g)(5)(A). However, “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.” § 923(g)(1)(A).

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<sup>4</sup> The 2004 appropriations rider was enacted after the appeal in *Blaustein & Reich* was briefed and argued, but before it was decided. A subsequent decision upheld the demand letter based on the same defective tracing study and made no mention of Congress’ admonition, which had been reenacted multiple times by then. *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1045 (9<sup>th</sup> Cir. 2007). (citing *Commerce in Firearms in the United States* 19 (2000)).

<sup>5</sup> An agency may not “rel[y] on factors which Congress has not intended it to consider . . . .” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).



The first ATF Director explained in 1968 that the demand-letter authority, then a regulation, would be used “when we become aware of violations of the law by an unscrupulous dealer,” and that “we have no intention of requiring law-abiding gun dealers to report their firearms transactions to us.” Letter of Harold Serr, Director, Alcohol & Tobacco Tax Division, to Senator Frank Church, Dec. 17, 1968, in 131 Cong. Rec. S9129 (July 9, 1985). When codified in the Firearms Owners’ Protection Act, the demand-letter authority was intended to ensure the agency’s authority “to conduct legitimate tracing activities in connection with bona fide criminal investigations.” S. Rep. 98-583, 98th Cong., 2d Sess., 18 (1984). That authority has now been stretched beyond recognition.<sup>6</sup>

2. The demanded records of all firearm acquisitions from nonlicensees are not used for bona fide criminal investigations, which Congress requires as a condition of compelling that they be reported. An FFL is required to respond only to “a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.” § 923(g)(7). Given that a bona fide criminal investigation is required for ATF to issue a trace request, it may not simply issue such requests without such bona fide investigation.

3. The Attorney General may not promulgate a rule or regulation which would require that “any portion of the contents” of FFL records “be recorded at or transferred to a facility owned, managed, or controlled by the United States . . . , nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.” § 926(a). The required reporting here does just that.

4. ATF is permanently prohibited from using funds “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, PL 112-55, 125 Stat. 552, 609 (2011). Requiring the reporting of all secondhand firearm acquisitions is obviously a consolidation of a portion of FFL records.

In sum, the demand letter at issue violates several interrelated statutes against overreaching by ATF. Congress intended that ATF have access to licensee records to conduct actual, bona fide criminal investigations, not to keep track of lawful firearm transactions based on a methodology that Congress has forbidden.

### **III. THE NOTICE SUBSTANTIALLY UNDERESTIMATES THE BURDEN**

The agency substantially underestimates the burden of the proposed collection of information, which lacks any apparent methodology or valid assumptions. The Notice states: “An estimated 1,322 respondents will take 30 minutes to complete the form. . . . The estimated

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<sup>6</sup> “To say to these appellants, ‘The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.” *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 n.13 (1984) (citation omitted).

annual public burden associated with this collection is 2,644 hours.” These figures are purely speculative.

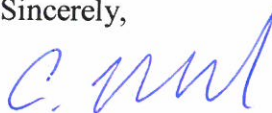
As noted above, FFLs subject to the demand letter are required “to submit an annual report followed by quarterly reports of used firearms acquired by the FFL.” The estimated time disregards the initial annual report and then assumes that it will take only 30 minutes to complete each quarterly report. This entirely disregards the daily burden of keeping a special record of used firearm acquisitions and of keeping track of filing deadlines. The estimate of 30 minutes to complete a quarterly report disregards that its length depends on sales volume, which varies greatly from one FFL to another; that licensees who keep paper rather than electronic records may expend many hours compiling the information; and that what is reported must be carefully reviewed before submission to preclude being accused of keeping inaccurate records, which could lead to revocation of the license.

As noted, 1,322 dealers are currently subject to the demand letter. That amounts to just over 2% out of the current total of 63,709 dealers.<sup>7</sup> It is a sharp increase – when the program began, demand letters were sent to 450 dealers, less than 1% of the total of 80,000 at the time. *Blaustein & Reich*, 365 F.3d at 283. Thus, the burden has significantly increased.

Finally, the Notice seeks comment on how to minimize the burden, such as by permitting electronic submission of responses. While electronic submission of responses will indeed reduce the burden, ATF should store the records in a manner consistent with privacy protections provided by Congress elsewhere. How ATF keeps out-of-business FFL records is subject to the following: “Provided further, That, hereafter, no funds made available by this or any other Act may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code . . . .” Consolidated & Further Continuing Appropriations Act, 2012, P.L. 112–55, 125 Stat. 552, 610 (2011). If ATF is to continue sending demand letters based on criteria rejected by Congress, it should at least protect the privacy of such records and destroy them on a timely basis.

Thank you for this opportunity to present our views.

Sincerely,



Christopher Zealand  
Director  
NRA-ILA Research & Information Division

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<sup>7</sup> <https://www.atf.gov/content/firearms/firearms-industry/listing-FFLs> (2015). “Dealers” refer to those with an 01 dealer’s license or an 02 pawnbroker’s license.