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Las Cruces, New Mexico 88001

January 15, 2017

Ms. Tracey Robertson
Chief, Federal Firearms Licensing Center
244 Needy Road
Martinsburg, West Virginia 25405

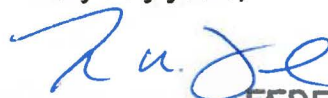
Dear Ms. Robertson:

This letter responds to your Agency's call for public comments published in the *Federal Register* on January 9, 2017 concerning revisions to ATF Form 7/7CR, *Application for Federal Firearms License*. My comments concern clarifications to four questions on Part B, Responsible Person Questionnaire; in particular, questions 26, 27, 28, & 32 on the draft revised form. These questions are identical to those asked on the ATF Form 4473, *Firearms Transaction Record*. Last April, I provided comments on the Agency's revisions to that form, which were partially adopted on the final version. Accordingly, I have enclosed a copy of those comments with this letter and incorporate them by reference.

1. Question 26, *Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year?* My recommended changes, as detailed in numbered paragraph one of the enclosed letter, are to clarify the instructions to indicate the statutory exclusion of certain white-collar trade offenses and provide clarification on the applicability of the question to military Court-Martial proceedings.
2. Question 27, *Have you ever been convicted in any court for a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence, even if you received a shorter sentence including probation?* My recommendation, as detailed in numbered paragraph two of the enclosed letter, is to clarify the instruction as above.
3. Question 28, *Are you a fugitive from justice?* This comment concerns a serious error in the Agency's regulatory definition of "fugitive from justice." While my recommended solution – revision of the regulation – is beyond the scope of this call for comments, it is, nonetheless, a substantive legal error that the Agency should address.
4. Question 32, *Have you been discharged from the Armed Forces under dishonorable conditions?* As detailed in numbered paragraph four of the enclosed letter, I recommend clarifying the instruction to clarify the scope of this question to include only a final, executed dishonorable discharge or dismissal adjudicated by a Court-Martial.

I appreciate the opportunity to comment on this proposed information collection activity.

Very truly yours,



Kevin M. Dent

FEDERAL FIREARMS

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LICENSING CENTER

4622 Rimrock Drive
Las Cruces, New Mexico 88012

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April 23, 2016

Ms. Carolyn King
Firearms Industry Programs Branch
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue NE
Washington, DC 20226

Dear Ms. King:

This letter responds to your Agency's request for public comments concerning the Proposed Information Collection Activity, ATF Form 4473 (5300.9), *Firearms Transaction Record*, published in the Federal Register on April 7, 2016.

1. Question 11.b. and its Instruction.

The instruction corresponding to question 11.b. ("Are you under information or indictment in any court for a felony, or any other crime for which the judge could imprison you for more than a year?") contains two areas requiring clarification.

a. Title 18, United States Code, Section 922(n) generally prohibits a "person who is under indictment for a crime punishable by imprisonment for a term exceeding one year" from receiving a firearm. The term "crime punishable by imprisonment for a term exceeding one year" is defined in Title 18, United States Code, Section 921(a)(20) to explicitly exclude two categories of offenses (State crimes punishable by up to two years imprisonment, but which are classified as misdemeanors; and certain white-collar crimes related to trade practices). Consequently, a person pending criminal proceedings for one of these excluded offenses is not subject to the 922(n) prohibition from receiving a firearm. I recommend that the instruction be amended to clarify this point.

b. The instruction is unclear on the applicability of the question to military Court-Martial proceedings.

i. The Uniform Code of Military Justice¹ (UCMJ) is a special Federal criminal code applicable to Service Members in the U.S. Armed Forces. Unlike civilian criminal codes, the UCMJ does not classify offenses as either felonies or misdemeanors. The maximum possible sentence for a conviction is set by a combination of an Executive Order prescribing punishments (the Manual for Courts-Martial) and the type of Court-Martial (Summary, Special, or General) hearing the case. Additionally, under the UCMJ, a sentence of imprisonment may be imposed either by a Military Judge alone or

¹ Title 10, United States Code, Chapter 47.

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by a Panel, the equivalent of a jury. Criminal proceedings under the UCMJ are not initiated by either an indictment or information, by rather a charge sheet which is then referred to a Court-Martial by the Convening Authority, a military officer authorized to direct disposition. Finally, the sentence of a Court-Martial is subject to any agreed upon cap contained in a pretrial agreement between the Accused and the Convening Authority. In short, it is very different from any conventional civilian criminal justice system.

ii. Accordingly, a Service Member pending a charge under the UCMJ may not know if he is a prohibited person under this section. For example, if an enlisted Soldier is accused of violating Article 92, UCMJ, for failure to obey a general order or regulation, the maximum sentence in the Manual for Courts-Martial is two years imprisonment. A Convening Authority could elect to dispose of the offense by a General Court-Martial, where the Soldier would be subject to the maximum penalty upon conviction; by a Special Court-Martial, where the Soldier would be subject to a maximum of one year imprisonment; by a Summary Court-Martial, where the Soldier would be subject to a maximum of one month imprisonment; or by some lesser non-judicial or disciplinary means where there is no potential for imprisonment. Even if a referred charge sheet is deemed an equivalent of an information for these purposes, until the Convening Authority has made a determination as to disposition of the offense, there is no clear answer as to whether the Soldier is subject to more than one year imprisonment. Until the Convening Authority has taken dispositional action, the charge sheet is the equivalent of a criminal complaint, without any judicial or Court involvement at all.

iii. I recommend that the instructions provide a black letter rule applicable to UCMJ proceedings: A person answers "yes" to this question if, upon conviction, he is subject to a sentence of more than one year imprisonment per the Manual for Courts-Martial; and it has been referred to a General Court-Martial, the only level of Court-Martial authorized to impose more than one year imprisonment, for trial. This rule supports Congressional intent not to extend Gun Control Act prohibitions to convictions by Special or Summary Courts-Martial, as evidenced by the dishonorable discharge prohibited person category²; this type of punitive discharge can only be adjudicated by a General Court-Martial.³

² See Title 18, United States Code, Section 922(g)(6).

³ *N.B.* The several States and Territories also have codes within their own statutes governing the conduct of State military forces (the National Guard when not in Federal Service and State Defense Force (Militia) personnel). Many are closely patterned off the UCMJ and present the same challenges in determining what would constitute a "crime for which the judge could imprison you for more than a year" for the purposes of answering this question. Additionally, some states strictly limit the sentences that can be adjudicated by a state court-martial, regardless of type or offense charged. (See N.Mex. Statutes Annotated § 20-12-6(A) ("Except when the militia is in actual service in time of war or public danger, no punishment imposed by court martial shall exceed that prescribed for a misdemeanor.")) While examination of each state military code is beyond the scope of these comments, and the frequency of state courts-martial vary widely among jurisdictions, the Agency should be aware that these

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2. Question 11.c. and its Instruction.

The instruction corresponding to question 11.c. ("Have you been convicted in any court for a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation?") contains one substantial omission and one area requiring clarification.

a. While the proposed instruction for question 11.c. correctly excludes State misdemeanors with a maximum sentence of two years or less from its scope, it does not mention the white-collar trade practice offenses excluded from the definition in Title 18, United States Code, Section 921(a)(20) which are, consequently, also outside the definition of "crime punishable by imprisonment for a term exceeding one year."⁴ I recommend amending the instruction to identify this additional excluded category of offenses.

b. As discussed above, the justice system established in the UCMJ does not align well with the traditional felony-misdemeanor distinction in civilian systems. For those same reasons, a Service Member or former Service Member may not be able to accurately determine if his conviction is the equivalent of a felony or one for which the Court-Martial could have sentenced him to more than a year imprisonment.

i. While a discharge under dishonorable conditions⁵ is a separate prohibited person criterion, a General Court-Martial may, in its discretion, sentence an enlisted defendant to either a dishonorable or bad-conduct discharge, or an officer to a dismissal from the Service; a Special Court-Martial (in accordance with Service regulations) may only sentence an enlisted defendant to a bad-conduct discharge, not a dishonorable discharge, and has no jurisdiction to sentence an officer to a dismissal; a Summary Court-Martial has no jurisdiction to adjudicate a discharge or dismissal.

ii. Accordingly, as with question 11.b, I recommend that the instructions provide a black letter rule applicable to UCMJ proceedings: A person answers "yes" to this question if he was convicted or pled guilty at a General Court-Martial where the

alternative state prosecution systems exist. I recommend Agency consultation with the State Judge Advocate, located at the National Guard Joint Forces Headquarters, in each of these jurisdictions to determine what impact, if any, their military codes would have in this area.

⁴ "[a]ny Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" 18 U.S.C. § 921(a)(20)(A).

⁵ "Discharged under dishonorable conditions. Separation from the U.S. Armed Forces resulting from a dishonorable discharge or dismissal adjudged by a general court-martial. The term does not include any separation from the Armed Forces resulting from any other discharge, e.g., a bad conduct discharge." 27 C.F.R. § 478.11.

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maximum sentence that could have been imposed, pursuant to the Manual for Courts-Martial, was greater than one year.⁶

3. Question 11.d. and its Instruction.

The instruction to question 11.d. ("Are you a fugitive from justice?") provides that "[t]he term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the state of prosecution." This expanded definition is inconsistent with the law. Consequently, I recommend that this language be removed from the form and that the Agency amend its regulation to conform to the law.

a. Title 18, United States Code, Section 921(a)(15) provides that "[t]he term 'fugitive from justice' means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." The proposed instruction abrogates the intent element, in that the mere act of crossing a state border creates fugitive status, even if the person intends to return and participate in all future Court proceedings.

b. Further, a defendant who is pending a criminal charge may not be prohibited under applicable law from leaving the state; travel restrictions are, most frequently, a discretionary condition of bond imposed by the Court.⁷ Additionally, a Defendant subject to such a condition of bond may apply to the Court for a modification to permit out-of-state travel; this is frequently accompanied by a waiver of extradition or other means to ensure his return to the jurisdiction.

c. Finally, in jurisdictions such as New Mexico where minor traffic violations are classified as misdemeanors under State law, this instruction would have the effect of rendering an out-of-state motorist who receives a traffic ticket and returns home a "fugitive from justice" ineligible to receive a firearm. This example illustrates the absurd consequence of extending this term beyond its explicit statutory definition.

d. The language in this instruction is drawn from the Agency's regulatory definition of "fugitive from justice."⁸ Commenter responses to the Agency's proposed rule pointed out key legal problems with the proposed definition:⁹

⁶ See footnote 3, above. The same concerns apply to state court-martial convictions and how they would count for the purposes of answering this question.

⁷ See, e.g., N.Mex. Rules of Criminal Procedure for the District Courts, 5-401 (providing discretion for the Court to impose travel restrictions under an analysis of least restrictive bond conditions necessary to ensure appearance)

⁸ "Fugitive from justice. Any person who has fled from any State to avoid prosecution for a felony or a misdemeanor; or any person who leaves the State to avoid giving testimony in any criminal proceeding. The term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the State of prosecution." 27 C.F.R. § 478.11.

⁹ See T.D. ATF-391, 62 F.R. 124 at 34634-24640 (Jun. 27, 1997).

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One Federal agency stated that the term is defined in the statute (18 U.S.C. 921(a)(15)) and, as such, any expansion of the definition would require legislative action. ATF is not proposing to "expand" the definition of fugitive from justice. Rather, the proposed definition is intended to clarify the meaning of the term. As mentioned in the preamble of Notice No. 839, the legislative history of section 921(a)(15), defining "fugitive," indicates that the term includes both felonies and misdemeanors, but makes no specific reference to misdemeanors. In addition, the statute does not spell out that to be a fugitive from justice it is not necessary that the person left a State with the intent of fleeing the charges. Rather, a person is a fugitive from justice if the individual, knowing that charges are pending, purposefully leaves the State of prosecution and does not appear before the prosecuting tribunal. Accordingly, ATF's proposed regulatory definition merely clarifies the statutory definition by covering these points

...

One State agency expressed concern regarding ATF's statement in the preamble of Notice No. 839 that a person is not a fugitive from justice merely because he or she has outstanding traffic citations. The commenter asked whether this includes criminal as well as civil traffic citations. The commenter also believed that the proposed definition should be amended to include individuals with outstanding traffic warrants. To be a fugitive from justice under the statute, a person must have left the State where criminal charges are pending against the person. A person who has an outstanding civil traffic citation or who has not left the State, does not meet the statutory definition. The statute and the final regulation make it clear that "fugitive from justice" does not include a person having only civil traffic citations.

The Agency's responses are unconvincing. As detailed above, under the Agency's regulatory expansion of the statute, a person who is not restricted from leaving the state, to include those defendants who have received special permission from the Court to leave the jurisdiction, are fugitives under the regulation. Likewise, the Agency makes assurances that a person who receives a "civil traffic citation" could not be a fugitive under this definition, but does not address those states where speeding and the like are low-grade misdemeanors. This regulation blatantly ignores very clear language in the statute and substitutes the Agency's judgment for that of Congress.

4. Question 11.g. and its Instruction.

As discussed above, Title 27, Code of Federal Regulations, Section 478.11 defines what constitutes a person "discharged from the Armed Forces under dishonorable conditions" to include only those dishonorably discharged (for enlisted members and warrant officers not commissioned) and dismissed from the Service (for cadets, midshipmen, commissioned officers, and commissioned warrant officers); it specifically

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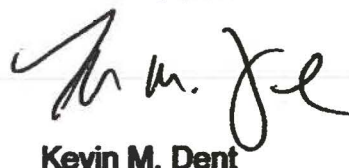
excludes bad-conduct discharges and characterizations of service in administrative separations.

a. A sentence to a punitive discharge is only final, and can be executed, under the UCMJ once the procedures in Rule for Courts-Martial 1113(c) have been completed. A sentence to a punitive discharge alone does not constitute a discharge. Accordingly, a Service Member could be sentenced to a dishonorable discharge or dismissal, but as result of a pretrial agreement, clemency by the Convening Authority, order of an appellate court, or action by the Service Secretary, it is not approved or executed. A former Service Member, under these circumstances, would not have been "discharged under dishonorable conditions" within the meaning of the regulation.

b. The instructions should be clarified to state that a "yes" is required in response to question 11.g. only as a result of a final, executed dishonorable discharge or dismissal from the Service. This will prevent confusion by persons who were discharged under some under non-qualifying characterization (such as an "other than honorable" administrative separation, or the formerly used "undesirable" discharge), as well as former officers who were dismissed and may not be aware that this is the legal equivalent of a dishonorable discharge.¹⁰

I appreciate the opportunity to comment upon this proposed information collection activity. In addition to the mailed copy, I will forward an electronic copy of this letter to the email address in the Federal Register notice.

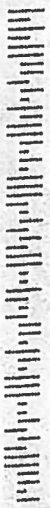
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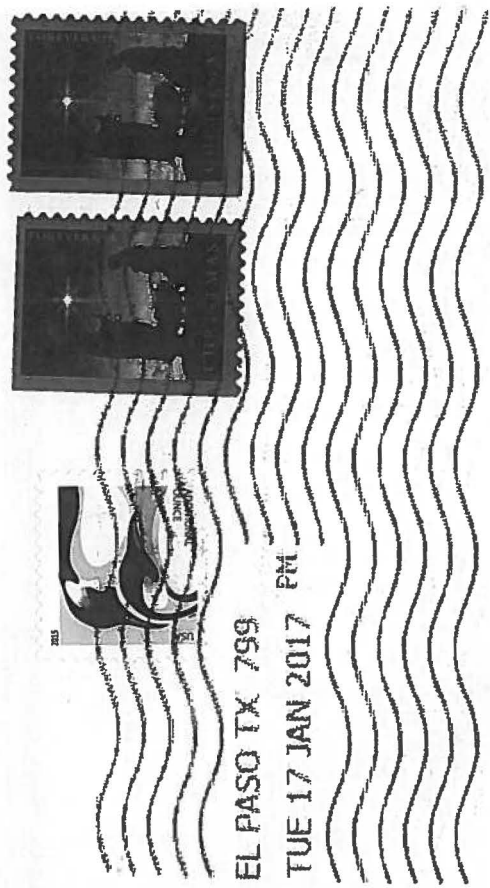
Kevin M. Dent

cc:
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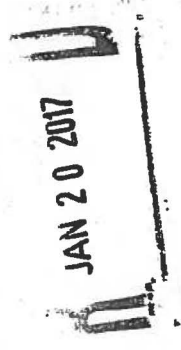
¹⁰ Note that there is no equivalent of a "Bad Conduct Discharge" for an officer under the UCMJ. See Rule for Courts-Martial 1003(b)(8).



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Mr. Kevin M. Dent
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Dear Mr. Dent:

This is in response to your comments regarding the Federal Register posting concerning the revision of ATF Form 7, Application for Federal Firearms License.

Thank you for your interest in this information collection. Your comments regarding the four areas where potential additional clarification could be provided, will be thoroughly reviewed and taken into consideration. We appreciate your detailed feedback regarding this information collection.

Sincerely yours,

Tracey Robertson
Chief
Federal Firearms Licensing Center