

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)
Topic: Extending ATF's Retention and Use of Multiple-Sales Records
Date: November 2020

Recommendation: Extend the retention of records of multiple sales of firearms so that they are deleted after ten years, instead of two years.

I. Summary

Description of recommended executive action

A federally licensed firearms dealer is required to report to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) when the same individual purchased two or more handguns within five consecutive business days. The ATF also receives records of a more limited group of multiple long guns sales. These records are an important source of information that the ATF uses when it traces guns recovered after use in crime. Currently, the ATF deletes these records after two years. The ATF should extend the retention of these records so that they are not deleted until ten years have passed, to align with the average time before a gun is recovered after use in a crime.¹ As described below, retaining these records will help ensure the ATF has the tools it needs to effectively investigate firearms trafficking and other gun crime through ATF's unique tracing authorities.

Overview of process and time to enactment

The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.² Under that act, the director must submit advance notice of the proposed policy change to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget (OMB) for an evaluation of the proposal's effect on individual's privacy and other rights.³ After incorporating any OMB comments into the proposal,⁴ the ATF may then publish a SORN in the Federal Register, providing the purpose and description of the internal

¹ See e.g., "Firearms Trace Data," accessed October 14, 2020, <https://www.atf.gov/resource-center/firearms-trace-data-2018> (reporting on national averages for several years, which in 2014 included the highest average of 10.88 years).

² Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-108, Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act 15-17 (2017) [hereinafter "OMB Reporting Under the Privacy Act"].

³ 5 U.S.C. § 552a(r) (2018).

⁴ OMB Reporting Under the Privacy Act, *supra* note 28, at 14.

policy change,⁵ and the policy could then be implemented.⁶ It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties is the entity best positioned to make that decision.

II. Current state

The ATF is charged with investigating crimes involving the illegal possession, use, transfer, or trafficking of firearms, among other things.⁷ In pursuit of this objective, the ATF assists international, federal, state and local law enforcement with requests to trace firearms used in the commission of a crime.⁸ As described below, the ATF's ability to trace firearms is dependent on the 25 firearms-related databases that it maintains.⁹ This memo concerns one of them: the Multiple-Sales (MS) database.

Legislative landscape

Prompted by the assassinations of President John F. Kennedy, Attorney General Robert F. Kennedy, and Dr. Martin Luther King, Jr., President Lyndon B. Johnson signed the Gun Control Act of 1968 (GCA) into law.¹⁰ The law was considered the most significant piece of gun control legislation passed in the United States at the time, imposing stricter licensing and regulation of the firearms industry.¹¹ Specifically, the law banned interstate shipments of firearms and ammunition to private individuals, sales to certain individuals including minors, and importantly, strengthened the licensing and record-keeping requirements for FFLs, who were previously subject to limited agency scrutiny.¹² FFLs are federally licensed retailers that import, manufacture, or sell firearms or ammunition.¹³

In 1986, Congress passed the Firearms Owners' Protections Act (FOPA), which rolled back some of the protections put in place by the Gun Control Act of 1968, including eliminating certain record-

⁵ *Id.* at 5-6.

⁶ *Id.* at 7.

⁷ U.S. Gov't Accountability Office, "GAO-16-552, Firearms Data: ATF Did Not Always Comply with the Appropriations Act Restriction and Should Better Adhere to Its Policies," 2016, 1 [hereinafter "GAO Firearms Data 2016"].

⁸ *Id.* at 7; ATF "National Tracing Center," June 15, 2020, <https://www.atf.gov/firearms/national-tracing-center#:~:text=ATF%20processes%20crime%20gun%20trace,to%20ten%20days%20on%20average>.

⁹ GAO Firearms Data 2016, *supra* note 5, at 11.

¹⁰ Pub. L. No. 90-618, 82 Stat. 1213 (Oct. 22, 1968); *see also* 18 U.S.C. §§ 921–31 (2020).

¹¹ Olivia B. Waxman, "How the Gun Control Act of 1968 Changed America's Approach to Firearms—And What People Get Wrong About that History," *Time*, October 30, 2018, <https://time.com/5429002/gun-control-act-history-1968/>.

¹² 18 U.S.C. §§ 922–23 (2020).

¹³ *Id.*

keeping requirements for ammunition dealers and permitting specific interstate sales of rifles and shotguns.¹⁴

Under FOPA, FFLs are also required to submit records of multiple handgun sales to the ATF and state law enforcement in certain circumstances.¹⁵ State law enforcement is required to destroy these records no later than 20 days after the day they are received. This provision does not mention the retention or destruction of these records by the ATF.

FOPA also authorizes the ATF to issue letters to FFLs requesting firearm sales information “for periods and at the times specified in such letter[s].” FFLs must provide information in response to these letters (known as “Demand Letters”) to the ATF “until notified to the contrary in writing.”¹⁶ Like the provision regarding multiple handgun sales, this provision does not mention the retention or destruction of information the ATF receives in response. The ATF has used this demand letter authority to require specific FFLs to submit information on multiple sales of certain long guns.¹⁷

FOPA also mandates that the DOJ’s rulemaking authority must not be used to establish “any system of registration of firearms, firearms owners, or firearms transactions or dispositions.”¹⁸

A. Multiple sales records by FFLs

The GCA, as amended by FOPA, requires FFLs to record and maintain details of multiple sale transactions, *i.e.*, sales of two or more handguns (pistols or revolvers) made to the same individual within five consecutive business days; the ATF also requires some FFLs to report multiple sales of certain semi-automatic rifles through a “demand letter” issued by the ATF, requesting specific information.¹⁹ The ATF’s regulations also explicitly require FFLs to file multiple-sales reports with the ATF.²⁰

FFLs are required to generate and maintain “multiple-sales reports” upon the sale of:

1. two or more handguns (*i.e.* pistols or revolvers) to a non-FFL purchaser at the same time or within five consecutive business days²¹

¹⁴ Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986); *see also* 18 U.S.C. §§ 922–23 (2020).

¹⁵ 18 U.S.C. § 923(g)(3).

¹⁶ 18 U.S.C. § 923(g)(5).

¹⁷ 18 U.S.C. § 923(g)(5).

¹⁸ 18 U.S.C. § 926(a)(3).

¹⁹ *See* 18 U.S.C. § 923(g)(1)(a), (3), (5); 27 CFR § 478.126a; *see also* ATF Form 3310.4, *supra*; ATF Form 3310.12, *supra*; “Reporting Multiple Firearms Sales,” accessed October 14, 2020, <https://www.atf.gov/firearms/reporting-multiple-firearms-sales>.

²⁰ 27 C.F.R. § 478.126a (implementing 18 U.S.C. § 923(g)(3)).

²¹ 18 U.S.C. § 923(g)(3).

2. two or more of certain semi-automatic rifles to a non-FFL purchaser in Arizona, California, New Mexico, or Texas at the same time or within five consecutive business days²²

When preparing a multiple-sale report, the FFL must provide information regarding the transaction, including the type and description of the firearm(s) sold and details regarding the firearm purchaser.²³ Once complete, the FFL is required to retain a copy of the multiple-sale report for its records and submit a copy of the multiple-sale report to the ATF by close of business on the date of sale.²⁴

An FFL must capture details of the firearm transaction by completing ATF Form No. 3310.4 (Report of Multiple Sale or Other Disposition of Pistols and Revolvers) or ATF Form No. 3310.12 (Report of Multiple Sale or Other Disposition of Certain Rifles).²⁵ The forms require an FFL to provide detailed information regarding the firearms sold, including whether the firearms are connected to another multiple sale, the location of the sale (e.g., at a gun show), the type of firearm, serial number, manufacturer, model, importer, caliber, transfer date, and personal information regarding the purchaser including name, residential address, sex, ethnicity, race, identification number and type, date and place of birth, and employer. Multiple-sales reports must be maintained at the FFL's business premises for at least five years.²⁶ Notably, if an FFL falls within the scope of Demand Letter 3, an FFL must file a copy of Form No. 3310.12 pertaining to the multiple sales of certain semi-automatic rifles, with ATF's National Training Center (NTC), no later than the close of business on the day the multiple sale occurred.

Form 3310.4 states that the information collected is "to determine if the buyer (transferee) is involved in an unlawful activity," and further, is "stored and retrieved in accordance with Justice/ATF-008 Regulatory Enforcement Record System 68 FR 3558 dated January 24, 2003."²⁷ This citation refers to a notice published in the Federal Register in 2003 and most recently updated in 2017²⁸ in compliance with the Privacy Act of 1974.

B. The ATF's inspection & storage of multiple-sales records

Computerization and storage policies. The ATF computerizes and stores data from both types of multiple-sales reports in the MS data system.²⁹ The MS data system is just one of the 25 firearms-

²² See 18 U.S.C. § 923(g)(5); ATF "National Tracing Center," June 15, 2020, <https://www.atf.gov/firearms/national-tracing-center#:~:text=ATF%20processes%20crime%20gun%20trace,to%20ten%20days%20on%20average>.

²³ ATF Form 3310.12, *supra*.

²⁴ 18 U.S.C. § 923(g).

²⁵ ATF Form 3310.4, *supra*; ATF Form 3310.12, *supra*.

²⁶ 27 C.F.R. § 478.129.

²⁷ See ATF Form 3310.4

²⁸ See e.g., "Federal Register," September 25, 2017, <https://www.govinfo.gov/content/pkg/FR-2017-09-25/pdf/2017-20352.pdf> (modifying ATF-008 regulatory records, under which MS is stored).

²⁹ GAO Firearms Data 2016, *supra* note 5, at 20, 41.

related data systems used by the ATF to track the sale of firearms to purchasers by computerizing firearm sales records provided to the ATF by FFLs.³⁰ The MS data system stores data collected from multiple-sales reports.

Prior to November 1995, the ATF stored multiple-sales reports as hard copies at its local field divisions' offices.³¹ In 1995, the MS data system was developed to "computerize" information from multiple-sales records to better facilitate the firearms tracing process.³² The process of inputting information into the MS data system is as follows.

1. The ATF receives the original multiple-sale report.³³
2. The ATF scans the document in a non-searchable, TIFF image format.³⁴
3. The document is tagged with a "transaction number."³⁵
4. The document is stored as an image-only file in the database.³⁶
5. If a firearm is not connected to a trace, the ATF deletes the purchaser's name from the system two years after the date of sale.³⁷

As of fiscal year 2018, ATF's NTC recorded 1.1 million firearms as part of the multiple-sales reporting program, which was 3% more than the prior year, and a 180% increase in the last decade.³⁸

Use of MS data system in firearms tracing. The ATF uses the information stored in the MS data system to assist law enforcement agencies in criminal investigations. The ATF's firearms tracing process consists of several steps. First, a firearms trace is initiated when a law enforcement agency submits a trace request after recovering a firearm from a crime scene or from a suspect.³⁹ Second, the ATF tracks the weapon through the chain of distribution, starting with the initial manufacturer, distributor, FFL, and ultimately to the retail purchaser.⁴⁰ The ATF's ability to track the distribution chain participants is due, in part, to the information in the MS data system's database. Third, the ATF initiates a trace request to the FFL that facilitated the sale.⁴¹ The FFL is obligated to provide the ATF with the purchaser's information, including name, address, and

³⁰ *Id.* at 11.

³¹ GAO Firearms Data Restrictions 2016, *supra* note 5, at 20 n.42.

³² *Id.* at 18.

³³ *Id.* at 20.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Bureau of Alcohol, Tobacco, Firearms and Explosives, "Congressional Budget Submission for Fiscal Year 2020," 2019, 16.

³⁹ *RSM, Inc. v. Buckles*, 254 F.3d 61, 63 (4th Cir. 2001)

⁴⁰ *Id.*

⁴¹ *Id.*

federal firearms license number.⁴² FFLs are required to respond to an ATF trace request within 24 hours.⁴³

The ATF calculates the time between when a gun is sold by an FFL and when it is recovered after use in a crime. This number is called the “time-to-crime” for the gun. Information about average time-to-crime for guns recovered in the US. is available on the ATF’s website, and discussed further below.⁴⁴

Because of the number of requests that the ATF receives for firearms tracing, the ATF has consistently requested additional resources to assist the agency with its firearms tracing cases.

Congressional appropriations limitation. Although the ATF is charged with collecting information regarding firearms sold in certain circumstances, the ATF must also balance its law-enforcement responsibilities with the privacy concerns of firearm owners.⁴⁵ Consequently, Congress has passed several provisions restricting the ATF’s handling of FFL records. In 1979, in response to a proposed ATF regulation that would have required FFLs to report their firearm transactions to the ATF on a quarterly basis, Congress passed an appropriations rider preventing the ATF from using federal funds to “consolidate or centralize” firearm records.⁴⁶ The relevant provision reads that “no funds appropriated herein or hereafter shall be available for salaries or administrative expenses in connection with consolidating or centralizing within the [DOJ], the records, or any portion thereof, of acquisition and disposition of firearms maintained by [FFLs].”⁴⁷ That provision was made permanent in 2012.⁴⁸

MS data system two-year deletion policy. The information stored in the MS data system enables the ATF to assist law enforcement in their firearms tracing efforts.⁴⁹ However, in order to strike a balance with the privacy concerns of firearms purchasers, the ATF adopted a self-imposed requirement to delete the name of the firearms purchaser from the MS data system after two years from the date of the sale, if the firearm in question has not been connected to a trace request (“two-year deletion policy”).⁵⁰ The remainder of the information in the MS data system,

⁴² *Id.*

⁴³ 18 U.S.C. § 923(g)(7); *see also* RSM, 254 F.3d at 63.

⁴⁴ *See e.g.*, ATF “Firearms Trace Data–2018,” accessed October 14, 2020, <https://www.atf.gov/resource-center/firearms-trace-data-2018> (reflecting an average 8-10 year period before a gun is used in a crime).

⁴⁵ GAO Firearms Data 2016, *supra* note 5, at 1.

⁴⁶ Pub. L. No. 112-55, 125 Stat. 552, 609-610 (2011); *see also* Pub. L. No. 103-123, 1993 (107 Stat. 1226) 1229; Pub. L. No. 95-429, 92 Stat. 1001, 1002 (1978).

⁴⁷ Pub. L. No. 112-55, 609-610.

⁴⁸ Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 4 (011).

⁴⁹ *Id.* at 19.

⁵⁰ *Id.* at 20. Purchaser names stored in the MS data system are retrievable by ATF agents who have access to eTrace, unless deleted pursuant to the two-year deletion policy. *Id.* However, the purchaser name is preserved in the original image file of the FFL submission at ATF’s NTC. *Id.* The file is accessible only by NTC officials. *Id.* If a firearm from an MS record that had the purchaser name deleted is later tagged in a trace, the purchaser name will be repopulated into the MS data system. *Id.* at 54 n.7

such as the firearms description, is preserved.⁵¹ The statutory mandate authorizing the ATF to inspect and collect certain firearm-transaction information, juxtaposed with Congress's prohibition against the consolidation and centralization of firearms records, likely caused the ATF to adopt the two-year deletion policy, which has been consistent since 1995. The two-year deletion policy is an internal policy, not mandated by federal statute or regulation.⁵²

III. Proposed action

The ATF should extend the MS data system's two-year deletion policy related to firearms purchaser information to ten years by issuing internal guidance, which may require publication of a System of Records Notice (SORN) in the Federal Register. This is the most effective and efficient way to ensure that multiple-sales data stored in the MS data system can be relied upon by the ATF for a longer period of time.

The DOJ's Office of Privacy and Civil Liberties is the entity that would most likely determine the proper vehicle to effect this internal agency policy change.⁵³ Notably, the form gun dealers use to report multiple handgun sales states that the information collected is "stored and retrieved in accordance with Justice/ATF-008 Regulatory Enforcement Record System 68 FR 3558 dated January 24, 2003."⁵⁴ A change in the ATF retention policy may therefore require an update to the systems of records notice in ATF-008.⁵⁵ The ATF may need to fulfill certain procedural requirements to extend the retention of the records in this system.

The ATF Director, through the DOJ, was granted authority under the GCA and DOJ regulations to maintain and operate the MS system.⁵⁶ Nevertheless, the ATF may need to fulfill certain procedural requirements to extend the retention of the records in this system. The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.⁵⁷ Under that act, the director must submit advance notice of the proposed policy change to the Committee on Government Operations of the House of

⁵¹ *Id.*

⁵² GAO Firearms Data Restrictions 1996, *supra* note 23, at 4.

⁵³ Department of Justice, "Frequently Asked Questions," September 11, 2020, <https://www.justice.gov/opcl/faq>.

⁵⁴ See Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Dep't Justice, ATF E-Form 3310.4, OMB No. 1140-0003, "Report of Multiple Sale or Other Disposition of Pistols and Revolvers," 2019, <https://www.atf.gov/file/61426/download> (hereinafter "ATF Form 3310.4"); Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Dep't Justice, ATF E-Form 3310.12, OMB No. 1140-0100, "Report of Multiple Sale or Other Disposition of Certain Rifles," 2019, <https://www.atf.gov/firearms/docs/form/report-multiple-sale-or-other-disposition-certain-rifles-atf-form-331012/download> (hereinafter "ATF Form 3310.12"). It is unclear why the long gun form does not reflect the ATF-008 information collection.

⁵⁵ See e.g., "Federal Register Vol. 82, No. 184," September 25, 2017, <https://www.govinfo.gov/content/pkg/FR-2017-09-25/pdf/2017-20352.pdf> (modifying ATF-008 regulatory records, under which MS is stored).

⁵⁶ 28 C.F.R. § 0.131 (2020).

⁵⁷ Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-108, Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act 15-17 (2017) [hereinafter "OMB Reporting Under the Privacy Act"].

Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget (OMB) for an evaluation of the proposal's effect on individuals' privacy and other rights.⁵⁸ After incorporating any OMB comments into the proposal,⁵⁹ the ATF may then publish a SORN in the Federal Register providing the purpose and description of the internal policy change,⁶⁰ and the policy could then be implemented.⁶¹ It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties is the entity best positioned to make that decision.

This proposal appropriately balances privacy and the needs of law enforcement

Extending the MS data system's current deletion policy would continue to protect firearms purchasers' privacy. Extending the deletion policy protects the privacy rights of firearm owners because the firearms purchaser information would continue to be deleted from the MS data system, albeit after ten years instead of two years.

In addition, any potential cost to firearms purchasers' privacy as a result of extending the deletion policy by additional years must be balanced against the significant benefit to the ATF in the execution of its law enforcement responsibilities. Importantly, extending the MS data system's deletion policy would better enable the ATF to trace a particular firearm as the information is available for a longer period of time, improving the ATF's firearms tracing process.

As mentioned above, the ATF calculates the "time-to-crime" for each gun recovered in the US by subtracting the date when the gun is sold by an FFL from the date when it is recovered after use in a crime. This is the period of time MS data would have to be retained in order to be helpful in tracing a gun. The vast majority of guns recovered in the US have a time-to-crime that exceeds two years. A gun's time-to-crime often extends far beyond this time. Overall, the average time-to-crime for all guns recovered and traced in the US in 2018, for example, was 8.8 years.⁶² In some states the average time-to-crime was much longer. For all guns recovered in Hawaii, for example, it was 17.64 years, but these states are outliers.⁶³ The average time-to-crime for all guns recovered in 41 states and DC was less than ten years.⁶⁴ Consequently, retaining MS data for ten years, rather than two, would enable this data to be used in a large number of gun traces.

In addition, the ATF's National Tracing Center (NTC) is the only organization authorized to trace US and foreign-manufactured firearms for international, federal, state, and local law enforcement

⁵⁸ 5 U.S.C. § 552a(r) (2018).

⁵⁹ OMB Reporting Under the Privacy Act, *supra* note 28, at 14.

⁶⁰ *Id.* at 5-6.

⁶¹ *Id.* at 7.

⁶² Bureau of Alcohol, Tobacco, Firearms & Explosives, "Firearms Trace Data - 2018," accessed October 14, 2020, <https://www.atf.gov/resource-center/firearms-trace-data-2018>. The relevant data is contained in the document labeled ATF, "Time-to-Crime – Firearms Recovered and Traced in the United States and Territories (xcl)," April 11, 2019, <https://www.atf.gov/file/137346/download>.

⁶³ *Id.*

⁶⁴ *Id.*

agencies in their efforts to solve firearms crimes, and to detect and prevent firearms trafficking.⁶⁵ Therefore, an extension of the MS data system's deletion policy would enable the ATF to: (1) better monitor and regulate FFLs, and prevent the unlawful sale of firearms to unauthorized, or straw, purchasers, and (2) better assist law enforcement with their firearms tracing efforts by retaining firearm purchaser information for an additional three years before the information is deleted from the MS data system.

Despite the strength of the arguments in favor of extending the deletion policy, there are certain vulnerabilities to doing so. Gun control is a politically contentious issue. Even politically neutral policies, such as the MS data system's deletion policy, could be perceived as violating the privacy rights of gun owners and could likely cause significant political and legal backlash. However, the strength of the plain language of the law, and the important policy interest in successfully tracing crime guns and combating gun violence support extending the MS deletion policy.

IV. Risk analysis

An agency action can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.⁶⁶ Extending the retention of MS records may withstand all these challenges, however.

Arbitrary and capricious challenge under the APA

Under the Administrative Procedures Act, any agency action can be struck down if courts deem the agency action as "arbitrary, capricious or an abuse of discretion."⁶⁷ Arbitrary and capricious is a broad standard that arises in instances where the agency failed to provide a logical basis for how it made a specific determination.⁶⁸ A court may also strike the rule as an abuse of discretion, i.e., if the agency tried to act beyond what the statute authorized it to do.⁶⁹

A court is not likely to hold that the proposed extension of the retention period for MS records is "arbitrary, capricious or an abuse of discretion." The MS data system is an essential component of the ATF's regulatory and enforcement system, and is pivotal in the enforcement of criminal statutes prohibiting violent crimes and gun trafficking. The MS data system provides great value in tracing firearms and preventing gun violence. Strengthening these efforts supports expanding the

⁶⁵ ATF, "Fact Sheet – Facts and Figures for Fiscal Year 2019," June 2020, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019>.

⁶⁶ 5 U.S.C. § 706.

⁶⁷ 5 U.S.C. § 706.

⁶⁸ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56-57 (1983).

⁶⁹ 5 U.S.C. § 706.

two-year deletion policy to ten years, based on the average time-to-crime reflected in the ATF's annual tracing reports for the past several years.⁷⁰

Extending the retention policy is within the ATF's authority

The Gun Control Act of 1968 grants the ATF the authority to promulgate rules and regulations necessary to carry out its regulatory and enforcement responsibilities, including the right to inspect and obtain multiple-sales records.⁷¹ The ATF's rules and regulations do not address, either explicitly or implicitly, the two-year deletion policy. The ATF has chosen to delete these records from the MS data system two years from the date of sale if the firearm is not connected to a trace. However, there is no provision of federal law that explicitly or implicitly requires the ATF to delete the information it receives from multiple-sales reports.⁷² Accordingly, the MS data system's two-year deletion policy appears to be an internal policy adopted by the ATF in response to the congressional restriction against consolidating and centralizing firearm sales records.⁷³

The MS data system, which only includes a limited subset of firearm purchaser information, does not constitute a federal firearms registry. The 5th Circuit Court of Appeals has concluded that Congress' intent would be lost if limitless demand letters could be used to circumvent the restrictions set forth in the statute.⁷⁴ However, that court also 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."⁷⁵

In fact, when Congress was considering the bill that became the Firearm Owners Protection Act, it considered placing constraints on the ATF's storage and use of multiple-sales records, but chose not to enact any restrictions.⁷⁶ Therefore, the FOIPA does not require that firearm purchaser information be deleted from the MS data system two years from the date of sale.

The two-year deletion policy is also not mandated by the congressional appropriations rider.⁷⁷ Although the congressional appropriations rider conditions the ATF's receipt of federal funding for expenses and salaries on not centralizing or consolidating certain information, Congress has not specified a time limit on the information contained in the MS data system.⁷⁸ Although the federal statutes collectively permit the ATF to collect multiple-sales records from FFLs and

⁷⁰ See e.g., ATF, "Firearms Trace Data - 2018," accessed October 14, 2020, <https://www.atf.gov/resource-center/firearms-trace-data-2018> (reflecting an average 8-10 year period before a gun is used in a crime).

⁷¹ 18 U.S.C. § 926.

⁷² 18 U.S.C. § 923.

⁷³ GAO Firearms Data Restrictions 2016, *supra* note 5, at 20 n.42.

⁷⁴ See *10 Ring Precision*, 722 F.3d at 722.

⁷⁵ *Id.*

⁷⁶ U.S. Gov't Accountability Office, "GAO/GGD- 96-174 ATF Compliance with Firearms Licensee Data Restrictions," September 11, 1996, 4.

⁷⁷ Pub. L. No. 112-55, 125 Stat. 552, 609-610 (2011).

⁷⁸ *Id.*

prohibit the consolidation and centralization of such records, the statutes are markedly silent as to the exact duration of their usage by the ATF.

These congressional restrictions have adversely impacted and hampered the ATF's gun tracing abilities.⁷⁹ However, courts have clearly held that the ATF's ability to request and use information from FFLs (either through the form of narrowly-tailored demand letters or other authorized means) does not violate the congressional prohibition against the centralization and consolidation of firearm records.⁸⁰ In focusing on the restrictions imposed by the congressional appropriations riders, courts analyzed the plain meaning of the terms "consolidate" and "centralize" and held that the terms "connote a large-scale enterprise relating to a substantial amount of information."⁸¹ Extending the deletion policy would not constitute a "large-scale enterprise relating to a substantial amount of information."⁸² Finally, even where Congress has imposed a spending restriction, courts have tended to interpret those restrictions narrowly and defer to the agency interpretation to avoid potential conflicts with an agency pursuing an action it is granted authority to pursue by Congress.⁸³

Approval of two-year deletion policy

The US Government Accountability Office (GAO) has previously reviewed the MS data system in 1996 and 2016. It concluded in two separate reports that the two-year deletion policy does not violate the ATF's statutory limitations and is in accordance with the congressional appropriations limitations prohibiting the consolidation and centralization of firearms records.⁸⁴ The GAO determined that "there is no indication in the legislative history that the [appropriations] rider was intended to overturn ATF's existing practices concerning the acquisition or use of licensee information."⁸⁵ The legislative history indicated Congress considered and ultimately rejected placing constraints on the MS system.⁸⁶ Further, in its 2016 report, the GAO found that the ATF failed to delete certain records in the MS data system within the two-year time frame consistent with its internal policy. Importantly, the GAO determined that the ATF's failure to delete the

⁷⁹ Chelsea Parsons, "The Most Important Gun Violence Prevention Agency You've Never Heard Of," Center for American Progress, June 19, 2019, <https://www.americanprogress.org/issues/guns-crime/news/2019/06/19/471232/important-gun-violence-prevention-agency-youve-never-heard/>.

⁸⁰ *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1160 (10th Cir. 2014); *Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281, 289 (4th Cir. 2004).

⁸¹ *Blaustein & Reich, Inc.*, 365 F.3d at 289.

⁸² *Id.*

⁸³ *Sherley v. Sebelius*, 644 F.3d 388, 393-97 (D. C. Cir. 2011) (granting deference to the agency interpretation of its authority in response to an Executive Order and finding that such deference was reasonable in light of the ambiguity both in its authority to fund certain forms of research and the limitations of that authority imposed by a Congressional restriction on what types of research could be funded).

⁸⁴ See *id.* at 38; U.S. Gov't Accountability Office, "GAO/GGD- 96-174, ATF Compliance with Firearms Licensee Data Restrictions," September 11, 1996, 6.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 5. A version of FOIA containing a passage prohibiting the maintenance of MS reports in a centralized system was passed in 5S. 49, 99th Cong., 1st Sess. (1985), but ultimately this restriction was not included in the version of the bill adopted by Congress. *Id.* at 13.

records after two years did not constitute a violation of the congressional appropriations rider or FOPA.⁸⁷

The ATF director can use the authority granted to the agency, pursuant to the GCA, to change the two-year deletion policy to ten years. Regulations give the director the power to “maintain and operate the National Tracing Center...and collect and analyze...multiple sales reports.”⁸⁸ Therefore, the director has the power to revise internal policies such as the MS data system’s two-year deletion policy.

Congress had multiple opportunities to enact explicit limits on the ATF’s use and storage of multiple-sales records including mandating a deletion policy of firearms information and purchaser records. However, Congress pointedly chose not to do so.

Despite lacking any statutory or formal regulatory mandate to do so, the ATF has chosen to delete MS records that are unconnected to a firearms trace request within two years of a multiple-sales submission. Therefore, a moderate extension of the MS data system’s deletion policy to ten years, for the purposes of improving the ATF’s crime gun tracing abilities, is likely to overcome any potential challenges.

Procedural and constitutional challenges

As noted above, the procedures that the ATF should use to effectuate this change may depend on the application of the Privacy Act of 1974 and other laws. The ATF should rely on the DOJ’s internal legal expertise to make these determinations.

There are no constitutional rights implicated in extending the retention of MS records. Courts have held that the government does not violate the Second Amendment by maintaining records of gun owners.⁸⁹ As a result, no court is likely to condemn the ATF for deciding to extend its retention of MS records.

V. Conclusion

Extending the MS data system’s deletion policy to ten years would be an efficient and effective solution for the ATF to improve its firearms tracing efforts and law enforcement objectives. In light of the relative strengths and weaknesses associated with the options to extend the deletion policy, including potential political backlash and litigation exposure, we recommend pursuing the non-executive order route, and pursue an extension of the two-year deletion policy by having the director of the ATF issue an updated notice revising the internal policy. Extending the retention policy would have tangible benefits for the ATF and crime reduction generally.

⁸⁷ GAO Firearms Data Restrictions 2016, *supra* note 5, at 44.

⁸⁸ 28 C.F.R. § 0.131 (2020).

⁸⁹ *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009) (finding that registration “merely regulated gun possession” rather than prohibiting it); *Heller v. District of Columbia (“Heller III”)*, 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally does not violate the Second Amendment)