



March 4, 2022

Statutory Federal Gun Registry Prohibitions and ATF Record Retention Requirements

Four provisions of current law prohibit a national registry of most, but not all, modern firearms. Two of these prohibitions set limits on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) principally, while the other two set limits on the Federal Bureau of Investigation (FBI). In 2016, the Government Accountability Office (GAO) found ATF mainly in compliance with its limits, but a May 2021 proposed rule has raised questions anew about ATF record retention. This rule would require gun dealers to retain transaction records for the entirety of their licensed activities, as opposed to the last 20 years of those activities. These records are submitted to ATF whenever dealers go out of business. Some gun rights advocates and Members of Congress contend that this proposed rule possibly exceeds ATF's legal authority and could be in contravention to the two ATF-related registry prohibitions described below.

GCA-NFA Firearms Recordkeeping

Two major federal statutes regulate commerce in and possession of firearms. They are the 1934 National Firearms Act (NFA) and the Gun Control Act of 1968 (GCA). At the Department of Justice (DOJ), ATF is the principal agency that administers and enforces the NFA and GCA; however, the FBI administers the GCA background check provisions. The GCA requires anyone who engages in the business of manufacturing, importing, or dealing in firearms to be licensed federally. These licensees are known collectively as federal firearms licensees, or FFLs.

All modern firearms based on post-1898 designs that are capable of accepting self-contained, commercially available ammunition are regulated under the GCA, in addition to certain devices (e.g., silencers) that also fall under the GCA definition of "firearm." Under the NFA, a subset of GCA-regulated firearms (e.g., machine guns, short-barreled shotguns, and silencers) deemed to be particularly dangerous are further regulated. The NFA imposes occupational taxes on FFLs who manufacture, import, and deal in NFA firearms; taxes on unlicensed persons making NFA firearms for themselves; and taxes on NFA firearms transfers to and among unlicensed persons.

ATF maintains a centralized registry of NFA-regulated firearms that are held privately by unlicensed persons and publicly by non-federal law enforcement agencies. This registry, the National Firearms Registration and Transfer Record (NFRTR), does not include records on firearms held or controlled by the U.S. government. Congress prohibited the transfer of machine guns manufactured after May 19, 1986 to civilians, but machine guns lawfully registered for civilian transfer prior to that date remain transferable. There are no similar tax or registration requirements for GCA-regulated firearms that do not fall under the purview of the

NFA. However, several states do have licensing/permitting regimes that serve as the basis for state gun registries.

Under the GCA, Congress authorized a decentralized system of recordkeeping that allows ATF to trace a firearm's chain of commerce, from manufacturer or importer to dealer, and to the first retail purchaser of record. FFLs must maintain firearms transaction records; i.e., ATF Form 4473s on individual transfers and a corresponding acquisition/disposition log. FFLs must maintain these records for a minimum of 20 years under current ATF-promulgated regulations, and must submit a minimum of 20 years of their most recent transaction records to ATF whenever they go out of business (27 C.F.R. § 478.129).

Permanent ATF Appropriations Limitation

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

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

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

Firearms Owners' Protection Act (FOPA), 1986

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

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of

registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation.

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

Brady Handgun Violence Prevention Act, 1993

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

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

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

For background, see CRS Report R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation*.

NICS Record Destruction Within 24 Hours

For nine years, FY2004 through FY2012, Congress included a general provision in the annual DOJ appropriations bill that required the FBI to destroy background check records on persons who are found *eligible* to receive and possess firearms within 24 hours. This provision was crafted in response to a 90-day NICS audit log that was maintained by the FBI during the Clinton Administration. For FY2012, Congress inserted a word of futurity (“hereafter”) in this provision, which indicates it is intended to be permanent law (H.Rept. 112-284, p. 269). It reads:

Sec. 511. Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for—(1) the implementation of any tax or fee in connection with the implementation of subsection 922(t) of title 18, United States Code; and (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the destruction of any identifying

information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law.

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

2016 GAO Audit of ATF Recordkeeping

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

ATF Fact Sheet and Proposed Rule

In January 2022, an ATF fact sheet indicated that the bureau had collected 54.7 million firearms transaction records in 2021 from FFLs who had gone out of business. Responding to a congressional inquiry, ATF later reported that it held nearly 921 million out-of-business records, 94% of which were computerized, as of November 2021. These statistics brought additional attention to an ATF May 2021 proposed rule (86 FR 27720) and a provision that would require FFLs to maintain their firearms transaction records for as long as they are in business or otherwise engaged in any licensed activities, instead of the 20 years under current law. ATF maintains that its proposed record retention and submission requirements are authorized under current law, instrumental for firearms tracing, and will increase trace-generated leads in criminal investigations.

Other provisions of this proposed rule would: (1) address case law calling into question long-standing ATF rulings about split firearm frames and receivers; (2) amend marking requirements for silencer baffles; (3) more closely regulate firearms parts kits, from which fully functional firearms might be “readily” assembled; and (4) require FFLs who have or acquire privately made firearms as part of their business inventories to mark and serialize those firearms.

Under current law, unlicensed individuals may make firearms for personal use, as long as their intentions are not to sell those firearms. Current law does not require that such privately made firearms be marked and serialized like firearms manufactured for commercial sale. If unlawfully trafficked, there are no commercial records to trace unmarked firearms back to their maker and subsequent transferees, and as such, are commonly referred to as “ghost guns.” For additional background, see CRS In Focus IF11810, *Privately Made Firearms: A Growing Source of Unmarked, Untraceable “Ghost Guns”?*

William J. Krouse, Specialist in Domestic Security and
Crime Policy

IF12057

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.