

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearm, & Explosives (ATF)

Topic: Expanding the use of demand letters to obtain crucial data about illegal gun trafficking

Date: November 2020

Recommendation: Expand the ATF’s demand letter program to increase data collection regarding indicators of illegal gun trafficking.

I. Summary

Description of recommended executive action

Under current law, the attorney general (and by delegation the Bureau of Alcohol, Tobacco, Firearms and Explosives) is authorized to issue letters requiring licensed gun dealers, or federal firearms licensees (FFLs), to “submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter [of the Code],” a request known as a “demand letter.” The agency describes its long-standing demand letter program as one that “collects FFL data vital to the success of the firearms tracing program.”¹ The program started in 2000. The ATF currently has three open demand letters requiring some gun dealers to provide information related to gun sales that are relevant to identifying potential illegal gun trafficking patterns. The next administration should expand these demand letters to include the following information requests.

- Expand demand letter 2 to cover all dealers with 10 or more firearms with a “time to crime” of 3 years or less traced to them within the past year, so that used guns (which are difficult to trace) won’t be as easily available from pawnbrokers and FFLs linked to gun trafficking. Demand letter 2 currently covers dealers with 25 or more firearms with a “time to crime” of 3 years or less traced to them within the past year.
- Expand demand letter 3, which is intended to address the trafficking of assault weapons to organized crime in Mexico and Central America, to cover dealers in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states in which such guns often originate. The current demand letter only covers dealers in Arizona, California, New Mexico and Texas.
- Issue a new proposed demand letter 4 to require all dealers covered by demand letters 1, 2, and 3 to provide records of all default sales to the ATF. Default sales occur when an FFL has initiated a background check for the sale of a firearm, has not been notified within three business days that the sale would violate federal or state law, and proceeds with the sale by “default.”

Overview of process and time to enactment

¹ Bureau of Alcohol, Tobacco, Firearms, and Explosives, “National Tracing Center,” accessed October 21, 2020, <https://www.atf.gov/firearms/national-tracing-center>.

To implement these proposed actions, the ATF will have to draft a proposal of each change and submit a notice of each proposed change for comment.² Because demand letters are considered a “collection of information” under the Paperwork Reduction Act of 1995, the agency must provide a 60-day notice of the proposed change.³ The notice must solicit comments to (1) evaluate whether the proposed collection is necessary for the agency functions, (2) evaluate the accuracy of the agency’s estimated burden from the collection, (3) enhance the quality, utility, and clarity of the information collected, and (4) minimize the burden of the collection for those required to respond. After the comment period, the agency will have to consider the comments to the extent necessary to avoid a court finding the final change “arbitrary and capricious,” as discussed more below in Part IV. The decision to accept or reject relevant comments must be included in the agency’s final notice.

Under 44 U.S.C. § 3506(c)(1), the ATF must also use its established process to (1) evaluate the need for the collection of information, (2) create a functional description of the information to be collected, (3) make a plan for the collection, (4) estimate, specifically and objectively, the burden on the agency, (5) test the collection through a pilot program, if appropriate, and (6) plan for the efficient and effective management and use of the information. The information collection must (1) be inventoried and display a control number, and, if appropriate, an expiration date; and (2) inform the person who receives the letter of the reasons why, the way the information will be used, the estimated burden of collection, whether the response is voluntary or mandatory, and the requirement for a control number before the recipient must respond.⁴ Prior to implementing the program, the ATF will also have to certify to the director of the Office of Management and Budget that the program complies with the requirements in 44 U.S.C. § 3506(c)(3).

II. Current state

The ATF is authorized to issue demand letters under 18 U.S.C. § 923(g)(5). The statute authorizes the attorney general to issue letters requiring FFLs to “submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter [of the Code].” The attorney general delegated this power to the ATF, a section of the Department of Justice. The ATF currently issues the letters in three situations.⁵ Each of these has been upheld by multiple federal appellate courts.

- Demand letter 1 is issued to FFLs that fail to respond to a trace request within 24 hours. FFLs that receive demand letter 1 must send their acquisition and disposition (A&D) records for the previous three years to the ATF, and must continue to send records on a

² For example, the notice for the latest change is located at: Bureau of Alcohol, Tobacco, Firearms, and Explosives, “Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Report of Multiple Sale or Other Disposition of Certain Rifles-ATF Form 3310.12,” September 12, 2017,

<https://www.federalregister.gov/documents/2017/09/12/2017-19335/agency-information-collection-activities-proposed-ecollection-ecomments-requested-revision-of-a>.

³ 44 U.S.C. § 3506(c)(2).

⁴ *Id.*

⁵ ATF provides information on the demand letter program and NTC. See Bureau of Alcohol, Tobacco, Firearms, and Explosives, “National Tracing Center,” accessed October 21, 2020, <https://www.atf.gov/firearms/national-tracing-center>.

monthly basis until told otherwise. This information allows the ATF to continue to trace firearms from the FFLs if they remain unresponsive to trace requests.

- Demand letter 2 is issued to FFLs that had 25 or more firearms with a “time to crime” of 3 years or less traced to them in the previous calendar year. “Time to crime” is measured from the sale of a firearm to the time the gun is used in a crime. A short time to crime is considered an indicator of gun trafficking, due to the increased likelihood that a firearm was purchased from the FFL with the intent to use it for criminal activity.

An FFL that receives demand letter 2 must submit information regarding “used guns” acquired in the previous year, such as the manufacturer/importer, model, caliber or gauge, serial number, and acquisition date. This information must be submitted quarterly, until the FFL is informed otherwise. Because trace requests only identify the FFL that initially received the firearm from the manufacturer, used guns normally cannot be connected to FFLs that obtain the gun after its original sale. Information on used guns acquired by the FFL allows the ATF to trace those firearms to the dealer, if they are later used in a crime. The information is considered especially relevant for FFLs with a higher likelihood of sales to gun traffickers, as it is more likely used guns coming from those dealers will be used in crime.

- Demand letter 3 is sent monthly to FFLs that are licensed dealers or pawnbrokers in Arizona, California, New Mexico, and Texas. These FFLs must report all transactions in which an unlicensed person acquired, at the same time or within five consecutive business days, two or more semi-automatic rifles larger than .22 caliber with the ability to accept a detachable magazine. The purpose of demand letter 3 is to combat the trafficking of guns across the border into Mexico. From 2008 through 2010—prior to the implementation of demand letter 3—4,568 of the 5,799 (nearly 80%) rifles greater than .22 caliber found in Mexico were traced to retailers in Arizona, California, New Mexico, and Texas.⁶ From 2004 to 2008, 70% of the firearms seized in Mexico and traced came from Texas, California, and Arizona. The sale of multiple firearms in a short time period is considered an indicator of firearms trafficking. The ATF is able to combat this in relation to handguns because FFLs must report all sales of two or more handguns to the ATF. However, because these reports are not required for long guns, demand letter 3 helps the ATF track the sale of the types of guns used more frequently in criminal activity in Mexico.

Demand letters 1 and 2 were initiated in 2000.⁷ The Obama administration initiated demand letter 3 in 2011 to combat the rising issue of gun trafficking across the southern border.⁸ This

⁶ See *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013).

⁷ Office of the Inspector General, “Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives,” US Department of Justice, July 2004, <https://oig.justice.gov/reports/ATF/e0405/background.html>.

⁸ Bureau of Alcohol, Tobacco, Firearms, and Explosives, “Reporting Multiple Firearms Sales,” accessed October 21, 2020, <https://www.atf.gov/firearms/reporting-multiple-firearms-sales>; Corbin Hiar, “Justice Department Enacts Rule For Reporting Of Rifle Sales Along The Southwest Border,” Center for Public Integrity, updated May 19,

new demand letter was challenged in multiple federal courts, all of which upheld the program, as discussed in detail below. In 2017, the Trump administration amended demand letter 2 to raise the number of “time to crime” gun traces required to trigger the additional reporting requirements to from 15 to 25. As a result, the number of FFLs that are subject to this requirement decreased. The Trump administration has made no other changes to the program.

III. Proposed action

The next administration should expand these demand letters to include additional information requests that would bolster the ATF’s efforts to effectively investigate and prosecute illegal gun trafficking in the following ways:

- expand existing demand letter 2 to cover all dealers with 10 or more firearms with a “time to crime” of 3 years or less traced to them within the past year, so that used guns (which are difficult to trace) do not continue to be easily available from pawnbrokers and FFLs linked to gun trafficking. Demand letter 2 currently covers dealers with 25 or more firearms with a “time to crime” of 3 years or less traced to them within the past year.
- expand existing demand letter 3, which is intended to address the trafficking of assault weapons to organized crime in Mexico and Central America, to cover dealers in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states in which such guns often originate. The current demand letter only covers dealers in Arizona, California, New Mexico, and Texas.
- issue a new proposed demand letter 4 to require all dealers covered by demand letters 1, 2, and 3 to provide records of all default sales to the ATF. Default sales occur when an FFL has initiated a background check for the sale of a firearm, has not been notified within three business days that the sale would violate federal or state law, and proceeds with the sale by “default.”

IV. Legal justification

Relevant legal considerations regarding the scope of the ATF’s demand letter authority

Each of the current demand letters has been reviewed and upheld by multiple federal circuit courts. Each case focused on three main considerations in evaluating the legality of the ATF’s action in issuing a demand letter: (1) whether the ATF has the statutory power to issue the demand letter in question, (2) whether the ATF’s action was arbitrary and capricious, and (3) whether the demand letter violates federal laws against consolidating and centralizing information on the sale of firearms. While each circuit that evaluated the existing demand letters found in favor of the ATF and upheld the use of these demand letters, the opinions provide some guidance on the potential limits of the agency’s power.⁹ In each situation, the court

2014, <https://publicintegrity.org/national-security/justice-department-enacts-rule-for-reporting-of-rifle-sales-along-the-southwest-border/>.

⁹ See, e.g., *RSM, Inc. v. Buckles*, 254 F.3d 61 (4th Cir. 2001) (upholding the ATF’s use of Demand Letter 1); *Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281 (4th Cir. 2004) (upholding the ATF’s use of Demand Letter 2); *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043 (9th Cir. 2007) (same); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711 (5th Cir. 2013) (upholding the ATF’s use of Demand Letter 3); *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200 (D.C. Cir. 2013) (same).

evaluated the ATF's action under the test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which asks (1) if Congress spoke directly on the issue in question, and (2) if not, whether the agency's interpretation was "based on a permissible construction of the statute." In each case the court determined that the statute was clear and unambiguous on its face, and therefore the inquiry has consistently ended at step one.

1. The ATF's power to issue demand letters

The ATF has a fairly broad power to issue demand letters that request from FFLs any records required to be kept under Chapter 44 of Title 18 of the United States Code. This power comes from 18 U.S.C. § 923(g)(5)(A), which reads: "Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify." The record information required by the chapter is broad, and specific records required for the proposed letters are addressed below.

However, the most significant record requirement states that an FFL must "maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe."¹⁰ The FFL must record firearms transactions with non-FFLs on Form 4473, including the "name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm." FFLs are required to keep these forms in "alphabetical (by name of purchaser), chronological (by date of disposition), or numerical (by transaction serial number) order."¹¹

The FFL must also create an acquisitions and dispositions (A&D) record that includes the "date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge."¹² It must also include "the date of the sale . . . the name and address of the [customer] . . . or the firearms transaction record, Form 4473, serial number if the licensed dealer transferring the firearm serially numbers the Forms 4473 and files them numerically."¹³

Courts have taken a fairly broad view of the ATF's statutory authority to request information from these records. For demand letter 1, courts have held that it is permissible for the ATF to request the entire collection of A&D records from the FFL when they are directly tied to the

¹⁰ 18 U.S.C. § 923(g)(1)(A).

¹¹ 27 C.F.R. § 478.124.

¹² 27 CFR § 478.125(e).

¹³ *Id.*

agency's statutory duties.¹⁴ For demand letter 3, courts have held that because the letter only requires submission of record information—namely information about the buyer and the firearm required on Form 4473—the ATF may place a condition precedent to reporting that the sale be of a firearm with a specific characteristics not required to be kept in the FFL's records—such as the caliber and ability to accept a detachable magazine.¹⁵

Challenges to the demand letter program have consistently claimed that the program is limited by other portions of § 923. First, opponents of the program often cite § 923(g)(1)(A)–(B), which limits the ATF's power to inspect an FFL's premises to instances in which it has a warrant, and limits the ATF's power to inspect the inventory and records without a warrant or probable cause to a "bona fide criminal investigation."¹⁶ They argue that because § 923(g)(1) states that FFLs shall not be required to submit information to the attorney general "except as expressly required by this section," that the limits of § 923(g)(1)(A)–(B) also limit the ATF's power to require FFLs to submit information and records.¹⁷ However, the courts have distinguished this requirement as applying only to physical entry onto the FFL's premises, while § 923(g)(5)(A) does not involve such entry.¹⁸ The courts have interpreted § 923(g)(5)(A) as an independent authorization to collect records, and have held that the criminal investigation requirement does not limit that authority.

Second, challengers similarly argue that § 923(g)(7)'s limit of trace requests to "bona fide criminal investigations" prevents the ATF from issuing demand letters outside of such investigations.¹⁹ Legal challengers have argued that demand letters that request the same information as can be obtained from a trace request, allow the ATF to circumvent the criminal investigation requirements for trace requests.²⁰ However, courts have consistently held that § 923(g)(7) has no bearing on the ATF's demand letter power and is simply limited to trace requests.²¹

Third, challengers of the demand letter power often cite to the language of the legislative history of the statute, stating that Congress intended to limit the demand letter power to: (1) FFLs in violation of the law, and (2) criminal investigations.²² Each court evaluating the issue has declined to consider the legislative history, stating that when a statute is clear on its face, the court need not look into the intent of Congress.²³

¹⁴ See *RSM*, 254 F.3d at 68.

¹⁵ See *Nat'l Shooting Sports*, 716 F.3d at 208.

¹⁶ See *Nat'l Shooting Sports*, 716 F.3d at 210; *Blaustein*, 365 F.3d at 287.

¹⁷ *Nat'l Shooting Sports*, 716 F.3d at 210.

¹⁸ *Id.*

¹⁹ See *Nat'l Shooting Sports*, 716 F.3d at 210–11; *J & G Sales*, 473 F.3d at 1049–50.

²⁰ *Nat'l Shooting Sports*, 716 F.3d at 210–11.

²¹ See *id.*; *J & G Sales*, 473 F.3d at 1049–50; *RSM*, 254 F. 3d at 66.

²² See *Nat'l Shooting Sports*, 716 F.3d at 211–12; *J & G Sales*, 473 F.3d at 1050.

²³ See, e.g., *Nat'l Shooting Sports*, 716 F.3d at 211–12; *J & G Sales*, 473 F.3d at 1050.

Lastly, the final statutory challenge to the demand letter power is specific to demand letter 3. Challengers have cited to § 923(g)(3)(A), which requires an FFL to “prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling [sic] two or more.” Because Congress specifically requires the reporting of multiple sales of handguns, challengers have argued that the law intentionally excludes the power to require FFLs to provide reports of multiple long guns under the theory of *expressio unius est exclusio alterius*.²⁴ The courts have consistently held that this interpretation disregards the more plausible interpretation that Congress’ decision to impose specific reporting requirements on FFLs did not preclude further requirements, but rather left them up to the agency through § 923(g)(5)(A).²⁵

2. Arbitrary and capricious consideration

The Administrative Procedure Act (APA) applies to actions by the ATF. Under the APA, a court will “set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁶ To survive review, an agency must “articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made” after analyzing relevant data.²⁷ The court requires support for the agency’s decisions, but it is a fairly deferential standard under which a court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”²⁸ When supporting its decision, the agency need only demonstrate that its action “stems from reasoned decision-making” in order to pass muster before the court.²⁹

The question is fact specific to each demand letter; however, the courts are highly deferential to agency decisions. For example, the demand letter considered in *J&G Sales* was sent to a subset of FFLs that had a high volume of gun traces with short time-to-crime timeframes. The demand letter explained that a large number of traces of new crime guns may also mean that the FFL is selling a high number of secondhand guns that had been used in crime. J&G argued that this extrapolation was improper, and constituted arbitrary and capricious action. The court rejected this argument and found it to be a reasonable deduction by the ATF.³⁰

The Plaintiff in *National Shooting Sports Foundation* similarly complained that the ATF acted arbitrarily in issuing demand letter 3 to certain FFLs in Arizona, California, New Mexico, and

²⁴ This theory is a common principle of statutory interpretation stating the explicit mention of one or more things of a class in a statute is evidence that other things in that class are intentionally excluded from coverage by the statute. See *Nat’l Shooting Sports*, 716 F.3d at 211; *10 Ring Precision*, 722 F.3d at 720–21.

²⁵ See *Nat’l Shooting Sports*, 716 F.3d at 211; *10 Ring Precision*, 722 F.3d at 720–21.

²⁶ 5 U.S.C. § 706(2)(A).

²⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁸ *Id.*

²⁹ *J&G Sales*, 473 F.3d at 1052.

³⁰ *Id.* at 1046, 1052–53.

Texas. The court in that case rejected the argument that the ATF drew an improper line in determining which FFLs to target, based on the “wide discretion” an agency has in making such decisions. It found, based on evidence the ATF presented, that the majority of firearms seized in Mexico came from US states along the Mexico-US border. Therefore, targeting FFLs in these states bore a rational relationship to its underlying regulatory concerns. Though the ATF “could have narrowed the scope of the demand letter,” its failure to do so did not qualify as arbitrary and capricious action.³¹

The other consideration in the arbitrary and capricious evaluation is whether the agency considered “reasonably obvious alternatives.” This is a limited consideration that requires the agency to consider only “significant and viable” and “obvious” alternatives.³² The court asks whether comments submitted “raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency.” Such comments must provide the factual or policy basis behind the commenter’s reasoning to be considered viable. If such comments exist, to survive the court’s review, the agency must explain its reason for not adopting the proposed strategy.³³ Whether this consideration is relevant to the ATF’s proposed demand letters will depend on the comments received by the agency for each proposed action.

3. Centralized federal database of firearms transactions

There are two laws prohibiting consolidation of FFL record information. The first is 18 U.S.C. § 926(a), which prohibits the ATF from promulgating a “rule or regulation” that requires FFL record information be “recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof” or that establishes a “system of registration of firearms, firearms owners, or firearms transactions or dispositions.” In *National Shooting Sports Foundation*, the DC Circuit determined that this section does not apply because “section 926(b) explains that ‘rule or regulation’ refers to rules created after ‘ninety days public notice’ while giving ‘interested parties opportunity for hearing.’”³⁴ The court concluded that a demand letter is therefore not a “rule or regulation” as considered by the statute. In contrast, the 5th Circuit has concluded that while a demand letter is not a “rule or regulation,” Congress’ intent would be lost if limitless demand letters could be used to circumvent the restrictions set forth in the statute.³⁵ However, that court determined that the demand letter in that case did not meet the level of creating a national registry, because it sought “a narrow subset of information relating to a specific set of transactions” from a “specific set of FFLs.”³⁶

³¹ 716 F.3d at 215, 217.

³² *Id.* at 215.

³³ *Id.*

³⁴ 716 F.3d at 212 (citing 18 U.S.C. §926(b)).

³⁵ See *10 Ring Precision*, 722 F.3d at 722.

³⁶ *Id.*

The other relevant concern arises from the Consolidated and Continuing Appropriations Act of 2012 (the 2012 Act), which “prohibits ATF from using the allocated funds ‘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 [FFLs].’”³⁷ The courts have interpreted “consolidating and centralizing” as contemplating a “large-scale enterprise relating to a substantial amount of information.”³⁸ The 5th Circuit applied the same language as it did for § 926, stating that the act does not prohibit letters that seek “a narrow subset of information relating to a specific set of transactions” from a “specific set of FFLs.”³⁹

From these cases, it is clear that the legal analysis of the permissibility of certain demand letters is the same, regardless of whether § 926 is applied. Either way, the relevant considerations are: (1) the number of FFLs from which information is sought, and (2) the amount of information sought in the letter. In analyzing the number of FFLs, it appears that the court will focus mainly on the number of FFLs information is sought from. Courts tend to cite to the percentage of FFLs when analyzing whether the letter creates a national registry.⁴⁰ However, how the class of FFLs is defined will still be relevant when the court considers the justification for the action under the APA.

Application of legal questions to proposed demand letters

1. Expansion of demand letter 2

Currently, an FFL that receives demand letter 2 must submit information regarding “used guns” acquired in the previous year, such as the manufacturer/importer, model, caliber or gauge, serial number, and acquisition date. The demand letter is only sent to gun dealers with 25 or more traces in a year with a “time to crime” of 3 years or less. The proposed change would allow the ATF to send these letters to all FFLs with 10 or more firearms with a “time to crime” of 3 years or less traced to them within the past year.

The ATF has the power to issue the proposed demand letter. The ATF may require FFLs to submit any record information required under the United States Code. The statute itself does not place a limit on the number of FFLs from which the information can be sought. The proposed letter simply asks for the manufacturer and/or importer, model, caliber or gauge, and serial number of secondhand firearms acquired by the FFL, all of which is information the FFLs are required to keep. The 4th Circuit already upheld the proposed scheme in *Blaustein*, determining that sending the letter to all FFLs with 10 or more guns traced to them was within

³⁷ 10 Ring Precision, 722 F.3d at 722 (citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011)).

³⁸ *Id.* (citing *Blaustein*, 365 F.3d at 289).

³⁹ *Id.*; see also Nat’l Shooting Sports Found., 716 F.3d at 213–14 (concluding that a demand letter seeking a limited amount of information from a small percentage of FFLs does not “come close to creating a ‘national firearms registry’”).

⁴⁰ See *J & G Sales*, 473 F.3d at 1046 (0.6% of nationwide FFLs); *RSM*, 254 F.3d at 63 (0.1% of nationwide FFLs); Nat’l Shooting Sports Found., 716 F.3d at 214.

the ATF's authority under 18 U.S.C. § 923(g)(5)(A).⁴¹ There is every reason to believe that this proposal is within the agency's authority.

Furthermore, this expansion would not be arbitrary and capricious, as the ATF likely has a factual basis for its decision to extend demand letter 2. If the first purchaser of a firearm sells or otherwise transfers it, it becomes "generally impossible" for the ATF to trace, because unlicensed sellers are not required to keep any records regarding transfers.⁴² The ATF's only option is to conduct an "investigative trace," which involves lengthy interviews and the use of informants. Because these traces require extensive resources and still rarely succeed, the ATF rarely undertakes them. As a result, even though FFLs are required to maintain records regarding acquisition of secondhand firearms, the ATF fails to make these connections, because there is "no link" between the first transaction involving a firearm and any subsequent transactions.⁴³ By focusing only on those FFLs with evidence linking them to trafficking, the proposed expansion of this demand letter is narrowly focused enough that it is unlikely to be vulnerable for failing to choose a better alternative.

Finally, the proposed demand letter 2 likely complies with the restrictions on federal firearms databases. As stated above, the two major considerations are: (1) the number of FFLs records are sought from, and (2) the amount of information being sought. The original demand letter 2 program was sent to those FFLs with 10 or more trace requests, the same class of FFLs proposed here. This scheme has already been upheld in the past.⁴⁴ While the exact number of FFLs the letter will be sent to is likely different than it was in 2004, when *Blaustein* was decided, there is little reason to believe the number is so significant that it will no longer be acceptable. Additionally, there is no additional information being sought compared to the existing demand letter.

2. Expansion of demand letter 3

Currently, demand letter 3 requires certain FFLs in Arizona, California, New Mexico, and Texas to submit records of multiple sales of semi-automatic rifles greater than .22 caliber and with the capability to accept a detachable magazine. The proposed change would extend this requirement to FFLs in Florida, Oklahoma, Nevada, Colorado, Washington, and Illinois, states that have been identified as being primary suppliers of crime guns trafficked to Mexico. The ATF has the power to issue the proposed expansion to demand letter 3. The information sought would expand upon the existing letter by including additional FFLs in states with demonstrated links to international gun trafficking, but would not alter the type of information required. Because there is no change in the information being sought, the expansion of the demand letter to more FFLs will not move it outside the ATF's statutory power.

⁴¹ 365 F.3d at 287.

⁴² *J&G Sales* at 1046 (citing Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, Commerce in Firearms in the United States 26 (2000)).

⁴³ *Id.*

⁴⁴ See, e.g., *Blaustein*, 365 F.3d at 287.

To avoid a successful challenge based on an argument that this expansion is arbitrary and capricious, the ATF will need to provide a rational connection to gun trafficking by the FFLs in the additional states. The arbitrary and capricious review in the *National Shooting Sports Foundation* focused on the total firearms recovered in Mexico, and evaluated the decision of the states chosen. Because of this, it is important to articulate a factual justification for the extension into any additional states. This basis can clearly be established, as a 2016 GAO report identified these states, in addition to the four already covered by demand letter 3, as being the top source states for crime guns with a US origin recovered in Mexico.⁴⁵

Finally, this expansion of demand letter 3 would likely not run afoul of the centralized database restrictions. The proposal increases the number of FFLs receiving the letter, but the number is limited to six additional states. This expansion still seeks “a narrow subset of information relating to a specific set of transactions” from a “specific set of FFLs.”⁴⁶ Under this language, there is a good defense for the expansion of the demand letter: the expansion is limited to a set of FFLs specifically linked to higher international gun trafficking. However, the expansion from 4 to 10 states will significantly increase the percentage of FFLs receiving the demand letter.⁴⁷ Because the courts have not provided much insight into how many FFLs would constitute too many, it is difficult to predict how the courts would react to the increase; however, there is a good faith basis to pursue this expansion.

3. New demand letter 4: records of “default proceed” sales

The proposed demand letter 4 would require all FFLs covered by demand letters 1, 2, and 3 to also submit records of all “default proceed” sales. The ATF has the power to require submission of records on default sales, so long as the information provided does not go beyond limited information about the buyer and the firearm, similar to what is required for demand letters 2 and 3. The only additional information required under the proposed letter is the default status of the sale. Form 4473, the record form FFLs are required to keep, requires the FFL to mark the response to a background check request, including if no response was provided within three

⁴⁵ Government Accountability Office, “U.S. Efforts to Combat Firearms Trafficking to Mexico Have Improved, but Some Collaboration Challenges Remain,” January 2016, figure 5, <https://www.gao.gov/assets/680/674570.pdf>.

⁴⁶ 10 *Ring Precision*, 722 F.3d at 722.

⁴⁷ The number of licensed dealers and pawnbrokers in each state as of July 2020 can be found at: Bureau Of Alcohol, Tobacco, Firearms and Explosives, “Report of Active Firearms Licenses - License Type by State Statistics,” July 10, 2020, <https://www.atf.gov/firearms/docs/undefined/ffltypebystate07-10-2020pdf/download>. According to the chart, there are 9,683 licensed dealers and pawnbrokers—labeled as 01 and 02 in the chart—in the four current states. This accounts for about 7.5% of the total FFLs in the country, about the same as when the court reviewed the program in 2013. The additional states would add 8,751 licensed dealers and pawnbrokers, so the 10 states in total make up about 14.3% of total FFLs.

business days.⁴⁸ Therefore, information on the default nature of a sale is a required record, and requesting it from a subset of FFLs is not outside of the ATF's authority under § 923.

The ATF can probably justify its decision adequately, and pass the arbitrary and capricious test before a court. Default sales allow purchasers of firearms to get around the background check requirement. This means that people who would be disqualified by a background check can nonetheless obtain firearms. Preventing individuals who are not legally allowed to obtain firearms from obtaining them is clearly an appropriate goal for the ATF, and this proposed demand letter would further the ATF's ability to do so. However, the ATF does not know how often this occurs, or how much of an issue this is. There is a clear and rational connection between the desired goal of finding the prevalence of default sales and the proposed method of achieving that goal. Additionally, the proposal limits the recipients to those that have already caught the attention of the ATF through the other demand letters. These FFLs have already failed to provide requested information in the past or have a heightened potential for gun trafficking. They provide a stronger rationale for mapping sales to individuals who should be disqualified from purchasing firearms. Therefore, the agency has an articulable justification for its action that should be given deference.

The proposed demand letter may be vulnerable with respect to the restrictions on creation of a centralized database, depending on how much overlap there is among FFLs subject to the existing three demand letters. It requests a limited amount of information on a specific subset of sales; however, it may not be considered narrowly tailored to a small subset of FFLs. Even if demand letters 1, 2, and 3 are all narrowly tailored, if there is little overlap between the three, demand letter 4 would apply to a significantly larger group. Overall, the demand letter program would be receiving information from the same number of FFLs. However, in the past, courts have analyzed this issue based on the specific demand letter in question, rather than looking at the program as a whole, and may consider the combined group too large. Based on the existing precedent, it is difficult to predict how the court will approach this question.

⁴⁸ See Bureau of Alcohol, Tobacco, Firearms and Explosives, "Firearms Transaction Record [Form 4473]," accessed October 21, 2020, question 19.d, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.