

WILLIAM J. OLSON
(VA, D.C.)
JOHN S. MILES
(VA, D.C., MD OF COUNSEL)
HERBERT W. TITUS
(VA OF COUNSEL)
JEREMIAH L. MORGAN
(D.C., CA ONLY)
ROBERT J. OLSON
(D.C., VA)

WILLIAM J. OLSON, P.C.
ATTORNEYS AT LAW
370 MAPLE AVENUE WEST, SUITE 4
VIENNA, VIRGINIA 22180-5615
TELEPHONE (703) 356-5070
FAX (703) 356-5085
E-MAIL: wjo@mindspring.com
<http://www.lawandfreedom.com>

114 CREEKSIDE LANE
WINCHESTER, VA 22602-2429
TELEPHONE (540) 450-8777
FAX (540) 450-8771

August 18, 2016
By electronic submission

Mr. Gregory M. Fodor
Mailstop 6.N-523
Attn: ATF 24P
Office of Regulatory Affairs, Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
United States Department of Justice
99 New York Avenue NE
Washington, D.C. 20226

Re: *Federal Register*, Vol. 81, No. 102 (May 26, 2016) OMB Number 1140-0100
Gun Owners of America, Inc. and Gun Owners Foundation Comments on:
Bureau of Alcohol, Tobacco, Firearms, and Explosives
Notice of Proposed Rulemaking on “Commerce in Firearms and Explosives;
Secure Gun Storage, Amended Definition of Antique Firearm, and
Miscellaneous Amendments”

Dear Sirs:

These comments are filed on behalf of our clients Gun Owners of America, Inc. (“GOA”) and Gun Owners Foundation (“GOF”). GOA is a national membership educational and lobbying social welfare organization, devoted to protecting and defending firearms rights across the country. GOA was incorporated in California in 1976 and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code (“IRC”). GOF is a nonprofit, educational, and legal defense organization, defending the Second Amendment to the United States Constitution and encouraging compliance with the rule of law in the administration of federal and state firearm regulations. Incorporated in Virginia in 1983, GOF is exempt from federal income tax under IRC Section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

In response to the above-referenced May 26, 2016 request¹ by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), GOA and GOF submit these comments on ATF’s Notice of Proposed Rulemaking (“NPRM”) entitled “Commerce in Firearms and

¹ <https://www.gpo.gov/fdsys/pkg/FR-2016-05-26/pdf/2016-12364.pdf>.

Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments.”

In short, ATF purports to enact regulations allegedly to “implement” various provisions of federal law, but which actually would rewrite federal law to achieve the objectives of ATF. ATF has a lengthy history of ignoring the plain text of statutes, even enacting regulations that are in direct conflict with the statutes they purport to implement. This proposed rulemaking is yet another such example of ATF’s lawless conduct.

COMMENTS

I. THE PROPOSED REGULATIONS CREATE NEW AND ONEROUS REQUIREMENTS FOR LICENSEES, IN VIOLATION OF FEDERAL LAW.

18 U.S.C. Section 923(d)(1)(G) requires that, as a prerequisite to obtaining a federal firearms license (“FFL”), an applicant for a **dealer** license must certify that “**secure gun storage or safety devices will be available** at any place in which firearms are sold under the license to persons who are not licensees....” Once a license has been granted, if the dealer does not maintain such storage, 18 U.S.C. Section 923(e) states that ATF may revoke the license of any dealer where such “secure gun storage or safety devices” (“SGS”) are not available.

A. Expansion of FFLs Covered by the SGS Requirement.

Section 923 provides for the issuance by ATF of three different types of licenses — **manufacturer, importer, and dealer**. Yet Section 923 requires that SGS certification applies only “in the case of an application to be **licensed as a dealer**” who will sell firearms on site to the public. ATF regulations allow that an importer or manufacturer may also sell firearms to the public at the same location, without applying for a dealer’s license. 27 C.F.R. Section 478.41(b). Thus, apparently since manufacturers and importers can sometimes perform some of the functions of a dealer, the PR proposes to impose the SGS requirement on all manufacturers and importers who sell firearms to the public. That is not what the statute says.

The statute clearly imposes the SGS requirement only “in the case of an application to be licensed as a dealer.” ATF ignores the most basic of principles of statutory interpretation that *expressio unius est exclusio alterius* — the inclusion of one thing is the exclusion of another. By explicitly applying the SGS requirement only to dealers, Congress implicitly rejected its application to manufacturers and importers. Just because manufacturers and importers can sometimes perform some of the functions of a dealer does not make them dealers. ATF’s attempt to rewrite the statute to expand SGS requirements to all classes of license cannot stand. ATF apparently thinks it **makes sense** to apply SGS requirements to manufacturers and importers who sell to the public, even though the statute does not permit it.

Finally, forcing manufacturers and importers to have SGS available and perhaps even to “use” such SGS (contrary to statute) could create a burdensome and expensive requirement for such licensees. Take, for example, a large manufacturer of firearms who occasionally makes retail sales. Such a licensee no doubt has a large, secure factory floor of firearms in all stages of production. To require those firearms, many not even finished, to be stored under lock and key every night would be difficult, time consuming, and cost-prohibitive.

The hurdle for an importer could be even greater. Consider, for example, a well-known importer such as AIM Surplus, that has a pickup counter for local customers to avoid shipping fees. On any given day, AIM no doubt has thousands of surplus firearms that are arriving, being stored, being cleaned and repaired, and being sold and shipped out. These surplus firearms are delivered and stored in racks,² in crates,³ in shipping containers, etc.⁴ Some surplus weapons are coated in cosmoline.⁵ There is no convenient or economical way to have enough SGS available to store this number of firearms, and be able to conduct business at the same time. It is possible that ATF’s new proposed SGS requirements could force some importers like this to shut down their small public storefronts entirely, dealing with the public only through shipments to dealers.

B. Announcement of ATF’s Plan to Ignore Federal Law.

With respect to SGS requirements, ATF apparently believes that various sections of the statute do not work well together. Thus, in order to give what ATF believes to be the intended effect of certain provisions, ATF announces that it intends to ignore those provisions of federal law of which it disapproves.

Specifically, the notes⁶ of Section 923 state that “evidence regarding compliance or noncompliance with [the SGS requirement] **shall not** be admissible as evidence in **any proceeding of any court, agency, board, or other entity.**” Pub. L. No. 105-277, § 101(b), 112 STAT. 2681-70 (Oct. 21, 1998). ATF notes that its license revocation proceedings are clearly a proceeding of an agency, and so the fact that a licensee has violated the SGS

² <http://goo.gl/OR0pYN>

³ <https://goo.gl/J36CdV>

⁴ <http://goo.gl/aYLTZY>

⁵ *See, e.g.*, <http://i53.photobucket.com/albums/g54/pepwalker/SKS/6CosmolineParts.jpg>.

⁶ ATF does not bother to mention that “a provision set out as a statutory note has the same validity and legal force as a provision classified as a section of the Code.” <http://uscode.house.gov/faq.xhtml>.

requirements is not admissible as evidence to revoke a license under Section 923(e) for failing to abide by the SGS requirements.

ATF decries this result. To counter this, ATF states that it “**construes** this section as applying to civil liability actions against dealers and other similar actions, and **not** to proceedings associated with license denials or revocations (or appeals in federal court....).” Audaciously, ATF purports to adopt a nonsensical “interpretation” of the statute not only for itself, but also for the federal courts! Such arrogation is truly bold, even for the ATF.

ATF claims that “a basic tenet of statutory construction is that each provision in a law is intended to have some effect.” Apparently, it is ATF who will give statutes their effect through “construing” them to permit something the plain text prohibits. Of course, a more basic tenet of statutory construction is that **words have meaning**, and something prohibited by statute is prohibited by statute, even if ATF does not like the implications. *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (West: 2012) at 101.

ATF may not like the way that statutes written by Congress are written, but ATF does not have the power to change or ignore them. Instead, ATF should present its proposal to Congress and ask for legislation to amend the statute. *Id.* at 100 (“If the defect is serious, the legislature will cure it.”).

C. New Requirement of “Compatible” SGS.

The PR creatively “interprets” the SGS requirement to mean that the SGS maintained by dealers must be “**compatible** with the firearms offered for sale.” Presumably, this means that, for example, a shop that sells both long rifles and handguns must have something more than safes which hold handguns and perhaps space to store every firearm. Apparently, ATF is attempting to take a general statutory requirement, and turn it into a specific regulatory requirement demanding some sort of nexus between the SGS and the size, and perhaps number, of weapons to be secured thereby.

Yet Section 923 says nothing about “compatible” SGS. Indeed, the statute does not even require that an FFL “**use**” his SGS, only that SGS “**be available**.” Moreover, ATF is given no authority to revoke the license of a dealer who **does not lock** up his guns, only a dealer that **does not have the ability** to lock up his guns. ATF may wish that the statute went further, but it does not, and ATF is not at liberty to enact through regulation what Congress did not require by statute.

CONCLUSION

For the reasons stated herein, the portions of the NPRM discussed above should be withdrawn and abandoned.

Sincerely yours,

/s/

William J. Olson

WJO/ljs