

**Congress of the United States**  
**Washington, DC 20510**

July 18, 2014

**VIA ELECTRONIC TRANSMISSION**

The Honorable Gene L. Dodaro  
Comptroller General of the United States  
U.S. Government Accountability Office  
441 G Street, NW Washington, D.C. 20548

Dear Mr. Dodaro:

From Fiscal Year (FY) 1979<sup>1</sup> to FY 2012,<sup>2</sup> appropriations for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have contained a variation of a rider stating that “no funds appropriated herein shall be available for administrative expenses in connection with consolidating or centralizing . . . the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees . . . .”<sup>3</sup> In FY 2012, Congress added futurity language intended to make the provision permanent law.<sup>4</sup>

Additionally, the Firearm Owners Protection Act of 1986 amended the Gun Control Act of 1968 by adding the following language, now located in 18 U.S.C. 926(a):

No . . . 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.<sup>5</sup>

As part of our investigation into ATF’s Operation Fast and Furious, we learned that ATF was encouraging Federal firearms licensees to sell firearms to suspected firearms traffickers. ATF would then record the firearm in a database known as the Suspect Gun Database, a feature of ATF’s Firearms Tracing System. ATF’s Suspect Gun Database entry would include the firearm information (manufacturer, model, caliber,

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<sup>1</sup> Treasury, Postal Service, and General Government Appropriations Act, 1979; Pub. L. No. 95-429, Oct. 10, 1978; 92 Stat. 1001, 1002.

<sup>2</sup> Consolidated and Further Continuing Appropriations Act, 2012; Pub. L. No. 112-55, Nov. 18, 2011; 125 Stat. 552, 609.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Firearm Owners Protection Act, 1986; Pub. L. No. 99-308, May 19, 1986; 100 Stat. 449, 459.

serial number, type, and importer), the purchaser information (name, address, date of birth, race, sex, height, weight, date of purchase, and any identification information, such as driver's license), and the dealer information (business name, licensee name, address, phone number, and Federal firearms licensee number). ATF agents in Operation Fast and Furious added extensive amounts of firearms to the Suspect Gun Database. There was apparently no requirement that the date of purchase be near in time to the date of entry in the database; for example, many firearms were entered into the Suspect Gun Database a little over a year after they had been purchased.<sup>6</sup> If the firearm was subsequently submitted for tracing, ATF's National Tracing Center checked the Suspect Gun Database to see if the firearm was already in ATF's records before going through the more laborious manual tracing process.<sup>7</sup> If the trace matched a record in the Suspect Gun Database, the Tracing Center sent a notification to the case agent or agent who requested the firearm's addition to the database, asking "whether or not [they] may conduct a Trace on this firearm."<sup>8</sup>

We have already documented several of our concerns with this process in the course of our investigation into Operation Fast and Furious. For example, as ATF watched straw purchasers buy cartel-preferred firearms over a long period of time, it should have been interdicting them, not simply entering them into a database. ATF agents attributed their extensive use of the Suspect Gun Database to ATF's focus on intelligence-gathering, but it seemed to come at the expense of law enforcement. ATF agents also seemed to have the motive of saving time on the tracing process when the firearms would be recovered at crime scenes.<sup>9</sup> Further, when the firearms were traced, their presence in the Suspect Gun Database gave the agent who had entered them an edge in any bureaucratic turf war, allowing the ATF case agent to keep the trace requester from receiving the trace result or to inform the trace requester that the firearm was already allegedly part of an "ATF case."<sup>10</sup>

Yet our investigation also raised broader questions about how ATF used the Suspect Gun Database outside of the context of Operation Fast and Furious. For instance, does ATF merely use the Suspect Gun Database to short-cut the trace process? Is ATF using the Suspect Gun Database to track information about gun owners even when it *does not* have enough evidence to meet the legal standard for seizing a firearm? What is the legal standard and evidentiary threshold for adding a firearm to the Suspect Gun Database? If there isn't one, then how is the collection of this data a lawfully authorized activity?

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<sup>6</sup> For example, see Attachment 1.

<sup>7</sup> For example, see Attachment 2.

<sup>8</sup> For example, see Attachment 3.

<sup>9</sup> See H. Comm. on Oversight & Gov't Reform and S. Comm. on the Judiciary Joint Staff Report, *The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence*, 112th Congress (July 26, 2011), at 16.

<sup>10</sup> *Id.*; see also H. Comm. on Oversight & Gov't Reform and S. Comm. on the Judiciary Joint Staff Report, *Fast and Furious: The Anatomy of a Failed Operation (Part I of III)*, 112th Congress (July 31, 2012), at 106-107.

During his confirmation process to become the Director of ATF, Ranking Member Grassley inquired about these issues with then-Acting Director Jones.<sup>11</sup> Jones responded that under 18 U.S.C. § 923(g)(7), “firearms can only be traced pursuant to a bona-fide criminal investigation.”<sup>12</sup> Therefore, he stated that suspect gun data need also only meet the threshold of being “connected to a criminal investigation”<sup>13</sup>—in other words, “a connection with potential illegal activity that ATF is investigating.”<sup>14</sup> However, unlike the scenario outlined in 18 U.S.C. § 923(g)(7), where a firearm is actually traced, firearms data is recorded in the Suspect Gun Database *prior to* being traced. Without any further legal standard, a firearm owned by a witness to a crime could be considered as “connected with a criminal investigation”<sup>15</sup> as a possible murder weapon or a firearm found in the possession of a possible suspect. Further, the decision to open a criminal case is largely left to the discretion of individual ATF agents. An agent might be able to open a criminal investigation based solely on the decision that a single firearm purchase is suspect, then add it to the Suspect Gun Database.

When asked what oversight ATF headquarters conducts over the usage of the Suspect Gun Database, Director Jones indicated that ATF periodically reviews the database to ensure that the criminal investigation is still active.<sup>16</sup> However, even when an investigation is closed and a firearm is deactivated, “[f]irearms information is not removed,”<sup>17</sup> purportedly “so that when future recoveries of those firearms are traced, the investigative lead is preserved.”<sup>18</sup> Thus, despite the effective lack of a standard for adding a firearm to the Suspect Gun Database, all suspect gun data remains in the Firearms Tracing System indefinitely. Altogether, ATF has added data on 173,784 firearms purchased by 7,329 individuals to its Suspect Gun Database since its creation in 1992, all of which is still accessible to ATF.<sup>19</sup>

When asked how usage of the Suspect Gun Database squares with various prohibitions on ATF maintaining a national gun registry, Jones claimed: “The GAO has addressed this very issue in a comprehensive report and concluded that the F[irearms] T[racing] S[ystem] was not a violation of either the Gun Control Act or ATF’s appropriations restriction.”<sup>20</sup> The GAO report, published in 1996, did indeed address the question of whether certain ATF databases complied with the database restrictions imposed by Congress.<sup>21</sup> Yet it did not examine the Suspect Gun Database specifically, but rather the Out-of-Business Records system and the Multiple Sales System, a

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<sup>11</sup> Attachment 3.

<sup>12</sup> Response C, at 29.

<sup>13</sup> *Id.*

<sup>14</sup> Response H, at 29-30.

<sup>15</sup> Response C, at 29.

<sup>16</sup> Response E, at 29.

<sup>17</sup> Response F, at 29.

<sup>18</sup> Response D, at 29.

<sup>19</sup> Responses F and G, at 29.

<sup>20</sup> Response H, at 29-30.

<sup>21</sup> U.S. General Accounting Office, *Federal Firearms Licensee Data: ATF’s Compliance with Statutory Restrictions* (September 1996) (GAO/GGD-96-174).

subsystem of the Firearms Tracing System.<sup>22</sup> Although Jones indicated that the Suspect Gun Program has been used since 1992,<sup>23</sup> the Suspect Gun Database was neither one of the three subsystems of the Firearms Tracing System nor one of the other thirteen systems that ATF listed for GAO in 1996.<sup>24</sup>

Unlike the Firearms Tracing System, which ATF told GAO “[c]ollects and tracks data on traces of firearms suspected of being involved in a crime to assist law enforcement agencies in identifying suspects for regulatory and criminal enforcement,”<sup>25</sup> detail on retail firearms purchasers is not added to the Suspect Gun Database because their firearm has been the subject of a trace, but rather to assist ATF with possible traces in the future. In this sense, it is like all three subsystems of the Firearms Tracing System listed in the GAO report, which also collect data prior to a trace. However, those three subsystems all have largely objective and verifiable criteria for the addition of firearms, such as a firearm being stolen or being part of a multiple sale.<sup>26</sup> The other subsystems are also fully inclusive—all firearms which fit those criteria are added to the database. In contrast, ATF clearly does not add all firearms connected with a criminal investigation to the Suspect Gun Database, nor even a subset of certain firearms most closely connected with a criminal investigation. With no clear criteria for adding a firearm connected to an investigation to the Suspect Gun Database, the decision appears to be largely up to the discretion of an individual ATF agent. As discussed above, an ATF agent might be able to add a firearm to the Suspect Gun Database based solely on a single firearm purchase that is allegedly suspect. Unlike stolen firearms or multiple sales, this is precisely the sort of broad discretion that requires rigorous oversight.

In examining the Multiple Sales System and a second system, the Out of Business Records system, GAO assessed whether the systems complied with all data restrictions, including ATF’s own. With regard to ATF’s own restrictions, GAO’s report noted of the Multiple Sales System:

[R]eports entered into ATF’s computerized Multiple Sales System are retrievable by firearm purchaser name. However, as part of its November 1995 policy, ATF adopted a requirement to purge firearms purchaser data in the system that were over 2 years old if they had not been linked to

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<sup>22</sup> *Id.* at 7-8. GAO examined the Firearms Tracing System as one of five systems that ATF indicated contain retail firearms purchaser data. ATF represented that the Multiple Sales Subsystem was the only of three subsystems in the Firearms Tracing System that contained such data.

<sup>23</sup> Response B, at 28.

<sup>24</sup> *Id.* at 33-35.

<sup>25</sup> *Id.* at 33.

<sup>26</sup> *Id.* at 33-34. According to the GAO report, the Federal Firearms Licensees Theft Subsystem collects and tracks data on firearms stolen, or missing in inventory, from federal firearms licensees’ place of business for regulatory and criminal enforcement. The Interstate Theft Subsystem collects and tracks, for criminal enforcement purposes, information on thefts of firearms during interstate shipment between the manufacturer and the wholesaler, the wholesaler and the retailer, or retailers. The Multiple Sales Subsystem collects and tracks data on purchasers of two or more pistols and/or revolvers at one time or during any 5 consecutive business days for regulatory and criminal enforcement.

firearms traces. According to the Chief of the Firearms Enforcement Division, the primary reason for purging purchaser data over 2 years old is to delete data that may not be useful because of its age. In addition, the head of the Tracing Center said that ATF is sensitive for privacy reasons about retaining firearms purchaser data that may no longer be useful.<sup>27</sup>

Yet GAO found that ATF was not implementing the system consistently with its design because “ATF had not fully implemented its 2-year purge requirement . . . .”<sup>28</sup> Specifically:

Our test of the Multiple Sales System at the Tracing Center showed that ATF’s requirement to purge firearms purchaser data over 2 years old if not linked to firearms traces had not been fully implemented. At our request, a Tracing Center computer specialist queried the system for multiple sale records with sales dates over 2 years old. The results of this query identified 2,291 records (of the over 86,000 that had been entered) that contained purchaser data for sales over 2 years old. The computer specialist indicated that he thought multiple sale purchaser data over 2 years old had been purged during the last upgrade of the Firearms Tracing System. In July 1996, the Chief of the Firearms Enforcement Division provided us with documentation stating that the affected purchaser data had been purged from the Multiple Sales System and that future purges would be performed weekly. We did not verify whether the affected purchaser data were purged and whether weekly purges were being done.<sup>29</sup>

Given the privacy issues ATF referenced with regard to the Multiple Sales System, ATF’s practices with that database and any new databases should be revisited to ensure that the data it keeps is consistent with this interest.

GAO’s 1996 report also examined whether the Multiple Sales System and the Out of Business Records system complied with data restrictions in appropriations or statute. GAO noted that both databases compile information that Federal firearms licensees were already required to provide to ATF pursuant to regulations in existence at the time Congress passed the first appropriations rider in 1979 and the Firearms Owners’ Protection Act of 1986.<sup>30</sup> Therefore, it found that neither system was subject to 18 U.S.C. 926(a), and that the appropriations rider also was not explicit enough to suggest that Congress intended to overturn existing practice.<sup>31</sup> GAO’s legal analysis suggested that the rider was more restrictive than the Firearms Owners’ Protection Act, yet concluded:

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<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 13 (footnote omitted).

<sup>30</sup> *Id.* at 9-10, 12-13.

<sup>31</sup> *Id.* at 60-64.

[T]o the extent that the centralization or consolidation of records is incident to carrying out a specific ATF responsibility and does not entail the aggregation of data on firearms transactions in a manner that would go beyond the purposes of the Gun Control Act of 1968, as amended, we do not believe that the rider would be violated.<sup>32</sup>

Under the Gun Control Act, ATF does have responsibility for various law enforcement functions, such as the tracing of firearms.<sup>33</sup> However, given the ambiguity in ATF's use of the Suspect Gun Database for tracing firearms, it and any other new database should be examined for compliance with ATF's data restrictions.

Therefore, we request that you update your 1996 report by re-examining all current systems and subsystems maintained by ATF which contain retail firearms purchaser data. In addition, please answer the following questions:

- 1) Does the Suspect Gun Database comply with the appropriations rider and the Firearms Owners' Protection Act of 1986?
- 2) Do all other ATF databases comply with the appropriations rider and the Firearms Owners' Protection Act of 1986?
- 3) Did ATF in fact ultimately purge all data over 2 years old from the Multiple Sales System in 1996? Have they conducted weekly purges in the Multiple Sales System since that time?
- 4) Does 18 U.S.C. § 923(g)(7) govern the addition of data to the Suspect Gun Database? Are there any other criteria or legal standards which govern the addition of data to the Suspect Gun Database?
- 5) What criteria and legal standards govern the addition of data to other ATF databases?
- 6) What criteria and legal standards govern the retention of data in the Suspect Gun Database and other ATF databases? Should ATF make a practice of removing firearms data from the Suspect Gun Database or any other database after a period of time, whether out of privacy concerns or legal obligations?
- 7) In practice, how periodically does ATF review the Suspect Gun Database to ensure that investigations are still active?

Thank you for your assistance with this important matter. Please contact Tristan Leavitt of the Senate Judiciary Committee staff at (202) 224-7703 or Jennifer Barblan of

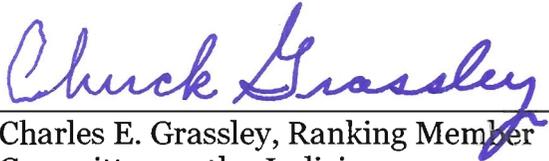
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<sup>32</sup> *Id* at 58.

<sup>33</sup> 18 U.S.C. §§ 923(g)(1)(B)(iii), 923(g)(7) (2013).

the Oversight and Government Reform Committee staff at (202) 225-5074 with any questions about this request.

Sincerely,



Charles E. Grassley, Ranking Member  
Committee on the Judiciary  
U.S. Senate



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives

cc: The Honorable Patrick Leahy, Chairman  
Committee on the Judiciary  
U.S. Senate

The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform  
U.S. House of Representatives