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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 40F; AG Order No. 3607-2016]

RIN 1140-AA41

**Commerce in Firearms and Ammunition – Reporting Theft or Loss of Firearms in Transit
(2007R-9P)**

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); Department of Justice

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) concerning the statutory reporting requirement for firearms that have been stolen or lost. The final rule specifies that when a Federal firearms licensee (FFL) discovers a firearm it shipped was stolen or lost in transit, the transferor/sender FFL must report the theft or loss to ATF and to the appropriate local authorities within 48 hours of discovery. The rule also reduces an FFL's reporting burden when a theft or loss involves a firearm registered under the National Firearms Act (NFA) and ensures consistent reporting to ATF's NFA Branch. In addition, the rule specifies that transferor/sender FFLs must reflect the theft or loss of a firearm as a disposition entry in their required records not later than 7 days following discovery of the theft or loss; moreover, if an FFL reported the theft or loss of a firearm and later discovers its whereabouts, the FFL must advise ATF that the firearm has been

located and must re-enter the firearm into its required records as an acquisition or disposition entry as appropriate.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Denise Brown, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE, Washington, D.C. 20226; telephone: (202) 648-7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Gun Control Act of 1968 (GCA), as amended by the Violent Crime Control and Law Enforcement Act of 1994, requires each licensed importer, licensed manufacturer, licensed dealer, or licensed collector of firearms to report the theft or loss of a firearm from the licensee's inventory or collection to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and to the appropriate local authorities within 48 hours after the theft or loss is discovered. *See* 18 U.S.C. 923(g)(6) (requiring licensees to report thefts or losses to the Attorney General and to the appropriate local authorities); 28 CFR 0.130(a) (delegating the Attorney General's functions and powers to the Director of ATF).

The regulation that implements section 923(g)(6) is 27 CFR 478.39a. This regulation provides that each Federal firearms licensee (FFL) must report the theft or loss of a firearm from the FFL's inventory (including any firearm which has been transferred from the FFL's inventory to a personal collection and held as a personal firearm for at least 1 year), or from the collection of a licensed collector, within 48 hours after the theft or loss is discovered. FFLs must report

such thefts or losses by telephoning 1-888-930-9275 (nationwide ATF toll-free number) and by preparing a Federal Firearms Licensee Firearms Inventory Theft/Loss Report, ATF Form 3310.11 (Form 3310.11), in accordance with the instructions on the form. The FFL must also report the theft or loss of a firearm to the appropriate local authorities.

When there has been a theft or loss of a firearm registered under the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*, such as a short-barreled rifle or short-barreled shotgun, silencer, machinegun, or destructive device, *see* 26 U.S.C. 5841, 5845, 27 CFR 479.141 imposes a separate and additional reporting requirement. Section 479.141 states that whenever any registered NFA firearm is stolen or lost, the person who has lost possession must, immediately upon discovery of such theft or loss, make a report to the Director of ATF showing the following: name and address of the person in whose name the firearm is registered; kind of firearm; serial number; model; caliber; manufacturer of the firearm; date and place of theft or loss; and complete statement of facts and circumstances surrounding such theft or loss. Accordingly, when an FFL loses possession of an NFA firearm, it has reporting obligations under both 27 CFR 479.141 and 27 CFR 478.39a.

Currently, an FFL reporting the theft or loss of a registered NFA firearm prepares and submits Form 3310.11 to ATF's National Tracing Center (NTC), the receiving office designated on the form, to meet the 27 CFR 478.39a requirements. In addition, the FFL must submit a separate notification to the Director of ATF to meet the requirements of 27 CFR 479.141. Because no form is directly associated with the separate notification to the Director, FFLs submit a letter to the NFA Branch of ATF, as directed in the "Important Notice" section of Form 3310.11. As a backup to this requirement, when NTC receives a completed Form 3310.11 involving the theft or loss of an NFA firearm, it currently forwards a copy of the completed form

to the NFA Branch, as the completed form often contains more information than the letters FFLs submit to the NFA Branch. Form 3310.11 does not, however, ask for the name and address of the person in whose name the firearm is registered, which is required to be reported under 27 CFR 479.141. Therefore, the NFA Branch may not currently be receiving consistent and complete information regarding the theft or loss of a registered firearm.

The instructions on Form 3310.11 also provide that FFLs must reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition (A&D Record) required by subpart H of 27 CFR part 478 (formerly 178). The disposition entry should indicate whether the incident is a theft or loss, the ATF-Issued Incident Number, and the Incident Number provided by the local law enforcement agency. The instructions further state that should any of the firearms be located, they should be re-entered into the A&D Record as an acquisition entry. In addition, the “Important Notice” section on Form 3310.11 provides that an FFL who reports a firearm as missing and later discover its whereabouts should advise ATF that the firearm has been located.

The text of the statutory reporting requirement, 18 U.S.C. 923(g)(6)—which obligates licensees to report the theft or loss of a firearm “from the licensee’s inventory”—does not clearly address the reporting of a firearm that has been stolen or lost in transit. That is, the statute does not expressly address whether such a firearm should be considered part of the inventory of the transferring/shipping FFL, a recipient FFL, or the common carrier transporting the firearm. Similarly, current regulations do not address reporting requirements arising from firearms stolen or lost in transit, including whether the firearms are considered stolen or lost from the inventory of the sending or receiving FFL. This gap in the regulations likely results in no one reporting the theft or loss of a firearm stolen or lost in transit—an anomalous result that the Department

believes is contrary to congressional intent in mandating the reporting of thefts and losses generally. Clarifying this responsibility is thus important to the effective administration of the GCA and NFA. Congress delegated the authority to prescribe necessary rules and regulations to carry out the provisions of the GCA and NFA to the Attorney General, who has delegated to ATF the authority to investigate, administer, and enforce those laws. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A)(i), 7805(a); 28 CFR 0.130(a).

II. Initial Notice of Proposed Rulemaking

On August 28, 2000, in ATF Notice No. 902, ATF published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) proposing several amendments to the firearms regulations. 65 FR 52054 (Aug. 28, 2000). Among those amendments, ATF proposed specifying that, when a firearm is stolen or lost in transit between licensees, for reporting purposes, the firearm is considered stolen or lost from the transferor's/sender's inventory. ATF noted that in Fiscal Year (FY) 1999, there were 1,271 crime gun traces in which an FFL claimed to have never received the firearm shipped to it and no one reported the theft or loss to ATF.¹ As proposed in 2000, a firearm stolen or lost in transit between licensees, for reporting purposes, would be considered stolen or lost from the transferor's/sender's inventory. Further, as proposed, the transferor/sender of the stolen or missing firearm would have been required to report to ATF and to the appropriate local authorities the theft or loss of the firearm within 48 hours after the transferor/sender discovered the theft or loss. In addition, to enable the transferor/sender of the stolen or lost firearm to obtain the knowledge necessary to comply with the theft or loss reporting requirements and fulfill the statutory responsibility of maintaining accurate records, ATF proposed that the transferor/sender be required to have or establish

¹ A crime gun is any firearm that is illegally possessed, used in a crime, or suspected by law enforcement officials of having been used in a crime or act of terrorism.

commercial business practices that confirm whether the transferee/buyer of the firearm ultimately received the firearm.

As a result of the comments received in response to various issues addressed in the document, the Department decided to study the issues further, and it subsequently withdrew these proposals. *See* 69 FR 37757 (June 28, 2004).

III. 2014 Notice of Proposed Rulemaking

On August 12, 2014, ATF published in the **Federal Register** another NPRM proposing to amend the regulations in subpart C of part 478, section 478.39a (ATF Notice No. 40P) (“2014 NPRM” or “proposed rule”). *See* 79 FR 47033. The proposed rule was intended to clarify that, when an FFL discovers a firearm that it shipped was stolen or lost in transit, that transferor/sender FFL would be the one responsible for reporting the theft or loss to ATF and to the appropriate local authorities.

The NPRM specified a time period within which to reflect the theft or loss of a firearm as a disposition entry—i.e., not later than 7 days following the discovery of the theft or loss—and required, rather than recommended, that the disposition entry in the FFL’s A&D Record include specified information. Under the regulations as proposed, if an FFL reported a firearm stolen or lost and later discovered its whereabouts, the FFL would be required to advise ATF that the firearm has been located and re-enter the firearm into the required records as an acquisition or disposition entry as appropriate. The proposed rule was intended to reduce an FFL’s reporting burden when a theft or loss involves a firearm registered under the NFA by having the FFL submit one Form 3310.11 to ATF to satisfy the requirements of both 27 CFR 478.39a and 27 CFR 479.141.

The proposed rule retained the same general approach for transferor/sender FFLs to report thefts or losses in transit as the 2000 NPRM, although there are some important differences. Unlike the 2000 NPRM, the 2014 NPRM did not propose to require FFLs to establish commercial business practices that would enable the FFL to verify that the transferee/buyer of a shipped firearm actually received the firearm. The 2014 NPRM merely solicited comments on whether a transferor/sender FFL should be required to obtain and retain confirmation of receipt. In addition, unlike the 2000 NPRM, the 2014 NPRM proposed to reduce the reporting burden with respect to NFA firearms. The 2014 NPRM also clarified that firearms lost or stolen in transit between FFLs and non-FFLs (not just between FFLs) would be included in the transactions that must be reported by a transferor/sender FFL. Finally, the proposed rule would require the A&D Records to be updated within 7 days of discovery of the theft or loss.

As stated in the 2014 NPRM, theft or loss of firearms in transit continues to be a problem. In its 2000 NPRM, ATF stated that in FY 1999, there were 1,271 crime gun traces in which an FFL claimed to have never received the firearm shipped to it and no one reported the theft or loss to ATF. More recent data from NTC shows that from FY 2010 through FY 2014, there was an average of 1,333 crime gun traces per year where the firearm was traced back to an FFL that claimed it never received the firearm allegedly shipped to it, but no theft or loss was reported to ATF. ATF recognizes that this figure may include some firearms lost or stolen at the licensed premises while not in transit (i.e., prior to or after shipment). However, because there are numerous firearms lost or stolen that have not been traced, the full count of firearms lost or stolen in transit may be significantly higher. The omission in the regulations regarding reporting the theft or loss of a firearm in transit adversely affects ATF's and local law enforcement's

investigative and tracing capabilities. For those reasons, the Department proposed amending the regulations to specify who is responsible for reporting the theft or loss of a firearm in transit.

As previously noted, the statutory provision requiring licensees to report lost or stolen firearms, 18 U.S.C. 923(g)(6), does not clearly address situations in which a firearm is lost or stolen in transit. The Department proposed to interpret section 923(g)(6)'s requirement that a licensee "report the theft or loss of a firearm from the licensee's inventory" to include a responsibility to report a theft or loss that occurs once the licensee has placed a firearm in shipment. Accordingly, the proposed rule specified that, when a firearm is stolen or lost in transit on a common or contract carrier,² for reporting purposes the firearm is considered stolen or lost from the transferor's/sender's inventory. The proposed rule would apply to transfers from a licensee to a nonlicensee, including interstate shipments for firearms repair and replacement, qualified interstate shipments to law enforcement officers for official duty, and intrastate transactions under 18 U.S.C. 922(c), 27 CFR 478.96, and ATF Procedure 2013-2. In all such transactions, the transferor/sender would be the only FFL involved in the transaction, and it would be reasonable for that FFL to assume responsibility to make a report to ATF if the shipment is lost or stolen in transit before the transferee acquires possession. The proposed rule would not require transferor/sender FFLs to establish commercial business practices to affirmatively verify or retain confirmation of receipt; instead, the rule would allow a transferor/sender FFL to rely on notification by the transferee/buyer, the common or contract carrier, or any other person that the shipment was not received. Only upon receiving such notification would the FFL be required to report the theft or loss and change its records accordingly.

² For purposes of this rule, the Department considers the U.S. Postal Service a "common or contract carrier."

The 2014 proposed rule retained most of the current procedures for licensees reporting the theft or loss of firearms subject to the GCA, in accordance with the instructions on Form 3310.11. For example, Instruction 7 on Form 3310.11 provides that FFLs must reflect the theft or loss of a firearm as a disposition entry in the A&D Record that is required by subpart H of part 478 (formerly 178). The form also provides that the disposition entry should indicate whether the incident is a theft or loss, include the ATF-Issued Incident Number, and include the Incident Number provided by the local law enforcement agency. The proposed rule set out these procedures in a new paragraph (e) of 27 CFR 478.39a with two modifications: (1) the rule would prescribe a time period to reflect the theft or loss of a firearm as a disposition entry (i.e., not later than 7 days following discovery of the theft or loss); and (2) it would require, rather than recommend, that the disposition entry include specified information. The proposed 7-day time period for reporting would be consistent with the firearms receipt and disposition reporting requirement for licensed dealers in 27 CFR 478.125(e), which requires the “sale or other disposition of a firearm” to be recorded “not later than 7 days following the date of such transaction.” The Department considers a theft or loss to be a disposition that must be reported within this time period.

In addition, the “Important Notice” section of Form 3310.11 provides that licensees who report firearms as missing and later discover their whereabouts should advise ATF that the firearms have been located, and Instruction 8 provides that licensees should re-enter these located firearms into the A&D Record as an acquisition entry. The proposed rule combined and set out these procedures in a new paragraph (f) of 27 CFR 478.39a with three modifications. The proposed rule would: (1) change the phrase “should advise ATF” to “shall advise the [ATF] Director”; (2) change the phrase “should re-enter” to “shall re-enter”; and (3) specify that the re-

entry is to be recorded as an acquisition or disposition entry as appropriate. Making mandatory both the advising of ATF and the re-entry of the located firearm into the A&D Record would help to improve the accuracy of NTC data, which would greatly assist law enforcement in solving violent crimes and enhancing public safety.

The proposed rule would also reduce a licensee's reporting burden to ATF for the theft or loss of a registered NFA firearm by allowing submission of one Form 3310.11 to meet the requirements of 27 CFR 478.39a and 27 CFR 479.141. Currently, if a licensee's registered NFA firearm is lost or stolen, the licensee prepares and submits Form 3310.11 to ATF's NTC to comply with the 27 CFR 478.39a requirements, which specify that Form 3310.11 be used. The licensee also provides to ATF's NFA Branch a separate notification—typically in the form of a letter—to comply with 27 CFR 479.141. The proposed rule would revise 27 CFR 478.39a to stipulate that a licensee's submission of a completed Form 3310.11 to ATF for the theft or loss of a registered NFA firearm satisfies the notification requirements under both 27 CFR 478.39a and 27 CFR 479.141. This would reduce the FFLs' reporting burden and help to ensure that information about lost or stolen registered NFA firearms is consistently reported to ATF.

The comment period for Notice No. 40P closed on November 10, 2014.

IV. Analysis of Comments and Department Response

All public comments were considered in preparing this final rule. In response to Notice 40P, ATF received 14 comments. Comments were submitted by individuals, corporations and other legal entities, FFLs, and trade associations.

Five commenters supported the proposed rule. Commenters who agreed with the proposed rule did so primarily because they believed that the implementation of the rule would help stop the unreported theft or loss of firearms in transit. One commenter agreed with the

proposed rule in its entirety because it would allow police to quickly investigate and possibly return missing firearms and simplify FFLs' reporting of stolen or lost firearms registered under the NFA, thus making that process more efficient for both FFLs and ATF.

Nine commenters disagreed with the proposed rule. Commenters who opposed the proposed rule did so for a variety of reasons, with the most common objection relating to ATF's lack of authority to request theft or loss reports of firearms once the firearms have allegedly been transferred from the transferor/sender FFL's inventory. One commenter opposed the proposed rule on "philosophical[]" grounds, claiming that there is over-regulation of commerce by the United States in general, and concluding that "any regulation of transactions involving small arms are uniquely inappropriate a subject for regulation by the national government because of the special provisions of the second amendment to the Constitution."

Another commenter opposed the proposed rule because he believed that the rule's imposition of the reporting obligation on the transferring/sending FFL was at odds with ATF's alleged "statement to the press" that the rule "applies to" carriers. He further stated that "[a]s written the regulation is ripe for abuse, should be rewritten so that the ATF can understand its own intent." Another commenter noted that "[c]urrent ATF rules are clear regarding the manufacturer's responsibility to report lost or stolen firearms that are under their control. The proposed new rule imposes an unrealistic burden on manufacturers to report same after the firearm has left its premise and has exited its disposition log." One commenter stated that the "issue of firearms lost in transit does not need solving because it is not a problem," and that ATF is "trying to solve a problem that does not exist." The following sections address the specific comments on the proposed rule.

A. *Legal Authority*

Comments Received

Regarding the comment that the transaction of small arms is not an appropriate subject for regulation by the national government because of the Second Amendment, the Department does not believe anything in this rule is inconsistent with that constitutional amendment.

Congress has long regulated the transportation and shipment of firearms,³ and courts have not interpreted the Second Amendment as limiting the authority of Congress to enact such laws.⁴

Some commenters asserted that ATF lacks the legal authority to impose the proposed rule because, in 18 U.S.C. 923(g)(6), Congress only mandated reporting of lost or stolen firearms when those firearms are currently in the “inventory or collection” of the FFL. These commenters argued that ATF impermissibly exceeded its statutory bounds in interpreting the requirement that licensees report “the theft or loss of a firearm from the licensee’s inventory” to require licensees to report the theft or loss of firearms after the firearms are no longer in the transferring FFL’s possession or on their premises; such an interpretation, the commenters argued, is at odds with the plain meaning of the word “inventory.” Citing *Black’s Law Dictionary*, two Merriam-Webster dictionaries, and the Internal Revenue Code, the commenters defined the term “inventory” to mean that the goods in question must physically be held “on hand” or “in stock.” The commenters thus argued, in essence, that the reporting requirement in section 923(g)(6) only applies to firearms stolen or lost from the licensee personally or from the licensee’s business

³ Long before enactment of the Gun Control Act of 1968, Congress imposed limitations on the shipment of firearms. *See, e.g.*, Nonmailable Firearms Act of 1927, Public Law 69-583, 44 Stat. 1059 (codified at 18 U.S.C. 1715) (restricting mailing and delivery of concealable firearms); Federal Firearms Act of 1938, Public Law 75-785, 52 Stat. 1250 (codified at 15 U.S.C. 901 *et seq.*) (repealed 1968) (restricting interstate shipment of firearms).

⁴ *See District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (“[N]othing in [the Supreme Court’s] opinion [interpreting the Second Amendment] should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”); *United States v. Decastro*, 682 F.3d 160, 168–69 (2d Cir. 2012) (statute prohibiting transporting into one’s state of residence firearms acquired outside the state did not infringe the right to keep and bear arms under the Second Amendment).

premises. Another commenter stated that ATF lacks regulatory authority to impose best business practices on FFLs to monitor shipments of firearms once the firearms depart the FFLs' facilities.

Department Response

Congress delegated the authority to prescribe rules and regulations to carry out the provisions of the GCA to the Attorney General, who has delegated to ATF the authority to investigate, administer, and enforce those laws. *See* 28 U.S.C. 599A; 18 U.S.C. 926(a); 28 CFR 0.130(a). The Attorney General (and, derivatively, ATF) also has authority, pursuant to 18 U.S.C. 923(g)(1)(A) and 923(g)(2), to promulgate regulations on how licensees must maintain records of shipment, receipt, sale, or other disposition of firearms. It is unlawful under 18 U.S.C. 922(m) for licensees to fail to make an appropriate entry in a required record. Additionally, pursuant to 28 U.S.C. 599A, 18 U.S.C. 926(a), and 28 CFR 0.130(a), ATF has the authority and responsibility to interpret and enforce the GCA provisions prohibiting the theft of firearms. *See* 18 U.S.C. 922(i) (transporting or shipping stolen firearms in interstate or foreign commerce), 922(j) (receiving, possessing, concealing, storing, bartering, selling, disposing, or pledging or accepting as security for a loan any stolen firearm which has moved in, is moving in, or will move in interstate or foreign commerce), 922(u) (stealing a firearm that has been shipped or transported in interstate or foreign commerce from the person or premises of an FFL), 924(l) (stealing a firearm which is moving in or has moved in interstate commerce), 924(m) (stealing a firearm from a licensee).

The present rulemaking reflects ATF's interpretation of the theft or loss reporting requirement set forth in the GCA, 18 U.S.C. 923(g)(6). Congress did not define the term "inventory" or the phrase "from the licensee's inventory" in 18 U.S.C. 923(g)(6) or elsewhere in the GCA. Nor did Congress expressly limit the licensee's reporting obligation to firearms that

are lost or stolen from the licensee’s premises: unlike 18 U.S.C. 922(u), for instance, which makes it unlawful to steal “*from the person or the premises of a person who is licensed . . . any firearm in the licensee’s business inventory*” (emphasis added), section 923(g)(6)’s reporting requirement is not limited to firearms taken “from the person or premises” of the licensee.

Commenters argued that, in the absence of a statutory definition of the word “inventory,” the Department must use the word’s plain or ordinary meaning, and they offered various definitions culled from a few sources in an effort to elucidate what that meaning is. But rather than revealing a clear commonality, the definitions in the commenters’ cited sources instead show that the word “inventory” can take on slightly different meanings suited to the particular contexts in which it used.⁵ In the context of Federal firearms regulation, a licensee’s “inventory” can, and does, include firearms that are not either “on hand” or owned by the licensee. For instance, FFLs may transport some or all of their firearms away from a particular licensed premises—to a warehouse where the firearms will be kept “solely for storage,” for example. *See* 27 CFR 478.50(a). Or an FFL may have on hand firearms that the FFL does not own, but which have been pawned, consigned, or stored with the FFL by the firearms’ owners. *See* 18 U.S.C.

⁵ *See Black’s Law Dictionary* 901–02 (9th ed. 2009) (first definition: “[a] detailed list of assets; esp., an executor’s or administrator’s detailed list of the probate-estate assets”; second definition, as used in accounting: “[t]he portion of a financial statement reflecting the value of a business’s raw materials, works-in-progress, and finished products”; third definition: “[r]aw materials or goods in stock”; fourth definition, as used in bankruptcy: “[p]ersonal property leased or furnished, held for sale or lease, or to be furnished under a contract for service; raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock”); *Merriam-Webster Online Dictionary* (definition 1a: “an itemized list of current assets as (1): a catalog of the property of an individual or estate [or] (2): a list of goods on hand”; definition 1b: “a survey of natural resources”; definition 3: “the quantity of goods or materials on hand”), <http://www.merriam-webster.com/dictionary/inventory>; 26 U.S.C. 865(i)(1), 1221(a)(1) (describing “inventory property” as “stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business”).

921(a)(11)(C), 921(a)(12).⁶ Similarly, licensed dealers may have on hand firearms that they are repairing or configuring for the firearms' owners. *See* 18 U.S.C. 921(a)(11)(B).

Elsewhere in the law, physical possession is often neither necessary nor sufficient for something to be counted as inventory. The section of the Uniform Commercial Code (UCC) governing secured transactions, for example, defines “inventory” to include not only goods “held by a person,” but also goods “furnished by a person,” and “leased by a person,” irrespective of who has them. U.C.C. 9-102(a)(48); *see also Matter of Watertown Tractor & Equip. Co.*, 289 N.W.2d 288, 293–94 (Wis. 1980) (holding that equipment constitutes a lessor’s “inventory” when in the possession of a lessee). The Supreme Court has even held that a farmer’s corn futures are considered the farmer’s “inventory” for tax purposes, even though they are considered capital assets in the hands of a holding company. *See Arkansas Best Corp. v. Comm’r*, 485 U.S. 212, 219–22 (1988).

Given its many meanings, the Department is of the view that the word “inventory” is ambiguous, and that Congress did not specifically intend—by use of the word—to deprive the Department of the authority to require FFLs to report the loss or theft of firearms in transit. That view is supported by multiple dictionaries that define inventory broadly to encompass any goods and articles that might appropriately be listed on an inventory. *See, e.g., 5 The Oxford English Dictionary* 453–54 (1978) (defining inventory broadly as, *inter alia*, “[t]he lot or stock of goods,

⁶ *See also Firearms Transaction Record*, ATF Rul. 76-15 (July 1976) (recordkeeping requirements for pawned firearms); *Engaging in the Business of Dealing in Firearms (Auctioneers)*, ATF Rul. 96-2 (Sept. 1996) (auctioneers must obtain a license as a dealer to take possession of firearms consigned for auction); ATF, *Federal Firearms Licensee Quick Reference and Best Practices Guide*, ATF Pub. No. 5300.15, at 8 (rev. Aug. 2010) (all firearms acquisitions must be documented in the A&D book, including pawned and consignment firearms), <https://www.atf.gov/file/58676/download>; *Return of Firearms Received for Appraisal*, *FFL Newsletter* (ATF, Washington, D.C.), Apr. 2015, at 4 (licensees must record firearms received for appraisal as a transaction on ATF Form 4473), <https://www.atf.gov/file/11691/download>; *Shot Show Q & A*, *FFL Newsletter* (ATF, Washington, D.C.), Jan. 2007, at 7, Q9 (licensees must treat firearms received for storage as acquisitions), <https://www.atf.gov/file/56436/download>.

etc., which are or may be made the subject of an inventory”); *Funk & Wagnalls New Standard Dictionary of the English Language* 1289 (1946) (defining inventory broadly as, *inter alia*, “[a]rticles which constitute or are to constitute the inventory”). In light of the range of items that can appear on an inventory—for example, “the goods and chattels, rights and credits, and in some cases, the land and tenements of a person or persons,” 2 *Bouvier’s Law Dictionary and Concise Encyclopedia* 1681 (3d rev. 1914)—the word “inventory” can be open-ended.

In the context of section 923(g)(6) specifically, the Department believes that the obligation to report lost or stolen “firearm[s] from the licensee’s inventory” is best understood to encompass firearms that are not yet in the physical possession of a transferee that the transferor is best positioned to monitor and control. The Department believes that this interpretation of the word “inventory” is consistent with the flexible, context-specific character of the term as used elsewhere in the law.

Further, it is more logical—and more consistent with the GCA scheme—to consider an in-transit firearm as part of the shipping FFL’s inventory and thereby place the reporting obligation on the transferor/sender licensee rather than the firearm’s intended recipient. The GCA scheme relies on firearms dealers to control commerce in firearms. *See Huddleston v. United States*, 415 U.S. 814, 824 (1974) (“The principal agent of federal enforcement [of laws regulating interstate commerce in firearms] is the dealer.”). The transferors/senders covered by this rule will be licensees who are subject to the reporting requirement under section 923(g)(6)—but not every intended recipient in firearms transactions will necessarily be a licensee. Thus, placing the reporting obligation on the transferor/sender licensee ensures that, for every firearm transaction, there will be an FFL responsible for reporting any discovered thefts or losses that occur along the way. The Department believes that this will ensure more consistent reporting of

stolen or lost firearms, thereby fulfilling the GCA’s purpose of “strengthen[ing] Federal regulation of interstate firearms traffic,” H.R. Rep. No. 90-1577, at 7 (1968), and furthering the aim of the Violent Crime Control and Law Enforcement Act of 1994 to “enhance public safety,” H.R. Rep. No. 103-711, at 1 (1994) (Conf. Rep.).

In reaching its interpretation of 923(g)(6)’s reporting mandate, the Department considered whether the “inventory” determination should be made in accordance with the variable approach of the UCC regarding the transfer of title for risk of loss purposes. The Department determined that neither the text nor the purpose of the GCA counseled in favor of adopting the UCC approach to determining in whose “inventory” a firearm belongs. As explained in the proposed rule, the UCC approach focuses on the ownership of the goods being shipped for the purposes of allocating the risk of loss, but the primary focus of the GCA and its implementing regulations is, instead, the tracking of the acquisition and disposition of firearms. Accordingly—and as the Department will explain in further detail below—the Department is of the view that the statutory obligation on firearms licensees to report a theft or loss should not turn on technicalities of commercial law regarding whether the seller or buyer has title to, or bears the risk of loss of, the shipped firearms.

Instead, under the final rule, the theft or loss reporting requirement will always remain with the transferor/sender FFL, who will know how and when firearms sent to the transferee were shipped. As the Department reasoned in the 2014 NPRM, the transferee will have an incentive to notify the transferor about any discrepancies in the shipment because the transferee would not want to pay for an item the transferee did not actually receive. Upon being contacted by the transferee about a shipment discrepancy, the transferor FFL will be in the best position to verify the theft or loss by reviewing its transaction records and the shipping information from the

carrier. The transferor could also be in a position to discover that the discrepancy was instead due to recordkeeping or other human error. Indeed, regardless of whether the transferee or transferor arranges the shipment, the transferor will know how and when the firearms were shipped. Moreover, if a firearm is stolen or lost in transit, the notation in the transferor's/sender's acquisition and disposition book indicating the firearm was disposed of to a particular transferee/buyer would be inaccurate.

The Department's interpretation that in-transit firearms remain in the transferring/sending FFL's "inventory" for purposes of section 923(g)(6) is further supported by the fact that an FFL's delivery of firearms to a common or contract carrier for transport does not result in a "disposition" or "transfer" unless and until the firearms are received by the transferee. The Department does not believe that the GCA scheme, which sets forth procedures for conveying firearms by carriers,⁷ supports the conclusion that delivering firearms to the carrier for transport is a "transfer" or "disposition" to that carrier. Under the GCA and current regulations, the carrier is not said to maintain an "inventory" of firearms, and the disposition records of the transferring FFL do not reflect the carrier as a person to whom firearms are disposed. If an FFL's submission of firearms to a carrier were a "disposition" or "transfer," such an interpretation would lead to results that Congress very likely did not intend. Specifically, the transferring FFL would be required to treat carriers like any other unlicensed person by: (1) having an employee of the carrier complete ATF Form 4473 prior to receiving any firearms for shipment;⁸ (2) checking

⁷ See 18 U.S.C. 922(e) (requiring notice to the common or contract carrier of firearms being transported or shipped), 922(f) (prohibiting common or contract carriers from violating the GCA, and requiring them to obtain acknowledgment of receipt of packages containing firearms); 27 CFR 478.31 (same); Open Letter to All Common and Contract Carriers from John W. Magaw, Director, ATF (Jan. 1, 1994), <http://www.nibin.gov/press/releases/historical/010194-openletter-contract-carriers.html>.

⁸ See 18 U.S.C. 922(b)(5), 923(g)(1)(A); 27 CFR 478.124(c).

identification and conducting background checks on the carrier's employees;⁹ (3) recording bound book entries as dispositions to the carrier, rather than to the actual transferees or purchasers of the firearms;¹⁰ and (4) possibly completing multiple sales or other disposition reports when applicable.¹¹ Moreover, unless similar disposition requirements were also imposed on the carriers' subsequent transfer of the firearms to their purchasers, the firearms could potentially end up in the hands of criminals, and would not be traceable if later used in crimes.

Finally, the Department's interpreting the phrase "firearm[s] from the licensee's inventory" to encompass firearms that a licensee has placed in transit accords with the congressional intent behind the GCA more generally. The GCA is a comprehensive statutory scheme designed to closely track the acquisition and disposition of firearms to ensure that firearms do not fall into the hands of criminals, and so that the firearms can be traced if later found to have been used in crime. Accordingly, section 923(g)(6) mandates that "[e]ach licensee shall report the theft or loss of a firearm from the licensee's inventory or collection." To be sure, Congress did not specifically address whether licensees must report the theft or loss of firearms in transit once the licensee ships the firearm to another recipient. Nor did Congress address how those firearms must be recorded in the transferor/sender FFL's acquisition and disposition records. But the text of 923(g)(6) does not foreclose the Department's interpretation of the term "inventory." And the final rule reasonably answers the questions left unaddressed by Congress by interpreting the reporting requirement to include a firearm stolen or lost from the licensee's inventory while in transit with a carrier, and by providing guidance on how FFLs must update their records in such situations. Adopting a contrary interpretation of the statutory language to

⁹ See 18 U.S.C. 922(t)(1); 27 CFR 478.102.

¹⁰ See 18 U.S.C. 923(g)(1)(A); 27 CFR 478.122(d), 478.123(d), 478.125(e).

¹¹ See 18 U.S.C. 923(g)(3)(A); 27 CFR 478.126a.

the effect that thefts or losses of firearms in transit need not be reported by *any* FFL, on the theory that firearms in transit should not be deemed to be part of the transferor/seller's inventory nor part of the intended recipient's inventory, would operate to defeat the statutory goal of reporting thefts and losses of firearms. Commenters who oppose the rule have offered no persuasive reason why Congress would have intended in-transit stolen or lost firearms to go unreported once a licensee discovers the theft or loss, and the Department sees none.

For all those reasons, the Department's determination that the statutory obligation to report "the theft or loss of a firearm from the licensee's inventory" in section 923(g)(6) encompasses an obligation to report the theft or loss of a firearm that the licensee has shipped amounts to a reasonable construction of the GCA.¹²

With regard to the comment concerning ATF's authority to require "best practices" to monitor shipments of firearms once the shipments depart the FFL's facility, the final rule does not require FFLs to monitor their shipments. Again, FFLs will only be required to report thefts and losses once they discover a theft or loss.

B. Commercial Business Practices

Comments Received

One commenter argued that the proposed rule is inconsistent with established commercial business practices. Citing U.C.C. 2-319, the commenter asserted that "firearms are almost

¹² The Department acknowledges its previous statements that section 923(g)(6) does not address the reporting of thefts or losses of firearms in interstate shipments. See ATF, *Safety and Security Information for Federal Firearms Licensees*, ATF Pub. No. 3317.2, at 1 (rev. Feb. 2010), <https://www.atf.gov/file/58656/download>; *FFL or Interstate Theft Procedures and Information*, *FFL Newsletter* (ATF, Washington, D.C.), Aug. 1998, at 5, <https://www.atf.gov/file/56391/download>. To the extent that the Department's prior statements, or ones like it, can be understood as the Department taking a position inconsistent with the interpretation of 923(g)(6) set forth in this final rule, the Department is "at liberty to depart from its longstanding interpretation of a statute" so long as it "provides a reasoned explanation for its decision." *TRT Telecomms. Corp. v. FCC*, 857 F.2d 1535, 1550 (D.C. Cir. 1988); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009). The Department has explained above why it now interprets the term "inventory" in 923(g)(6) to encompass firearms that an FFL has shipped.

universally shipped ‘F.O.B. Factory,’” indicating that once physical custody has passed at the place of shipment, so has legal title to the firearms and risk of loss.

Department Response

The Department disputes the commenter’s factual assertion that firearms “are almost universally shipped ‘F.O.B. Factory.’” The Department believes that transferor/sender FFLs generally select the means by which the firearms in their inventory are shipped and secure insurance from the carriers for the value of the firearms. While these costs may be passed along to buyers in the purchase contracts, the Department believes that in many, if not most, cases, the transferor/sender FFL is legally responsible for any losses incurred in transit. This is because many, if not most, firearm purchase contracts require delivery at a specified destination.¹³ For this reason, if a firearm is lost or stolen in transit, the shipping FFL usually sends a replacement firearm.

Even if the commenter’s factual assertion were proven correct, however, the Department would nonetheless adhere to the position it expressed in the proposed rule that the UCC should not be used to determine the responsibility for reporting thefts and losses of firearms in transit. Adopting the variable UCC approach for reporting firearms stolen or lost in transit would be problematic for FFLs to apply and for ATF to enforce. Instead of being able to follow a single, consistent rule holding the transferor FFL responsible for reporting stolen or lost firearms in every transaction (should a theft or loss be discovered), FFLs in a transaction would need to examine each individual contract to determine who has the reporting responsibility. For that

¹³ See U.C.C. 2-401(2) (“Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . [and] if the contract requires delivery at destination, title passes on tender there.”)

same reason, it would be impracticable for ATF to ensure regulatory reporting compliance under the variable UCC approach.

The UCC does not address whether a merchant must report thefts or losses of goods in transit; rather, the UCC approach focuses on the ownership of the goods being shipped and allocating the risk of loss for purposes of commercial law. By contrast, the primary focus of the GCA and its implementing regulations is on the acquisition, disposition, and misuse of firearms in service of public safety objectives. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (“In enacting the 1968 gun control legislation, Congress was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.” (internal quotation marks omitted)); *Barrett v. United States*, 423 U.S. 212, 220 (1976) (“The history of the 1968 Act reflects a . . . concern with keeping firearms out of the hands of categories of potentially irresponsible persons Its broadly stated principal purpose was ‘to make it possible to keep firearms out of the hands of those not legally entitled to possess them’” (quoting S. Rep. No. 1501, at 22 (1968))); H.R. Rep. No. 103-711, at 1 (the 1994 amendments were intended to “enhance public safety”). The Department thus interprets the GCA to impose reporting and recordkeeping requirements on licensees in certain circumstances regardless of whether the licensee has title to, or bears the risk of loss of, the firearm in question.

Other Federal agency regulations support the conclusion that transferors should be required to report the theft or loss of regulated goods in transit. For example, since 1974, the Drug Enforcement Administration (DEA) has required by rule that suppliers—i.e., transferors—are responsible for reporting in-transit losses of controlled substances by common or contract carriers upon discovery of the theft or loss. *See* 21 CFR 1301.74(c). The DEA also imposes a

duty on suppliers to select common or contract carriers that provide adequate security to guard against in-transit losses, *see* 21 CFR 1301.74(e), and to report theft and loss information to the DEA on a standard form, *see* 21 CFR 1301.74(c), to help the DEA to determine the patterns and methods of diversion of controlled substances. *See* 38 FR 31840 (Nov. 19, 1973) (proposed rule); 39 FR 26022 (July 16, 1974) (final rule); *see generally* Larry K. Houck, *The Drug Enforcement Administration's Final Rule on Theft and Significant Loss Reporting: We Can See More Clearly Now*, 61 Food & Drug L.J. 1 (2006). ATF believes that many of the arguments informing DEA's decision to require suppliers to notify DEA of in-transit thefts and losses are applicable to this rulemaking.

C. Method of Reporting Theft or Loss of Firearms

Comments Received

Five commenters supported the requirement to report a theft or loss of firearms in transit in part or in the requirement's entirety. One commenter supported the use of Form 3310.11 to report the theft or loss of firearms in transit to simultaneously meet the requirements of §§ 478.39a and 479.141. Another commenter supported the requirement that FFLs notify local authorities as well as ATF, stating that "[t]his is a very serious issue and the more authorities that are notified of the issue, the more likely it is to be resolved." The same commenter also agreed that transferring/sending FFLs should have the responsibility to report a theft or loss of a firearm in transit because a transferring/sending FFL has access to the shipping history and, therefore, should have better knowledge of the firearm's whereabouts and would be able to "effectively report" the theft or loss of the firearm.

Two commenters made statements to the effect that "[t]he updated regulations will help strengthen our nation[']s ability to track firearms that are lost or stolen while in transit" and that

a single method of reporting such thefts and losses to ATF and local authorities should be adopted. Although those two commenters supported notification of theft or loss by the transferring/sending FFL, they suggested that the requirement to inform local law enforcement of shipping losses or suspected thefts should be eliminated because many local authorities often refuse to take the report. They also suggested that the requirement to make a report to local authorities should be clarified because, as one commenter put it, currently the regulation is “particularly vague about who exactly the appropriate local authorities would be. If a firearm is being shipped from Philadelphia to Orlando and it gets lost in Atlanta[,] who are the proper local authorities to contact?” Another commenter suggested that reporting to local authorities could be simplified by updating Form 3310.11 to be applicable for both ATF and local authorities.

Several commenters who opposed the proposed rule did so based on the claim that, once a firearm is logged out of the transferring/sending FFL’s A&D Record, it is no longer the responsibility of that FFL. One commenter asserted that the shipping companies instead have responsibility for the shipment and should therefore be required to report any in-transit thefts or losses.

Three commenters had practical concerns about the transferor/sender licensee bearing the responsibility to report the theft or loss of a firearm in transit because, even though a transferor/sender might receive confirmation that the firearms were delivered, such confirmation might not reflect whether the full amount of firearms was received; that discrepancy might only become apparent once the recipient compares the shipping invoice to the specific firearms ordered. Those commenters stated that the transferee in such a situation would be in a better position to know and report whether a firearm was received. The commenters explained that the

transferee would have more incentive to report a firearm shipment stolen or lost because businesses are not in the habit of paying for products they do not actually receive.

Department Response

The reporting statute, 18 U.S.C. 923(g)(6), requires FFLs to report the theft or loss of firearms from their inventories or collections not only to the Attorney General (delegated to ATF) but also to “the appropriate local authorities.” Thus, as a statutory requirement, the report must be submitted to such local authorities even if it is refused. The Department believes that if the report is made to the local authorities with proper jurisdiction over the incident (i.e., the “appropriate” authorities), the chance that the report would be refused is greatly reduced. More specifically, if the location of the loss or theft is known, the local law enforcement agency at that location would be the “appropriate local authorit[y].” Otherwise, the transferor/sender should report the theft or loss to the local law enforcement agency at the shipper’s location—the same agency the FFL would contact in the event of any other missing or stolen property. Not only does the theft or loss report provide local law enforcement officers with the information necessary to commence an investigation to pursue the offenders and locate the property, such reporting may also assist the FFL in filing an insurance claim to recover the value of the firearms. Because the Department agrees with the commenters that clarification concerning local authority reporting would provide helpful guidance to licensees, the rule has been modified accordingly.

The Department does not agree with one commenter’s suggestion that common or contract carriers should be held legally responsible under this rule for reporting the theft or loss of firearms while in transit. The commenter who proposed that the reporting obligation lie with the carriers did not cite any statutory authority under which such a requirement could be

imposed. Congress did not ignore the role of common or contract carriers in firearms transactions in the GCA. For example, it is unlawful for a common or contract carrier to transport or deliver any firearm shipment in violation of the GCA, or to deliver a firearm without obtaining written acknowledgment of receipt. *See* 18 U.S.C. 922(f)(1)–(2). Yet Congress did not impose any express requirement on carriers to report the theft or loss of firearms they transport. If Congress had intended that the theft or loss of firearms in transit be reported by carriers, it likely would have drafted the law to state that requirement and specify the carriers’ responsibility to file reports.

Instead, the GCA’s scheme relies on firearms dealers to control commerce in firearms and places the burden of reporting stolen and lost firearms on licensees. As we have explained, it is reasonable to interpret the phrase “from the licensee’s inventory” to require transferor/sender licensees to report the thefts or losses of firearms they have placed in transit. In addition, the transferor/sender FFL is in the best position to verify the theft or loss by reviewing its records and the shipping information from the carrier that was utilized. The transferor/sender FFL may also discover that the discrepancy is due to a recordkeeping or other human error, or a theft or loss at the licensed premises, rather than a theft or loss in transit. To be sure, ATF has long encouraged carriers to file theft and loss reports and issued ATF Form 3310.6, Interstate Firearms Shipment Theft/Loss Report, to assist carriers in reporting. However, ATF considers such reporting merely voluntary, not clearly required by statute.

Regarding the comment alleging that ATF made a conflicting statement to the press to the effect that this rulemaking would apply to “the carriers” rather than FFLs, ATF has not been able to locate any such statement. Both the 2000 and 2014 proposed rules consistently identified

the transferor/sender licensee as the person who would be responsible for reporting thefts and losses of firearms in transit.

D. Burden on FFLs to Report and Update Records

Comments Received

One commenter agreed with the basic process outlined in the proposed rule, but stated that the rule should clarify the type of shipping documents the transferring FFL must retain and for how long. Additionally, the commenter suggested that the proposed time frame for licensees to update their A&D Records to reflect a theft or loss—“7 days following discovery of the theft or loss”—be extended to a longer term. The same commenter also recommended that disposition entries for shipped items not be entered into the A&D Record until the shipment has been received (by the transferee) or declared lost (by the carrier). The commenter asked for clarification on when the “discovery” of the theft or loss occurs if the transferor/sender is waiting for proof of delivery to make a “final disposition entry.” The commenter further suggested that maintaining the complete electronic tracking record would be a good idea, but that the licensee should be able to dispose of the records a week after the carrier’s tracking system (or the recipient’s acknowledgment) indicates that the shipment has been received, because otherwise the paperwork could become burdensome.

Another commenter argued that no signature should be required for a shipment and that the rule should not require proof of delivery to be retained. The commenter explained that “[t]his burden should not fall on the shipping [FFL],” because “someone acting nefariously on the receiving end could refute any signature or proof of delivery very easily.”

Another commenter opposed the rule on the basis that the transferor/sender cannot know that the firearm has been stolen or lost in transit until the intended recipient or the carrier notifies

the transferor/sender, and the commenter did not know what would constitute notification. The same commenter further asserted that if FFLs are to timely report theft or loss of firearms in transit they must rely upon shipping companies to “provide accurate information.”

Two other commenters believed that imposing the burden on manufacturers—particularly those that ship thousands of firearms—to report the theft or loss of firearms no longer under the manufacturers’ control would be unrealistic. As one commenter complained, “The resulting logistical burden would be enormous, and require an estimated 2-3 full time personnel to manually track, log and store documentation related to the hundreds or thousands of open orders on any given day.” Another commenter projected that ATF’s estimated time of 24 minutes to complete Form 3310.11 was too low.

Department Response

In light of comments received, the Department has chosen not to implement a recordkeeping requirement related to shipment and delivery paperwork at this time. While the 2000 proposed rule would have required FFLs to establish commercial business practices to verify delivery, this final rule does not require licensees to track shipments or receive verification of receipt. There is only a reporting requirement once the transferor/sender FFL discovers that one or more firearms have been lost or stolen in transit. As stated previously, the FFL’s discovery may come from contact with the intended recipient, the common or contract carrier, a witness, or some other person. In accordance with section 923(g)(6), licensees are required to report the theft or loss in transit to ATF and appropriate local authorities within 48 hours after discovery.¹⁴ The

¹⁴ For further guidance concerning the discovery and reporting of stolen and lost firearms, see ATF, *Safety and Security Information for Federal Firearms Licensees*, ATF Pub. No. 3317.2 (rev. Feb. 2010), <https://www.atf.gov/file/58656/download>; Open Letter to All Federal Firearms Licensees from Carson W. Carroll, Assistant Director, Enforcement Programs & Services, ATF (Jan. 14, 2009), <https://www.atf.gov/file/60871/download>.

Department believes that, in many cases, transferor/sender FFLs are already reporting such thefts and losses to law enforcement authorities and insurance companies to recover the firearms and obtain compensation for their losses.

Licensees will have up to 7 days to reflect the theft or loss of the firearm with a correct disposition entry in the A&D Record. This is consistent with the longstanding firearms disposition reporting requirement for licensed dealers under 27 CFR 478.125(e). ATF understands that there will be instances in which licensees must make corrections to the existing disposition information in their A&D Records to reflect the theft or loss of firearms. In those instances, the FFL should draw a single line through the disposition information. If there is room in the disposition block, the FFL should record the date of the theft or loss, the ATF-Issued Incident Number, and the local authority Incident Number. The licensee should then initial and date the changes. Alternatively, if there is no room in the disposition block to legibly record the required information, the FFL should line-out the disposition information and initial and date the change. The FFL should then make a new entry in the next available line in the current A&D Record. In that case, the FFL must enter a reference to the new book, page, and line number in the disposition side of the updated record, and use the new entry to record the date of the theft or loss, the ATF-Issued Incident Number, and the local authority Incident Number.

Though the number of responding FFLs will grow due to the expansion of the reporting requirements, the estimate of 24 minutes' average completion time for Form 3310.11 will not increase. Form 3310.11 has been utilized since 1994 for the reporting of firearms thefts and losses and this rulemaking makes no significant changes to Form 3310.11 that would lead to an increase in the time required to complete it.

E. Benefit to Law Enforcement

Comments Received

One commenter supported the proposed rule because the rule “would close a loophole in federal regulations that lets thousands of lost and stolen guns go unreported.” The commenter believed that if FFLs were required to promptly report guns lost and stolen, illegal gun trafficking would be curtailed and guns would be kept out of the hands of dangerous criminals.

Several commenters asserted that requiring the reporting of firearms stolen or lost in transit would not lead to any appreciable benefits. They questioned whether such reporting would make ATF or local police more successful in an investigation or in tracing firearms. They suggested that the costs of imposing the reporting requirement on licensees exceed any benefits to law enforcement.

Department Response

The moment the theft of a firearm occurs, the firearm has been diverted to an illegal channel and is a threat to public safety. The knowledge that a particular firearm has been diverted is important to law enforcement at the local and Federal levels. A law enforcement agency cannot charge a suspect in possession of a firearm with a theft if there is no information that the firearm was stolen. An agency may not retain a firearm from a suspect if there is no information that the property was stolen. And an agency that has retained such a firearm cannot return the firearm to its rightful owner if there is no information about who the rightful owner might be. Without proper reporting of thefts, law enforcement may not be able link the person(s) who stole the firearm with the suspect who ultimately is found in possession of the firearm.

In addition, even where a report is made to local law enforcement, in-transit shipments often result in interstate or cross-jurisdictional activities. Such activities are the purview of

Federal law enforcement, which is designed to bridge jurisdictional gaps and provide assets not available to local law enforcement. ATF has found patterns in thefts in interstate shipments that can only be developed through the examination of aggregate data. This data often includes seemingly separate and unrelated individual incidents of theft over a period of time, which, when analyzed in the aggregate, reveal commonalities that allow ATF to dismantle larger criminal schemes. This process is highly dependent upon the collection of accurate interstate shipment theft information.

In FY 2015, 313 firearms that interstate carriers had voluntarily reported as lost or stolen were recovered and traced by law enforcement agencies. In the past 5 years, 25 firearms that interstate carriers had voluntarily reported as lost or stolen were recovered and traced and the recovering agency reported that they were engaged in a homicide investigation involving the recovered firearm. Carriers voluntarily reported that information to ATF, and those numbers do not reflect the additional amount of firearms lost or stolen in transit that will be reported to ATF by FFLs pursuant to this rule. Such additional reporting will allow law enforcement to open more criminal investigations to locate criminals, deter thefts, and promote better controls by carriers to prevent losses. This additional reporting should also result in the return of more lost or stolen firearms to their rightful owners.

In addition to ensuring that thefts and losses of firearms are reported, the procedures outlined in this rule seek to eliminate redundancy in reporting. By designating the transferor/sender FFL as the required reporting party, confusion about who needs to report the incident will be reduced.

V. Final Rule

This final rule adopts, with minor changes, the proposed amendment to 27 CFR 478.39a requiring the transferor/sender FFL to notify ATF and the appropriate local authorities when a firearm is stolen or lost in transit. For purposes of this final rule, the Department considers the U.S. Postal Service a “common or contract carrier.” Therefore, the regulatory text of the proposed § 478.39a(a)(2) is amended to read as: “common or contract carrier (which for purposes of this paragraph includes the U.S. Postal Service).”

Upon the effective date of this final rule, transferor/sender licensees will be required to use Form 3310.11 to notify ATF of firearms stolen or lost in transit. For stolen or lost NFA firearms, submitting Form 3310.11 will satisfy the requirements of 27 CFR 478.39 and 479.141. In addition, transferor/sender FFLs must reflect the theft or loss of a firearm in transit as a disposition entry in their required records not later than 7 days following discovery of the theft or loss. The rule also specifies that FFLs that report theft or loss of a firearm and later discover its whereabouts must advise ATF that the firearm has been located, and must re-enter the firearm into their required records as an acquisition or disposition entry as appropriate. These recordkeeping requirements apply whether the firearm is stolen or lost in transit between FFLs or between a licensee and a nonlicensee.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866 and Executive Order 13563—Regulatory Review

This final rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b).

The Department of Justice has determined that this final rule is a “significant regulatory action” under Executive Order 12866, section (f), and accordingly this final rule has been reviewed by the Office of Management and Budget. However, this final rule will not have an annual effect on the economy of \$100 million or more; nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Accordingly, this final rule is not an “economically significant” rulemaking under Executive Order 12866.

Executive Orders 12866 and 13563 both direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this final regulation and believes that the regulatory approach selected maximizes net benefits.

Under 18 U.S.C. 923(g)(6) and its current implementing regulation, 27 CFR 478.39a, each FFL must report the theft or loss of a firearm from the licensee’s inventory or collection within 48 hours after the theft or loss is discovered. The licensee must report the theft or loss of a firearm to ATF and to the appropriate local authorities. Current regulations do not specify reporting and recordkeeping requirements for firearms lost or stolen while in transit. This final rule specifies that when a firearm is stolen or lost in transit, for reporting purposes it is considered stolen or lost from the transferor’s/sender’s inventory.

The GCA and the current implementing regulations have long required that a licensee must report the theft or loss of a firearm. This final rule specifies that a transferor/sender

licensee is required to submit the required report if a firearm is lost or stolen in transit on a common or contract carrier from that licensee to another person. This final rule retains most of the existing requirements under 27 CFR part 478, subpart H, and the instructions for Form 3310.11 with respect to how FFLs are to record the theft or loss of firearms from their inventories in their A&D Records.

The final rule will reduce the current reporting burden on licensees when the theft or loss involves a registered NFA firearm. Currently, as discussed in section I, a licensee must submit Form 3310.11 to NTC to comply with 27 CFR 478.39a and, if the licensee is the person who lost the firearm, provide additional notification to the NFA Branch to comply with 27 CFR 479.141. Under this final rule, to meet the 27 CFR 478.39a requirements, a licensee must complete and submit Form 3310.11 to NTC. If the theft or loss involves a registered NFA firearm, NTC will notify the NFA Branch. This will satisfy the 27 CFR 479.141 notification requirements; licensees will no longer have to submit additional notification about NFA firearms to ATF.

Although there is no definite count of the total number of firearms that were lost or stolen in transit, ATF can provide an estimate based on tracing data. From FY 2010 through FY 2014, there was an average of 1,333 crime gun traces per year where the firearm was traced back to an FFL that claimed it never received the firearm allegedly shipped to it, but no theft or loss was reported to ATF.¹⁵ ATF recognizes that this figure may include some firearms lost or stolen at licensed premises while not in transit (i.e., prior to or after shipment). However, because there are numerous firearms lost or stolen that have not been traced, the full count of firearms lost or stolen in transit that would be reported under this rule may be significantly higher. Although the

¹⁵ In the 2014 NPRM, the Department relied on the crime gun trace average for FY 2008 through FY 2012. In this final rule, the Department has used the more recent average from FY 2010 through FY 2014 because it believes that the updated figure more accurately reflects the actual benefits and costs of the final rule. The updated figure does not meaningfully change the Department's estimates of the rule's costs and benefits.

number of unreported thefts or losses of firearms may be substantially greater than this estimate, any additional burden to report them should be minimal. At this time, the 1,333 figure reflects the best data available.

Pursuant to the instructions on Form 3310.11, a separate form is required for each theft or loss. ATF estimates that it takes an FFL 24 minutes to complete Form 3310.11; the postage cost to mail the form to NTC is 49 cents. If FFLs complete a separate Form 3310.11 for each of the average of 1,333 firearms that tracing data indicates are lost or stolen each year but are not currently being reported, ATF estimates the total burden hours to be 533 (1,333 x 24/60), and the current estimated cost to be \$18,350. (Cost of completing the form = 24 minutes at \$33.19 per hour x 1,333 = \$17,697; Cost of mailing the form = \$.49 x 1,333 = \$653.) ATF estimated the cost of the time to complete these tasks using employee compensation data for June 2015 as determined by the Bureau of Labor Statistics (BLS), U.S. Department of Labor. *See News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Employer Costs for Employer Compensation* (Sept. 9, 2015), http://www.bls.gov/news.release/archives/ecec_09092015.pdf.¹⁶ The BLS determined the hourly compensation (which includes wages, salaries, and benefits) for civilian workers to be \$33.19.

The instructions on Form 3310.11 also provide that FFLs must report firearms thefts or losses by telephone to ATF. ATF estimates that it takes an FFL 24 minutes to call and provide the requisite information to ATF. If an FFL called ATF for each of the average of 1,333 firearms that tracing data indicates are lost or stolen each year but are not currently being reported, ATF

¹⁶ In the 2014 NPRM, the Department relied on BLS employee compensation data from December 2013. In this final rule, the Department has used the more recent BLS data from June 2015 because it believes that the more recent data more accurately reflects the actual benefits and costs of the final rule. The more recent BLS data does not meaningfully change the Department's estimates of the rule's costs and benefits.

estimates the total burden hours to be 533 ($1,333 \times 24/60$), and the current estimated cost is \$17,697 (24 minutes at \$33.19 per hour \times 1,333).

Therefore, the combined total estimated burden hours for submitting Form 3310.11 and calling ATF are 1,066 ($533 + 533$). The combined total estimated cost of fulfilling those same two requirements is \$36,047 ($\$18,350 + \$17,697$).

Alternatives, such as the UCC variable approach discussed in section III of the SUPPLEMENTARY INFORMATION in the 2014 NPRM, are more burdensome for FFLs than the approach taken in this final rule. This is because, under the UCC variable approach, FFLs would need to examine the terms of the individual contracts to determine how the contract allocates the risk of loss as between the two parties. In contrast, the final rule provides a simple, consistent rule so that there is no basis for uncertainty or need for additional review: the final rule assigns the theft or loss reporting requirement to the transferor/sender FFL.

In addition, this final rule will alleviate reporting burdens on licensees in that licensees will need only report the theft or loss of a registered NFA firearm once to ATF instead of reporting the incident separately to NTC and the NFA Branch. As the licensee is providing much of the same information under both reporting requirements, ATF estimates that it takes the same amount of time and cost for postage, and ATF uses the same hourly compensation as listed above (i.e., 24 minutes for time, 49 cents for postage, and \$33.19 for hourly compensation). Currently, the NFA Branch receives notification of the theft or loss of a registered NFA firearm from approximately 60 licensees annually. ATF estimates the total burden hours to be 24 ($60 \times 24/60$) and the total cost to be \$826. (Cost of submitting the notification = 24 minutes at \$33.19 per hour \times 60 = \$797; cost of mailing the notification = $\$.49 \times 60 = \29 .) Therefore, ATF estimates the savings to be these amounts.

B. Executive Order 13132

This final rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, “Federalism,” the Attorney General has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

D. Regulatory Flexibility Act

The Regulatory Flexibility Act requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The Attorney General has reviewed this final rule and, by approving it, certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Under section 18 U.S.C. 923(g)(6) and its implementing regulation, 27 CFR 478.39a, each FFL must report the theft or loss of a firearm from the licensee’s inventory or collection within 48 hours after the theft or loss is discovered. The licensee must report the theft or loss of a firearm to ATF and to the appropriate local authorities. This final rule clarifies that when a

firearm is stolen or lost in transit, for reporting purposes, it is considered stolen or lost from the transferor/sender FFL's inventory.

As discussed in section I of this preamble, the current regulation requires that an FFL report thefts or losses telephonically to ATF and complete and submit to NTC a separate Form 3310.11 for each theft or loss. ATF estimates the time to complete the form as 24 minutes, the time for the telephone call as 24 minutes, and the postage cost as 49 cents. If an FFL called ATF to report the theft or loss and completed a separate Form 3310.11 for each of the average of 1,333 firearms that tracing data indicates are lost or stolen each year but are not currently being reported, ATF estimates the total cost of completing and mailing the form and calling ATF to be \$36,047. See section VI.A. for a full discussion of these costs. Therefore, this final rule will not impose a significant impact on a substantial number of small entities.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This final rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed

necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1532(a), 1533(a).

G. Paperwork Reduction Act

This final rule revises an existing reporting and recordkeeping requirement under the Paperwork Reduction Act. It also eliminates an existing reporting requirement. The current regulation at 27 CFR 478.39a provides that each FFL must report the theft or loss of a firearm from the licensee's inventory or collection within 48 hours after the theft or loss is discovered. Licensees must report such thefts and losses to ATF both telephonically and by submitting Form 3310.11. Licensees must also report the theft or loss to the appropriate local authorities.

Pursuant to 27 CFR 479.141 and according to the instructions on Form 3310.11, licensees reporting the theft or loss of registered NFA firearms must provide additional notification to ATF. As discussed in section I, no form exists for this purpose, and the person reporting typically submits a letter with the required information to the NFA Branch. As part of this rulemaking, Form 3310.11, approved under OMB control number 1140-0039, will capture the information required by 27 CFR 479.141. Therefore, under this final rule, a licensee will satisfy its obligation to provide the required notification to the NFA Branch by submitting Form 3310.11 to NTC, and NTC will notify the NFA Branch. Submitting Form 3310.11 will satisfy the requirements of both 27 CFR 478.39a and 27 CFR 479.141 with one notification.

In addition, the instructions on Form 3310.11 state that a licensee must reflect the theft or loss of a firearm as a disposition entry in the A&D Record required by subpart H of part 478 (formerly 178). These instructions further state that the disposition entry should indicate whether the incident is a theft or loss and include the ATF-Issued Incident Number and the Incident Number provided by the local law enforcement agency. Finally, the instructions state that if the

firearms are located, they should be re-entered in the A&D Record as acquisition entries. The final rule adds both sets of these instructions to the regulatory text in 27 CFR 478.39a with modifications. See section V for full discussion of these revisions.

The information collection required by 27 CFR 478.39a—i.e., the submission of Form 3310.11—has been approved by the Office of Management and Budget under control number 1140–0039. This final rule specifies that when a firearm is stolen or lost in transit, for reporting purposes, it is considered stolen or lost from the transferor’s/sender’s inventory.

Drafting Information

The author of this document is Denise Brown, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Customs duties and inspection, Exports, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

- 1. The authority citation for 27 CFR part 478 is revised to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

- 2. Revise § 478.39a to read as follows:

§ 478.39a Reporting theft or loss of firearms.

(a)(1) Each licensee shall report the theft or loss of a firearm from the licensee's inventory (including any firearm which has been transferred from the licensee's inventory to a personal collection and held as a personal firearm for at least 1 year), or from the collection of a licensed collector, within 48 hours after the theft or loss is discovered.

(2) When a firearm is stolen or lost in transit on a common or contract carrier (which for purposes of this paragraph includes the U.S. Postal Service), it is considered stolen or lost from the transferor/sender licensee's inventory for reporting purposes. Therefore, the transferor/sender of the stolen or lost firearm shall report the theft or loss of the firearm within 48 hours after the transferor/sender discovers the theft or loss.

(b) Each licensee shall report the theft or loss by telephoning ATF at 1-888-930-9275 (nationwide toll-free number), and by preparing and submitting to ATF a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, in accordance with the instructions on the form. The original of the report shall be retained by the licensee as part of the licensee's required records.

(c) When a licensee submits to ATF a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, for the theft or loss of a firearm registered under the National Firearms Act, this report also satisfies the notification requirement under § 479.141 of this chapter.

(d) Theft or loss of any firearm shall also be reported to the appropriate local authorities. If the location of the theft or loss is known, the local law enforcement agency at that location would be the appropriate local authority. Otherwise, the report should be made to the local law enforcement authorities at the licensee's location or business premises.

(e) Licensees shall reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition required by subpart H of this part not later than 7 days following discovery of the theft or loss. The disposition entry shall record whether the incident is a theft or loss, the ATF-Issued Incident Number, and the Incident Number provided by the local law enforcement agency.

(f) Licensees who report the theft or loss of a firearm and later discover its whereabouts shall advise ATF at 1-888-930-9275 (nationwide toll-free number) that the firearm has been located, and shall re-enter the firearm in the Record of Acquisition and Disposition as an acquisition or disposition entry as appropriate.

Dated: January 4, 2016.

Loretta E. Lynch,
Attorney General.

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