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Gun Control: Statutory Disclosure Limitations on ATF Firearms Trace Data and Multiple Handgun Sales Reports

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Summary

For FY2003-FY2006, riders on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) appropriations have prohibited that agency from disclosing firearm trace data (based on firearm transfer records maintained in part by licensed gun dealers) and multiple handgun sales reports data for any purpose other than supporting a bona fide criminal investigation or agency licensing proceeding. This rider is known as the “Tiaht” amendment, for its sponsor in full committee markup of the FY2004 Commerce-Justice-State appropriations bill, Representative Todd Tiaht. Members have introduced legislation to overturn the FY2006 appropriations rider (see S. 2460/H.R. 5033 and S. 2629). Nevertheless, a similar rider may be included in the FY2007 ATF appropriations language. In addition, on May 18, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security approved a bill (H.R. 5005) that includes a provision to permanently codify this disclosure limitation.

Background

Located in the Department of Justice (DOJ),¹ the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the lead law enforcement agency charged with administering and enforcing federal laws related to the manufacture, importation, and distribution of firearms and explosives. ATF also investigates arson cases with a federal nexus and violations of laws related to the manufacture, importation and distribution of alcohol and tobacco.² For FY2006, Congress appropriated nearly \$932 million for ATF,

¹ As part of the Homeland Security Act (P.L. 107-296, 116 Stat. 2135), Congress transferred ATF’s enforcement and regulatory functions for firearms and explosives to the DOJ from the Department of the Treasury, adding “explosives” to ATF’s title.

² The regulatory aspects of those laws related to the manufacture, importation and distribution of alcohol and tobacco are the domain of the Tax and Trade Bureau (TTB), which was established at Treasury following ATF’s transfer to DOJ.

of which nearly \$671 million (72%) was allocated for the firearms decision unit in the ATF budget.³

ATF Firearm Trace Data and Multiple Handgun Sales Reports

To enforce federal firearms laws, ATF conducts firearm traces for federal, state, tribal, county, and municipal law enforcement agencies. Gun dealers must also report multiple handgun sales to ATF. Firearm trace data and multiple handgun sales reports, along with other investigative data, can be strong indicators of illegal firearms trafficking. For several reasons, however, there are methodological and operational limits on the use of such data and reports, in addition to the statutory limitations, as discussed below.

Firearm Trace Process. As part of a trace, law enforcement officers submit to ATF certain information about a firearm in question, including the manufacturer, model, caliber, and serial number. In turn, ATF firearm specialists systematically research the firearm's transfer documents, which Federal Firearms Licensees (FFLs) are required to maintain, as a firearm passes through the commercial chain of distribution, from manufacturer/importer, to wholesaler/distributor, and to first retail seller. From the first retail dealer's transfer records (bound log book and ATF Form 4473s), ATF can determine the first private person to whom the firearm was first transferred. When dealers go out of business, these records are sent to, and maintained by, ATF.⁴ By following up with the private person to whom the firearm was last transferred, investigators are often able to generate new leads to solve crimes, including identifying suspects.

YCGII and Comprehensive Tracing. As gun violence increased from the mid-1980s to the early 1990s, law enforcement agencies increasingly availed themselves of ATF's firearm tracing capabilities. As the firearm trace database grew, it yielded new insights for law enforcement agencies. In 1994, ATF made "comprehensive tracing," which entails tracing all "crime guns" recovered by law enforcement in a particular geographic area, an agency objective. In 1996, the Clinton Administration launched the Youth Crime Gun Interdiction Initiative (YCGII). Under this initiative, participating cities were provided funding to comprehensively trace crime guns and improve information about the illegal sources of firearms. In FY1996, 27 cities participated in this program. By FY2004, it had been expanded to more than 60 cities. For FY2005, the Bush Administration requested and received funding to expand Project Safe Neighborhoods (PSN) and YCGII to 80 cities, yet ATF dropped the YCGII program in FY2005 and began promoting the PSN program as part of its wider integrated violence reduction strategy.

³ The other two decision units in the ATF budget include arson and explosives and alcohol and tobacco. See Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Congressional Budget Submission, Fiscal Year 2007*, (Feb. 2006), Exhibit C-Summary of Requirements.

⁴ Another ATF appropriations rider prohibits those records from being searched electronically by firearm or firearm owner to prevent their use as a gun registry. Those records are currently indexed by firearm serial number.

For the years 1997 through 2000, ATF published YCGII reports that included data on firearm traces by participating city.⁵ Although the data in these reports were anonymized and did not identify individual FFLs, ATF has issued no additional YCGII reports. ATF had also made trace data available to researchers under contract with disclosure restrictions, but such data were only released after five years, because ATF did not want to compromise ongoing investigations, among other things. After reviewing the trace data, some researchers suggested that through comprehensive crime gun tracing new findings could be made regarding illegal gun trafficking — especially at the regional level.⁶ These and other researchers noted, however, that there were methodological shortcomings in the firearms trace data that precluded making conclusions about crime guns and their sources at a national level.⁷

Methodological Limits on Firearms Trace Data. ATF has defined “crime gun” to mean any firearm that is illegally possessed, used in crime, or suspected to have been used in crime. An abandoned firearm may also be categorized as a crime gun if it is suspected it was used in a crime or illegally possessed.⁸ Under this definition, most, but not all, traced firearms are “crime guns.” Nevertheless, firearms trace data are limited by several factors:

- traced firearms are generally recovered by law enforcement, and they may not be representative of firearms possessed and used by criminals;
- there remains significant variation over time and from jurisdiction to jurisdiction as to “when, why, and how” a firearm is recovered and selected to be traced; and
- a substantial percentage of recovered firearms cannot be successfully traced for several reasons including poor recordkeeping by FFLs.

By those and perhaps other factors, firearm trace data may be biased: consequently, such data cannot be used to test for statistical significance between firearm traces in general and the wider population of firearms available to criminals or the wider American public. Neither the Federal Bureau of Investigation (FBI) — the principal federal agency charged with the collection of national crime statistics — nor ATF has endorsed the use of firearm trace data for any purpose other than advancing compliance with firearms commerce laws and bona fide criminal investigations. In conclusion, the ATF firearms trace database is an operational system designed to aid in ongoing investigations, rather than a system to capture “crime gun” statistics.⁹ Nonetheless, combined with multiple handgun sales reports and other investigative data, firearm trace data has proved to be a viable tool for ATF in targeting regulatory and investigative resources with greater effect.

⁵ Those reports are available at [<http://www.atf.treas.gov/firearms/ycgii/2000/index.htm>].

⁶ Philip J. Cook and Anthony A. Braga, “Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets,” *Arizona Law Review*, vol. 43:2, 2001, p. 290.

⁷ *Ibid.*

⁸ See U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Crime Gun Trace Reports (2000), National Report, The ATF Youth Crime Gun Interdiction Initiative*, (July 2002), p. A-3. Available at [<http://www.atf.gov/firearms/ycgii/2000/index.htm>].

⁹ *Ibid.*

Multiple Handgun Sales Reports. Federal law requires FFLs to report to the Attorney General (AG) whenever they transfer more than one handgun (pistol or revolver) to any nonlicensee within five consecutive business days.¹⁰ The FFL must also forward this information to either the state police or local law enforcement agency that has jurisdiction in the area where the transfer occurred.¹¹ Furthermore, except for information pertaining to persons prohibited from possessing firearms, federal law prohibits state or local law enforcement agencies from disclosing those records to any person or entity, and requires those records be destroyed within 20 days of receipt, so that those records cannot be used as a registry of firearms or firearms owners.¹² At the end of every six-month period, the state or local law enforcement agency is required to certify to the AG that the record nondisclosure and destruction requirements were complied with.

Operational Limits on Illegal Firearms Trafficking Indicators. ATF analyzes firearm trace data, multiple handgun sales reports, and firearms-trafficking investigative data to more effectively target armed violent criminals and gun traffickers for prosecution. By aggregating these data, ATF analysts are often able to discern regional illegal firearms trafficking trends and patterns. Working with contract researchers at Northeastern University, ATF developed indicators of illegal firearms trafficking:¹³

- multiple crime guns traced to an FFL or first retail purchaser;
- short time-to-crime for crime guns traced to an FFL or first retail purchaser;
- incomplete trace results, due to an unresponsive FFL or other causes;
- significant or frequently reported firearms losses or thefts by an FFL;
- frequent multiple sales of handguns by an FFL or multiple purchases of firearms by a non-licensee, combined with crime gun traces; and
- recovery of firearms with obliterated serial numbers.

In February 2000, ATF reported that a small number of FFLs accounted for a large percentage of successfully traced “crime guns.”¹⁴ ATF reported further that (1) out of 83,200 FFLs, about 1,020 had 10 or more firearms that were traced back to them in 1998; (2) while those FFLs only represented about 1.2% of licensed retail dealers, they accounted for more than 50% of traces to retail dealers in that year; and (3) less than 1% of retail dealers, about 330 FFLs, had 25 or more firearms traced back to them.¹⁵ By concentrating their enforcement and regulatory actions on this small percentage of FFLs, ATF sought to prevent the further diversion of firearms into illegal channels of commerce.

¹⁰ 18 U.S.C. 923(g)(3).

¹¹ Ibid.

¹² Section 7 of H.R. 5005 (discussed below) would repeal the multiple handgun reporting requirement to state and local law enforcement.

¹³ U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Commerce in Firearms in the United States*, (Feb. 2000), p. 22.

¹⁴ Ibid.

¹⁵ Ibid.

At the same time, ATF's findings might have undergirded the policies of a number of municipalities, under which civil lawsuits were pursued against the gun industry for gun violence in their jurisdictions. This is despite the fact that ATF has consistently stated that trace frequency, in and of itself, is not indicative of criminal activity by an FFL. In addition, with ATF data, gun control advocates began identifying and publishing the names of FFLs who in their judgement were "bad apple" dealers, as the data showed "crime guns" being traced back to their businesses, along with multiple handgun sales reports, in numbers the gun control advocates found unacceptable.¹⁶

As noted above, while multiple handgun sales reports, along with firearm trace and other investigative data, can be strong indicators of illegal firearms trafficking, alone they do not constitute proof of criminal wrongdoing on the part of an FFL. As required under the appropriations rider, which was initially predicated on ATF's disclosure policy, ATF declined to disclose such data to the City of Chicago. ATF also argued in part that trace and multiple handgun sales data were exempt from the Freedom of Information Act, as such data could potentially compromise ongoing investigations.¹⁷

Lawsuits Against the Gun Industry

Mayors and other municipal leaders have sought to curb gun violence in their communities by filing civil lawsuits against gun manufacturers and dealers based on three arguments: (1) the firearms they sold were defective, (2) the gun industry had engaged in improper marketing techniques, and (3) the proliferation of firearms in certain urban areas constituted a public nuisance. Many lawsuits against the gun industry were thrown out of court, while others were not. In some of these cases, analyses of ATF firearms trace and investigative data by nongovernmental parties were submitted as evidence showing liability on the part of gun manufacturers and/or dealers.

Congress passed the Protection of Lawful Commerce in Arms Act (P.L. 109-92) to limit the tort liability of gun manufacturers and dealers by prohibiting civil actions or proceedings or administrative proceedings against any gun manufacturer or dealer, or trade association for damages resulting from the criminal or unlawful misuse of a firearm or ammunition.¹⁸ Exceptions were provided under certain circumstances. The city of New York is currently pursuing a public nuisance civil suit against multiple gun manufacturers based in part on ATF trace and investigative data that were acquired under a strict confidentiality order entered by a federal judge before the disclosure limits were enacted.¹⁹

¹⁶ Brady Campaign to Prevent Gun Violence, "Brady Campaign to Prevent Gun Violence: Ten Worst 'Bad Apple' Gun Dealers in America," July 16, 2003.

¹⁷ For further information, see *City of Chicago v. U.S. Department of Treasury*, 297 F.3d 672 (7th Cir. 2002), *vacated and remanded*, 537 U.S. 1229 (2003), *vacated on rehearing*, 423 F.3d 377 (7th Cir. 2005).

¹⁸ For further information, see CRS Report RS22074, *Limiting Tort Liability of Gun Manufacturers and Gun Sellers: Legal Analysis of P.L. 109-92 (2005)*, by Henry Cohen.

¹⁹ For further information, see *City of New York v. Beretta U.S.A.*, No. 00-CV-3641, 2006 U.S. Dist. LEXIS 24452 (E.D.N.Y. Apr. 27, 2006).

Related Legislative Proposals

For FY2003-FY2006, riders on the ATF appropriations language have prohibited that agency from disclosing data on illegal gun trafficking based on firearm traces and FFL transfer records, as well as multiple handgun sale reports, for any purpose other than supporting a bona fide criminal investigation. This rider is known as the “Tiahrt” amendment, for its sponsor in full committee markup of the FY2004 Commerce-Justice-State appropriations bill, Representative Todd Tiahrt.²⁰ While this language has been modified over the years, most recently to provide an exception for using FFL records to produce domestic manufacture and importation reports, its effect has remained the same. ATF has not disclosed trace data to any person or entity, unless the request for such data is part of a bona fide criminal investigation within their jurisdiction. As a result, trace and investigative data are no longer available to outside researchers. Nor are additional data generally available for municipalities and other third parties to build cases against gun manufacturers and dealers in civil lawsuits. ATF has also ceased reporting on firearms commerce, which typically included analysis of crime gun trends and patterns, and shifted its efforts in accordance with PSN to reducing youth firearms violence. A similar rider may be included on the FY2007 ATF appropriation.

Representative Lamar Smith introduced H.R. 5005, which includes a provision (Sec. 9) that would codify limitations placed on ATF regarding the disclosure of firearms trace data and multiple handgun sales reports data. Proponents for Section 9 (and the current limitation) contend that the business records of FFLs should be confidential. They argue that access to these records is only authorized under federal law for the purposes of conducting ATF trace requests in order to solve crimes. They argue further that it was never intended that firearm trace data be used to support civil, public nuisance lawsuits against firearms manufacturers and dealers, such as a lawsuit currently being pursued by New York City. On May 18, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security approved H.R. 5005.

Opponents of Section 9, like Mayor Bloomberg of New York City, counter that every tool is needed to “crackdown” on irresponsible FFLs by analyzing firearm trace data on a regional and national basis, so that federal, state, and local law enforcement authorities can be informed of the source and market areas for “crime guns.”²¹ They contend further that Section 9, if enacted, would preclude such analysis and may prohibit the sharing of such data between law enforcement agencies pursuing multi-jurisdictional (regional) gun trafficking investigations. Senator Robert Menendez and Representative Steven R. Rothman have introduced identical bills (S. 2460/H.R. 5033) to repeal the FY2006 appropriation rider. Senator Charles Schumer introduced a similar bill (S. 2629).

²⁰ The Tiahrt language includes other provisions that (1) require ATF to qualify the statistical limitations of reported firearms trace data, by stating that “not all firearms used in crime are traced and not all firearms traced are used in crime,” and “the firearms selected [for tracing] 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;” (2) require the FBI to destroy approved firearm background check records within 24 hours; and (3) prohibit ATF from issuing new regulations to require licensed dealers to conduct physical inventories of their businesses.

²¹ Sewell Chan, “15 Mayors Meet in New York to Fight Against Gun Violence,” *New York Times*, Apr. 26, 2006, p. A18.