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Ms. Helen Koppe
Program Manager
ATF Firearms & Explosives Industry Division
Bureau of Alcohol, Tobacco, Firearms, and Explosives
United States Department of Justice
99 New York Avenue NE
Washington, D.C. 20226

Re: Comments of Gun Owners of America, Inc. and Gun Owners Foundation
on Bureau of Alcohol, Tobacco, Firearms, and Explosives
Notice of Proposed Changes to the ATF Form 4473
Federal Register, Vol. 81, No. 143 (July 26, 2016)

Dear Sirs:

These comments are filed on behalf of our clients, 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.

In response to the above-referenced July 2016 request¹ by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), GOA and GOF submit these comments on ATF’s proposed changes to the “Firearms Transaction Record,” commonly known as the Form 4473.

¹

<https://www.gpo.gov/fdsys/pkg/FR-2016-07-26/html/2016-17616.htm>

BACKGROUND

The Form 4473 is not required by any federal law. Instead, it is a remnant of an age of paper records, before the FBI's computerized National Instant Criminal Background Check System ("NICS") was in place. However, rather than do away with the Form 4473 when the NICS system was established, ATF has continued to use the Form 4473 and, indeed, has greatly expanded its length numerous times over the years, adding additional questions, instructions, and fine print. These incessant changes have made the Form 4473 more complicated and complex, to the point where it takes both a legal education and training in federal firearms law in order to fully understand the Form and complete it properly. But that has not stopped ATF from continuing to pursue both dealers and purchasers who make understandable and innocent mistakes in completing this complex form, with ATF going so far as to revoke licenses, and even charge both purchasers and dealers with felony crimes.²

The ATF claims the Form 4473 continues to be necessary because it is information about the sale of a firearm that is required to be kept by the dealer. But that is, of course, not true. Dealers already keep information about the sale of the firearm (including the identity of and information about the purchaser) in their Acquisition and Disposition book (their "bound book").

Next, ATF claims that it "relies" on the information submitted on the 4473 while conducting the NICS check. Again, that is not true. Rather, ATF relies on the purchaser's photo ID, the dealer's identification of the person, and FBI records in conducting the background check.³

The Form 4473 is touted as the central component in the background check system. Yet, in truth, the Form 4473 has virtually nothing to do with background checks for gun sales. Instead, today the Form 4473 is nothing more than a trap designed to manufacture crimes (for inadvertently making erroneous statements on the form), and to manufacture evidence of crime (by forcing purchasers to sign the form under penalty of perjury). The Form 4473 is a trap for the unwary.

² See, e.g., K. Riddell, "Onerous ATF rules threaten to put gun dealers out of business," The Washington Times, Sep. 18, 2014, goo.gl/XQJsIe

³ For example, with respect to the ban on felons purchasing firearms, if the ATF actually "relied" on the Form 4473, then all a purchaser would need do to obtain a firearm would be, for example, to check "no" that he is not a felon. In truth, the FBI does not rely on the purchaser's attestation that he is not a felon on the Form 4473 — instead the FBI conducts its own computerized check to determine whether the purchaser is a felon.

COMMENTS

1. **The Proposed New Form 4473 and Instructions Are Unnecessarily Verbose and/or Serve Only to Increase the Complexity of an Already Complex Form.**

The Form 4473 presents a significant practical and legal hurdle for millions of law-abiding Americans who each year seek to exercise their Second Amendment right to keep and bear firearms. Such individuals should not be subject to an overwhelmingly burdensome administrative process simply to go through a NICS check with respect to their eligibility. The Form 4473 should be eliminated. At a minimum, ATF should seek ways to make it more simple and streamlined, not made more complex. If ATF wants to add to the language of the Form 4473, the specific reasons for those changes should be announced beforehand, and an opportunity given to the public to comment on the rationale underlying the proposed additions.

The first proposed addition to the proposed new Form 4473 is a statement at the top that a purchaser is to “**Prepare in original only at licensed premises....**” And the transferor certification on page 3 requires certification that “this entire transaction record has been completed at my licensed business premises....” Any such requirement is inconsistent with applicable law:

- 18 U.S.C. Section 923(j) generally restricts a licensee to “conduct business” only at the location covered by his license.
- This requirement is also in 27 CFR Section 478.50, which states that “[t]he license covers the class of business or the activity specified in the license at the address specified therein.”
- And 27 CFR Section 478.124 which creates the requirement for the Form 4473 states that a dealer “shall obtain a Form 4473 from the transferee....”

Thus, nowhere but on the proposed Form 4473 does there appear any requirement that the **purchaser** actually complete the entirety of the Form 4473 at the FFL’s location and in his presence. As discussed above, the Form 4473 is confusing, lengthy, and complicated. While ATF presumably wants gun owners to understand the Form 4473 and its instructions, and complete it properly, ATF now would require them to be put “on the spot,” by filling in the Form 4473 while standing at a counter at the dealer’s premises, instead of being able to take the time to sit down and read and understand the Form, and complete it carefully and correctly. This requirement is unauthorized, and should be deleted, as it will only serve to cause purchasers to create errors on the form that ATF can then recommend for selective prosecution, as well as seemingly create a new federal crime of falsely swearing to as to where an American filled out a government form.

There are many additional examples of unnecessary and/or confusing language in the proposed new form and instructions.

- Question 1 contains new requirements for listing “IO” if a person’s name is an initial only.
- The Instructions for Question 10 are new, and unnecessarily verbose, even if designed to provide what some would consider helpful information. Three full paragraphs of such explanatory material — none of which was thought necessary in the current Form 4473 — would appear to have the overall effect of making the Instructions more difficult to get through.
- And, as set forth in more detail below, the definition of “fugitive from justice” in the Instructions for Question 11.d (page 4 of the proposed new Form 4473) is incorrect as a matter of law.

It is difficult to provide a thorough critique of all of the changes in the proposed new Form 4473 language and instructions, but many of the changes are unauthorized, many seem to incorrectly state the law, and even those which are not necessarily unauthorized or unlawful seem ill-advised. Moreover, ATF has not provided any explanation of the reasons for any of the proposed changes.

2. Questions 10.a and 10.b Exceed ATF’s Authority.

As the U.S. Supreme Court recently observed, the Gun Control Act (“GCA”) “establishes a detailed scheme to enable [an FFL] to verify, at the point of sale, whether a potential buyer may lawfully own a gun.” Abramski v. United States, 134 S. Ct. 2259, 2263 (2014). Thus, “[b]efore completing any sale, the [FFL] must ‘verify the buyer’s identity by examining a valid identification document’ bearing a photograph.” *See* Section 922(t)(1)(C). Additionally, the FFL “must procure the buyer’s ‘name, age and place of residence.’” *See* Section 922(b)(5). Pursuant to those requirements, ATF regulations governing the Form 4473 and the Form itself provide space for the recording of such information. *See* 27 C.F.R. Section 478.124(c)(1).

However, the Form 4473 requires not only the identifying information mandated by Congress, but also additional information not required by any law, rather by ATF regulatory fiat, such as the ethnicity and race of the potential buyer. *See* ATF proposed Form 4473 Question 10.a and 10.b. However, in order to justify the required inclusion of ethnicity and race information, ATF must comply with 28 U.S.C. Section 926(a) which limits the power of the Attorney General to make “**only** such rules and regulations as are **necessary** to carry out the provisions of this chapter.” (Emphasis added.) The proposed Form 4473 fails to comply with this statutory limitation on its regulatory authority. According to the proposed Form 4473, the information on ethnicity and race merely “**helps** the FBI and/or State POC make or rule out potential matches during the background check process and **can assist** with criminal investigations.” *See* ATF Form 4473 Draft at 4 (emphasis added). But just because the information could be “helpful” does not make it “necessary.”

The requirement that information demanded be “necessary” is not a matter of mere formality, but a substantive requirement. Originally, under the Gun Control Act of 1968, the Secretary was empowered by Section 926 to “prescribe such rules and regulations **as he deems reasonably necessary.**” Public Law 90-618, Sec. 926, 82 STAT. 1226 (Oct. 22, 1968). But in the 1986 Firearms Owners’ Protection Act (“FOPA”), Section 926 was amended so that ATF was authorized to “prescribe **only** such rules and regulations **as are necessary.**” *See* Public Law 99-308, Sec. 106, 100 STAT. 459 (May 19, 1986).

By failing to show how the ethnicity and race mandate are, in fact, necessary, the proposal regarding Question 10 is an invalid exercise of ATF’s regulatory power and should be stricken.

3. The Instructions for Questions 10.a and 10.b Are Nonsensical.

The instructions associated with the “race” and “ethnicity” requirements are ridiculous and nonsensical. ATF has borrowed the definitions in its instructions from the OMB. Those definitions are inapt here. Drafted for the primary purpose of doling out of federal welfare benefits to individuals of certain favored groups, OMB admits that its categories are not “anthropologically based” nor “biologically or genetically” determined. Rather they are political, social, and cultural constructs, the interpretation of which are largely left to individual “self-identification.” As such, they are of little use to the ATF as reliable identifiers in a NICS background check or even in criminal investigations.

As for the one category that is clearly not left to individual self determination — that of “American Indian or Alaska Native” — one must determine whether he has the requisite “tribal affiliation or community attachment.” Neither factor could possibly serve as an identifier for ATF purposes. Rather, both are most likely dictated by “American Indian tribal or Alaska Native village governments.” While OMB states that “Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; **ideally, respondent self-identification should be facilitated to the greatest extent possible,**”⁴ ATF does not adopt that standard in its definitions.

And what happens to a person who checks what ATF considers to be the wrong box? Giving false answers on the U.S. Census (which also asks the ethnicity and race questions) nets a \$500 fine under 13 U.S.C. Section 221(b), while giving false answers on the 4473 carries punishments under Section 924(a)(1)(A) of up to five years imprisonment, and under Sections 922(a)(6) and 924(a)(2) of up to 10 years imprisonment. If a bi-racial man checks only the box attesting that he is white, has ATF now made that into a federal felony?

⁴ https://www.whitehouse.gov/omb/fedreg_directive_15

4. The Instructions for Question 11.d Defining “Fugitive from Justice” Are Incorrect and Nonsensical.

The proposed new Form 4473 would add an Instruction to Question 11.d. — defining “Fugitive from Justice” — where none existed before. Although 18 U.S.C. Section 921(a)(15) defines the term as “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding,” ATF purports to redefine it, adding an additional sentence: “[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 may be consistent with ATF’s regulatory definition in 27 C.F.R. Section 478.11, but both of ATF’s definitions are inconsistent with the statute. Moreover, the meaning of “fugitive from justice” in the Gun Control Act of 1968 is obviously critical, since that Act is the law that prohibits possession, receipt, etc. of firearms. *See* 18 U.S.C. § 922(g)(2).

ATF’s proposed definition would expand the definition of “fugitive from justice” to include a person who — irrespective of motive — simply leaves the State knowing that misdemeanor or felony charges are pending against him. That is a clear distortion of the statutory definition set forth in 18 U.S.C. Section 921(a)(15), and erroneous as a matter of law. Not all persons who have charges pending against them are required to remain within a particular state, whether as a condition of bond, or otherwise. ATF’s senseless, overbearing definition would apply to a person who lives in Nebraska, is charged with reckless driving across the border in Kansas, and returns to his home in Nebraska while he awaits his court date. Even though neither the prosecution nor the court has any problem with him returning home, and he fully intends to return for his court date — according to ATF he is prohibited from purchasing a firearm. ATF may have intended its regulation to “clarify” the statute rather than rewrite it (*see* 62 Fed. Reg. at 346366), but ATF’s attempt to do so is flawed and should be stricken.

5. Proposed Question 12.c (Currently Question 11.k) Is Insufficient to Keep Guns Out of the Hands of Illegal Aliens.

18 U.S.C. Section 922(g)(5)(A) bans from firearm ownership anyone who “is illegally or unlawfully in the United States.” Yet question 11.k of the current version of the Form 4473 only asks a person “Are you an alien illegally in the United States?” Thus, ATF’s proposed new version of the Form 4473 mirrors the statute, as Question 12.c asks “Are you an alien illegally or unlawfully in the United States?”

The difference between illegal and unlawful would appear to be an important distinction, since it is illegal (a crime) for a noncitizen to enter the country without permission, while it is unlawful to remain in the country without authorization (such as overstaying a visa). As a general rule, GOA and GOF support ATF’s reliance on the statutory text as opposed to some definition or interpretation that ATF invents. *See* comment 4, *supra*.

But there is yet another issue that ATF should consider. In their *amicus* brief⁵ in Arizona Dream Act Coalition v. Brewer, No. 15-15307 in the U.S. Court of Appeals for the Ninth Circuit, in support of a petition for rehearing *en banc*, GOA and GOF noted that the Obama administration's creation of the Deferred Action for Childhood Arrivals ("DACA") program purported to bestow "lawful presence" on hundreds of thousands of illegal aliens, while claiming that they do not have "lawful status." *Id.* at 10. GOA and GOF noted that some states are already granting driver's licenses to such illegal aliens, and that the Ninth Circuit panel's decision would force other states to do the same. *Id.* at 11. And, since a driver's license is the gateway identification needed to obtain a firearm, GOA and GOF explained how President Obama's DACA program could facilitate unauthorized persons obtaining firearms. *Id.* at 12.

Even with ATF's proposed question 12.c, it still might be unclear to some how the Obama administration's "lawful presence" but not "lawful status" applies to whether a person is "unlawfully in the United States." GOA and GOF believe, and four circuit courts of appeal agreed, that illegal aliens do not have Second Amendment rights. *See* GOA/GOF Arizona Dream Act *amicus* brief, *supra*, at 11. Section 922(g)(5)(a) clearly was written to keep firearms out of their hands.

Echoing the concerns raised in GOA/GOF's May 31, 2016 *amicus* brief, the ATF on June 30, 2016 sent an "Open Letter to all California Federal Firearm Licensees," noting that California in 2015 had begun issuing driver's licenses to "persons ... who are unable to provide satisfactory proof that his or her presence in the United States is authorized under federal law" (a politically correct way of saying "illegal aliens"). The ATF cautioned California FFL's, noting that persons holding such driver's licenses are prohibited under federal law from possessing firearms, and warning FFL's not to make sales to such persons.

Although GOA/GOF do not concede the legitimacy of the Form 4473, ATF should consider clarifying that DACA recipients who, in particular, will claim they have "lawful presence" in the United States, are nevertheless considered to be "illegally or unlawfully present in the United States" and, as such, may not purchase or possess firearms. Illegal aliens are not part of "the People," because they are not part of this nation's "political community,"⁶ and they do not contribute to "the security of a free state." Plus, they are prohibited by federal

⁵ <http://lawandfreedom.com/wordpress/wp-content/uploads/2016/06/Arizona-Dream-Amicus-Brief.pdf>

⁶ D.C. v. Heller, 554 U.S. 570, 580-81 (2008) ("the term [the People] unambiguously refers to all members of the political community, not an unspecified subset ... We start therefore with a strong presumption that the *Second Amendment* right is exercised individually and belongs to all Americans.")

law from possessing firearms. *See* 18 U.S.C. Section 922(g)(5). ATF needs to do more to ensure that such persons do not inadvertently gain access to firearms.

6. Proposed Question 20 (Currently Question 22) Defies the Plain Text of Federal Law.

Generally, “prior to transferring any firearm to an unlicensed person, a licensed importer, manufacturer, or dealer must first contact the National Instant Criminal Background Check System (NICS).” Instructions for Question 22 on (current) ATF Form 4473; *see also* 18 U.S.C. Section 922(t). However, section 922(t) states that requirement does not apply to transfers of National Firearm Act (“NFA”) weapons where “the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986....”

In compliance with those statutory provisions, the current version of the Form 4473, Question 22, provides a box for the FFL to check if “No NICS check was required because the transfer involved only National Firearms Act firearm(s).”

However, Question 20 of the proposed new version of the Form 4473 would change this language to: “No NICS check was required because a background check was completed during the NFA approval process on the individual who will receive the NFA firearm(s), as reflected on the approved NFA application.” In the proposed Instructions for the new Question 20, ATF now asserts:

A NICS check must be conducted if an NFA firearm has been approved for transfer to a trust, or to a legal entity such as a corporation, and no background check was conducted as part of the NFA approval process on the individual who will receive the firearm. Individuals who have undergone a background check during the NFA application process are listed on the approved NFA transfer form. [Emphasis added.]

ATF’s new Question 20 and accompanying instruction violate the plain text of the law. Section 922(t) **explicitly states that approved NFA transfers are exempt from the NICS check** when they are transferred, yet ATF **would require a NICS check for some approved NFA transfers.**

ATF’s attempt to apply NICS checks to approved NFA transfers stems from its 2013 move to change the statutory definition of “person” to include “trusts.” Citing baseless concerns that ineligible persons were using trusts to avoid background checks and obtain NFA weapons (78 Fed. Reg. 55016), ATF invented the notion of a “responsible person” (ATF Rule

41F), which went into effect on July 13, 2016.⁷ Now, any time a “trust” obtains an NFA weapon, ATF requires each “responsible” person in the trust to submit a separate questionnaire (ATF Form 5320.23), and also submit photographs and fingerprints so that a background check can be run.⁸

In an effort to correct what it perceives to be a loophole in one statute, ATF proposes to disregard the plain text of yet another statute. ATF has no authority whatsoever to require dealers to perform NICS checks on persons during approved transfers of NFA weapons.

CONCLUSION

For the reasons stated herein, various portions of the proposed revisions to the 4473 discussed above should be withdrawn and abandoned, while the definition associated with the proposed Question 12.c should be strengthened.

Sincerely yours,

/s/

William J. Olson

WJO/ljs

⁷ ATF Rule 41F violates the statutory text of both the NFA and the GCA, as discussed in GOA and GOF’s amicus brief in Hollis v. Lynch, No. 15-10803, in the U.S. Court of Appeals for the Fifth Circuit, <http://lawandfreedom.com/wordpress/wp-content/uploads/2015/11/Hollis-v-Lynch-amicus-brief.pdf>.

⁸ Of course, Section 922(t)(1) applies only to transfers to “persons,” a definition which does not include “trusts.”