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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.<sup>1</sup> 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

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<sup>1</sup> *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 (5th 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 with 18 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 registration 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.”<sup>2</sup> Citing the recent ban on semiautomatic weapons in Australia, the President chided Congress for not taking similar action in the United States.<sup>3</sup> 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 (4<sup>th</sup> 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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<sup>2</sup> 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/>.

<sup>3</sup> *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