



# Gun Trafficking and the Southwest Border

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## Summary

According to the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the lead federal agency responsible for stopping the illegal flow of firearms, or gun trafficking, from the United States to Mexico. ATF has developed a nationwide strategy to reduce firearms trafficking and violent crime by seeking to prevent convicted felons, drug traffickers, and juvenile gang members from acquiring firearms from gun traffickers. These criminals often acquire firearms from persons who are otherwise not prohibited from possessing firearms, or by buying firearms from corrupt federal firearms licensees (FFLs) who sell firearms off-the-books in an attempt to escape federal regulation. ATF also reports that Mexican drug trafficking organizations (DTOs) are increasingly sending enforcers across the border to hire surrogates (straw purchasers) who buy several “military-style” firearms at a time from FFLs. The DTOs also reportedly favor pistols chambered to accommodate comparatively large cartridges that are capable of piercing through armor vests usually worn by law enforcement officers, and magazines capable of holding more than 10 rounds of ammunition. Less frequently, but no less troubling to law enforcement, the DTOs have also sought .50 caliber sniper rifles that are capable of penetrating bullet-proof glass and lightly armored vehicles.

ATF reports that there are around 6,700 FFLs in the United States operating in the Southwest border region of Texas, New Mexico, Arizona, and California. By inspecting the firearms transfer records that FFLs are required by law to maintain, ATF investigators are often able to trace crime guns from their domestic manufacturer or importer to the first retail dealer that sold those firearms to persons in the general public, generating vital leads in criminal investigations. In addition, by inspecting those records, ATF investigators sometimes discover evidence of illegal, off-the-books transfers, straw purchases, and other patterns of suspicious behavior. During FY2006 and FY2007, ATF dedicated approximately 100 special agents (SAs) and 25 industry operations investigators (IOIs) to a Southwest border initiative known as “Project Gunrunner” to disrupt the illegal flow of guns from the United States into Mexico. By the end of FY2008, ATF had deployed 146 SAs and 68 IOIs to the Southwest border to bolster that initiative at a conservatively estimated cost of \$32.2 million. The Omnibus Appropriations Act of 2009 included an increase of at least \$5 million for Project Gunrunner, and the FY2009 Supplemental Appropriations Act includes an additional \$14 million for this initiative. Both the House-passed and Senate-reported FY2010 Commerce, Justice, Science, and Related Agencies appropriations bill (H.R. 2847) would provide ATF with an \$18 million increase for Project Gunrunner, an amount equal to the President’s request.

U.S. firearms laws currently govern the possession and transfer of firearms and provide penalties for the violation of such laws. “Gun trafficking,” although not defined by statute, essentially includes the movement or diversion of firearms from legal to illegal markets. This report includes legal analyses of three ATF-investigated, Southwest border gun trafficking cases to illustrate the federal statutes that are typically violated as part of wider gun trafficking schemes. The report also examines anti-gun trafficking proposals introduced in the 110<sup>th</sup> Congress. So far, no similar proposals have been introduced in the 111<sup>th</sup> Congress. The report concludes with possible policy questions for Congress regarding the magnitude of Southwest border gun trafficking, the use and significance of ATF crime gun trace data, the possible ratification of an Inter-American Gun Trafficking Convention (CIFTA), and the adequacy of the federal statutes designed to deter and reduce illegal gun trafficking.

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## Overview of Gun Trafficking from the United States to Mexico

In the U.S. Department of Justice's *National Drug Threat Assessment 2009*, Mexican drug trafficking organizations (DTOs) were identified as the greatest organized crime and drug trafficking threat to the United States worldwide.<sup>1</sup> With increased U.S. efforts to interdict narcotic smugglers in the Caribbean and Florida in the late 1980s and 1990s, the Colombian drug cartels began subcontracting with Mexican DTOs to smuggle cocaine into the United States across the Southwest border. By the late 1990s, Mexican DTOs had pushed aside the Colombians and gained greater control and market share of cocaine trafficking into the United States. Today, Mexico is a major supplier to U.S. markets of heroin, methamphetamine, and marijuana and the major transit country for cocaine smuggled into the United States. The Department of State estimates that as much as 90% of the cocaine entering the United States now transits through Mexico.<sup>2</sup>

Since taking office in December 2006, Mexican President Felipe Calderón has made combating drug cartels<sup>3</sup> and drug violence a top priority of his administration. President Calderón has deployed some Mexican army contingents and federal police to cartel-controlled areas throughout Mexico to reestablish government control.<sup>4</sup> In response, drug cartel enforcers reportedly are buying semiautomatic versions of AK-47 and AR-15 style assault rifles, and other military-style firearms, including .50 caliber sniper rifles in the United States. With those rifles and other armaments,<sup>5</sup> the cartels are achieving parity in terms of firepower with the Mexican army and law enforcement. President Calderón has called upon the United States to increase its efforts to suppress the flow of U.S. firearms into Mexico. According to the U.S. Department of Justice, drug-related murders in Mexico doubled from 2006 to 2007, and more than doubled again in

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<sup>1</sup> National Drug Intelligence Center, *National Drug Threat Assessment 2009*, U.S. Department of Justice, Product 2008-Q0317-005, December 2008, p. III, <http://www.usdoj.gov/ndic/pubs31/31379/31379p.pdf>.

<sup>2</sup> Department of State Bureau of International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report 2009*, February 2009.

<sup>3</sup> Some law enforcement agencies and observers prefer to use the term "drug trafficking organizations" when referring to these groups. The term drug cartel remains the dominant term used colloquially and in the press, but some experts disagree with this because "cartel" often refers to price-setting groups and it is not clear that the Mexican drug cartels are setting illicit drug prices.

<sup>4</sup> See CRS Report R40582, *Mexico's Drug-Related Violence*, by June S. Beittel.

<sup>5</sup> One commentator has asked, "Where are the military-grade firearms really coming from?" Despite press accounts to the contrary, grenades, rocket launchers, bazookas, and high-explosives are not easily obtainable in normal (non-military) commercial channels in the United States. However, a significant number of these items are imported legally by the Government of Mexico from the United States, prompting this commentator to suggest that many of those items are illegally trafficked in Mexico by corrupt government officials or stolen by deserting Mexican soldiers. This commentator also suggests that other military-grade firearms that were previously transferred by the United States to other Central American countries as part of military aid packages have been trafficked illegally to Mexico. See Bill Conroy, "Legal U.S. Arms Exports May Be Source of Narco Syndicates Rising Firepower," *Narcosphere*, March 29, 2009.

2008 to 6,200 murders.<sup>6</sup> Of the murders in 2008, nearly 10% involved law enforcement officers or military personnel killed in the line of duty.<sup>7</sup>

More than 23,000 firearms were recovered by Mexican authorities and submitted for tracing to the U.S. Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) from FY2004 through FY2008.<sup>8</sup> Although only a fraction of recovered firearms are submitted for tracing,<sup>9</sup> approximately 87% of traced firearms were determined to have originated in the United States.<sup>10</sup> Law enforcement authorities in both nations are confronting the Southwest border paradigm: drugs and illegal migrants flow north, guns and money flow south.<sup>11</sup> The Mexican government estimates that 2,000 firearms are smuggled across the Southwest border daily.<sup>12</sup> Although firearms trafficking is not the only reason violent crime is increasing in Mexico, reducing the flow of illegal firearms from the United States to Mexico would arguably reduce crime rates in Mexico and improve public safety.

Mexican gun laws are generally much stricter than U.S. gun laws.<sup>13</sup> The Department of State's Bureau of Consular Affairs "Tips for Travelers to Mexico" warns U.S. gun owners not to take firearms to Mexico unless they have a permit from the Mexican Embassy, as several dozen U.S. citizens have been incarcerated in Mexico on weapons-related charges, including some who inadvertently carried a U.S.-licensed weapon into Mexico.<sup>14</sup> In its publication, *Guide To The Interstate Transportation of Firearms*, the National Rifle Association (NRA) also warns that firearms are "severely restricted" in Mexico, but offers information on how firearms can be taken legally to Mexico for sporting purposes.<sup>15</sup>

In many ways, the gun trafficking issue between Mexico and the United States is analogous to the "crime gun" trafficking issue that has arisen among states within the United States.<sup>16</sup> Some states have more liberal gun laws, and others, stricter gun laws. Oftentimes, the latter view the former as

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<sup>6</sup> U.S. Department of Justice, Statement of David Ogden, Deputy Attorney General, before the United States Senate Committee on Homeland Security and Governmental Affairs, "Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities," March 25, 2009, p. 5.

<sup>7</sup> Ibid.

<sup>8</sup> U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, June 29, 2009, p. 18, <http://www.gao.gov/new.items/d09709.pdf>.

<sup>9</sup> According to GAO, Mexican authorities recovered approximately 30,000 firearms in FY2008. Of those firearms, 7,200 were submitted for tracing. Ibid., p. 16.

<sup>10</sup> Ibid., p. 15.

<sup>11</sup> Oscar Becera, "Firing Line – Tracking Mexico's Illegal Weapons," *Jane's Intelligence Review*, April 28, 2008.

<sup>12</sup> Alfredo Corchado, "Mexico's violence to intensify, Officials from both sides of border may be targets, experts predict." *Dallas Morning News*, January 4, 2009, p. 1A.

<sup>13</sup> David Kopel, Guns in American Society, "Mexico," *Second Amendment Project (2007)*, available at <http://www.davekopel.com/espanol/Mexican-Gun-Laws.htm>, last accessed on July 23, 2009. Also, see Library of Congress, Law Library, *Firearms Regulations in Various Foreign Countries*, Report LL98-3, 97-20110, (May 1998), pp. 131-141.

<sup>14</sup> U.S. Department of State, Bureau of Consular Affairs, "Mexico: Country Specific Information," September 13, 2007.

<sup>15</sup> National Rifle Association, *Guide to Interstate Transportation of Firearms (2008)*, available at, <http://www.nraila.org/GunLaws/FederalGunLaws.aspx?ID=59>, last accessed on May 22, 2008.

<sup>16</sup> According to ATF, a "crime gun" is any firearm that is illegally possessed, used in crime, or suspected to have been used in crime. An abandoned firearm may also be categorized as a crime gun if it is suspected it was used in a crime or illegally possessed. See U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Crime Gun Trace Reports (2000)*, National Report, The ATF Youth Crime Gun Interdiction Initiative, (July 2002), p. A-3.

the source of many crime guns and, hence, gun-related crimes.<sup>17</sup> It is noteworthy that the cross-border flow of illegal firearms has also been an issue for Canada,<sup>18</sup> because Canadian gun laws are also generally much stricter than U.S. gun laws.<sup>19</sup> Indeed, both Mexico and Canada, in addition to a minority of U.S. states, require the registration of most privately held firearms, but there is no U.S. federal registry of firearms.<sup>20</sup>

Illegal gun trafficking from the United States to Mexico reportedly ranges from frequent small-scale smuggling of one or two handguns per border crossing to less frequent, larger-scale conspiracies to smuggle large shipments of military armaments.<sup>21</sup> The Department of Homeland Security's Customs and Border Protection (CBP) and the Immigration and Customs Enforcement (ICE) and one of its predecessor agencies, the U.S. Customs Service, have interdicted large weapons shipments on occasion. It has been reported that firearms are frequently diverted from legal commercial channels to illegal channels in the United States and then smuggled into Mexico.<sup>22</sup> Although cross-border firearms trafficking is illegal and a high-risk endeavor, the reward is great, with profit margins that in the past have typically ranged between 300% and 500%.<sup>23</sup>

## **U.S. Gun Control Statutes and an Inter-American, Anti-Gun Trafficking Convention**

Four federal statutes govern U.S. commerce of firearms domestically and internationally. Many states supplement these federal statutes and have firearms laws of their own that are more strict. For example, some states require permits to obtain firearms and impose a waiting period for firearm transfers. Domestic commerce and importations into the United States are generally regulated under the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). The exportation of firearms from the United States is regulated by the Arms Export Control Act of 1976 and, to a lesser extent, the Export Administration Regulations (EAR). Federal firearms laws are primarily enforced by the ATF. In addition, the U.S. government is a signatory to an inter-American, anti-gun trafficking convention.

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<sup>17</sup> For example, the state gun laws in New York and New Jersey are much stricter than in states like Pennsylvania and Virginia. In response to evidence of interstate gun trafficking, the Virginia General Assembly passed a law limiting handgun purchases to one gun per sale in an attempt to thwart out-of-state gun traffickers from coming to Virginia to buy multiple handguns. Va. Code § 18.2-308.2:2(P)(1).

<sup>18</sup> Charlie Gillis, "American Guns, Canadian Violence: Weapons Are Crossing The Border by The Thousands and The Number of People Wounded and Killed in This Country Is Mounting," *Macleans*, August 10, 2005.

<sup>19</sup> Library of Congress, Law Library, *Firearms Regulations in Various Foreign Countries*, Report LL98-3, 97-20110, (May 1998), pp. 25-39.

<sup>20</sup> Under the National Firearms Act (described below), the U.S. Attorney General maintains the National Firearms Registry and Transfer Record (NFRTR), which is a registry of machineguns that fire in full-automatic mode, certain other short-barreled and easily concealable firearms, as well as destructive devices.

<sup>21</sup> Oscar Becera, "Firing Line – Tracking Mexico's Illegal Weapons," *Jane's Intelligence Review*, April 28, 2008. Also, see Lora Lumpe, "The U.S. Arms Both Sides of Mexico's Drug War," *Covert Action Quarterly*, Summer 1997, no. 61, pp. 39-46.

<sup>22</sup> *Ibid.*

<sup>23</sup> Tim Weiner and Ginger Thompson, "U.S. Guns Smuggled Into Mexico Feed Drug War," *New York Times*, May 19, 2001, p. 3.

## **National Firearms Act of 1934 (NFA)<sup>24</sup>**

The NFA was enacted to make it difficult to obtain certain types of firearms perceived to be especially lethal or the chosen weapons of “gangsters,” most notably machine guns and short-barreled shotguns. This act also regulates firearms, other than pistols or revolvers, that can be concealed on a person (e.g., pen, cane, and belt buckle guns), and destructive devices (grenades, mines, bazookas, rockets, and missiles). Under the NFA, all aspects of the manufacture and distribution of such weapons are taxed. The statute also compels manufacturers and buyers alike to disclose, through registration with the Attorney General, the production and distribution of covered firearms and destructive devices. For the most part, the NFA is administered by the ATF.

## **The Gun Control Act of 1968 (GCA)<sup>25</sup>**

Under the GCA, as amended, the stated purpose of federal firearms regulation is to assist federal, state, and local law enforcement in the ongoing effort to reduce crime and violence, while not placing undue or unnecessary burdens on law-abiding citizens in regard to the lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity. The GCA requires all persons manufacturing, importing, or selling firearms *as a business* to be federally licensed; prohibits the interstate mail-order sale of all firearms; prohibits interstate transfer of handguns between non-licensed persons; sets forth categories of persons to whom firearms or ammunition may not be sold (such as persons under a specified age or with criminal records); requires the Attorney General to authorize the importation of sporting firearms; requires that dealers maintain records of all commercial gun sales; and establishes special penalties for the use of a firearm in the perpetration of a federal drug trafficking offense or crime of violence.

As amended by the Brady Handgun Violence Prevention Act in 1993,<sup>26</sup> the GCA requires background checks to be completed for all non-licensed persons seeking to obtain firearms from federal firearms licensees. While the GCA is generally administered by the ATF, Brady background checks are administered by the Federal Bureau of Investigation (FBI). Under the GCA, background checks are not required for private, intrastate transactions between non-licensed persons who are not “engaged in the business” as a firearms dealer.<sup>27</sup> Such transactions and other matters such as possession, registration, and the issuance of licenses to firearm owners may be covered by state laws or local ordinances, however.

Regarding possession under federal law, the GCA prohibits certain categories of persons from possessing or purchasing firearms or ammunition. Those categories generally cover: (1) persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) users or addicts of drugs; (4) persons adjudicated as a mental defectives or committed to mental institutions; (5) illegal immigrants and nonimmigrants;

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<sup>24</sup> 26 U.S.C. § 5801 *et seq.*

<sup>25</sup> 18 U.S.C. § 921 *et seq.*

<sup>26</sup> P.L. 103-159, codified at 18 U.S.C. § 922(t).

<sup>27</sup> A person is “engaged in the business” as a firearms dealer if he devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through repetitive purchase and resale of firearms. The term does not apply to a person who makes occasional sales, exchanges, or purchase of firearms for the enhancement of a personal collection or hobby, or who sells all or part of his personal collection of firearms. 18 U.S.C. § 921(a)(21).



(6) persons dishonorably discharged from the U.S. Armed Forces; (7) persons who have renounced their U.S. citizenship; (8) persons restrained under a court-order from harassing, stalking, or threatening an intimate partner or child of such intimate partner; and (9) persons convicted of misdemeanor domestic violence.<sup>28</sup>

The GCA does not distinguish between citizens and legal permanent residents (legal immigrants); both are eligible to receive, possess, and transfer firearms and ammunition as long as they are not in one of the categories of prohibited persons. As shown above, among prohibited categories are illegal immigrants and nonimmigrants (with exceptions for the latter). Illegal immigrants are those noncitizens (aliens) who have either entered the United States without inspection or have violated the terms of their nonimmigrant visas or entry by overstaying or accepting unauthorized employment. Illegal immigrants are prohibited from possessing firearms with no exceptions.

Nonimmigrants are admitted for temporary stays – sometimes for several years. In general, nonimmigrants are not eligible to purchase and take possession of firearms or ammunition in the United States.<sup>29</sup> There are limited exceptions, however, for certain nonimmigrants who:

- have resided in a state for 90 days that they intend to make their home, in which case they may purchase handguns in their state of residence, or purchase long guns (rifles or shotguns) in any state;

and establish that they are either:

- official representatives of a foreign government who are accredited to the United States government or the nonimmigrant’s government mission to an international organization that is headquartered in the United States and possession of a firearm is necessary to their official capacity;
- officials of foreign governments or distinguished visitors who have been designated by the State Department and possession of a firearm is necessary to their official capacity;
- foreign law enforcement officers of a friendly foreign government entering the United States on law enforcement business; or
- visitors admitted to the United States for lawful hunting or sporting purposes or are in possession of a valid hunting license or permit lawfully issued in the United States.<sup>30</sup>

## **Arms Export Control Act of 1976 (AECA)<sup>31</sup>**

Section 38 of the Arms Export Control Act (AECA) authorizes the President to control the export and import of “defense articles” and “defense services;” to designate articles and services that are to be considered as such; and to issue regulations governing the import and export of these items. The United States Munitions List (USML) includes items that are designated by the President as

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<sup>28</sup> 18 U.S.C. §§ 922(g) and (n).

<sup>29</sup> 18 U.S.C. § 922(y).

<sup>30</sup> For further information, see ATF brochure, “Nonimmigrant Aliens Purchasing Firearms and Ammunition in the United States (ATF P 5300.18),” (Washington, July 2002).

<sup>31</sup> 22 U.S.C. §2778 *et seq.* This section was written by Jeanne J. Grimmett, Legislative Attorney, x75046.

defense articles and defense services.<sup>32</sup> Weapons on the USML include non-automatic and semi-automatic firearms to caliber .50 inclusive (12.7mm); fully automatic firearms to .50 inclusive (12.7mm); firearms or other weapons having special military application regardless of caliber; combat shotguns; silencers and similar items for such weapons; riflescopes manufactured to military specifications; barrels, cylinders, receivers or complete breech mechanisms for such weapons; and components and parts for the above-listed articles.<sup>33</sup> The U.S. Department of State implements controls over the export and temporary import of items on the USML under the International Traffic in Arms Regulations.<sup>34</sup> The exportation of items that are not contained on the USML may either be subject to the exclusive control of other federal agencies or to export controls administered by Department of Commerce.<sup>35</sup> The AECA imposes strict criminal and civil penalties for those persons who violate its provisions.

## **Export Administration Regulations (EAR)<sup>36</sup>**

The Department of Commerce (DOC), through its Bureau of Industry and Security (BIS), implements controls on the export of goods subject to DOC jurisdiction in the EAR.<sup>37</sup> DOC export controls were originally authorized in the Export Administration Act of 1979, but upon the expiration of the act in 2001, DOC export controls have been maintained under an executive order issued under the International Emergency Economic Powers Act (IEEPA).<sup>38</sup> IEEPA grants the President broad authorities to control exports from the U.S. as well as to regulate other international economic transactions by persons subject to U.S. jurisdiction, provided that he first declare a national emergency due to “an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>39</sup>

Firearms are controlled in the Commerce Control List (CCL) under Category 0, “Nuclear Materials, Facilities and Equipment and Miscellaneous Items,” and are listed under Subgroup A, “Systems, Equipment and Components.” The following items are covered:

- (0A984) Shotgun, barrel length 18 inches (45.72 cm) inches or over; buckshot shotgun shells, except equipment used exclusively to treat or tranquilize animals, and except arms designed solely for signal, flare, or saluting use; and parts, n.e.s. [not elsewhere specified];

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<sup>32</sup> The USML is set out at 22 C.F.R. Part 121.

<sup>33</sup> See Category I of USML.

<sup>34</sup> The International Traffic in Arms Regulations are set forth in 22 C.F.R. Parts 120-130. The U.S. Attorney General, through the ATF, controls the *permanent importation* of defense articles from foreign countries by persons subject to U.S. jurisdiction under 27 C.F.R. Part 447. Items subject to ATF controls are enumerated in the U.S. Munitions Import List set out at 27 C.F.R. § 447.21.

<sup>35</sup> See 15 C.F.R. § 734.3(b) for a list of items whose export is exclusively controlled by other federal agencies (e.g., the Department of Energy).

<sup>36</sup> This section was written by Jeanne Grimmett, Legislative Attorney, x75046. For further information on the EAA, see CRS Report RL31832, *The Export Administration Act: Evolution, Provisions, and Debate*, by Ian F. Fergusson.

<sup>37</sup> 15 C.F.R. Parts 730 *et seq.*

<sup>38</sup> Executive Order 13222, 73 Fed. Reg. 43603 (2008).

<sup>39</sup> IEEPA, P.L. 95-223, as amended, § 202, 203, 50 U.S.C. §§ 1701, 1702.

- (0A985) Discharge type arms (for example, stun guns, shock batons, electric cattle prods, immobilization guns and projectiles) except equipment used exclusively to treat or tranquilize animals, and except arms designed, solely for signal, flare, or saluting use; and parts, n.e.s.;
- (0A986) Shotgun shells, except buckshot shotgun shells, and parts, n.e.s.; and
- (0A987) Optical sighting devices for firearms (including shotguns controlled by 0A984), and parts, n.e.s.

In general, these items are regulated for crime control reasons,<sup>40</sup> implementation of certain U.N. embargoes, and the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA, a Spanish acronym<sup>41</sup>; discussed below), and in some cases, anti-terrorism purposes. The EAR provides information as to the specific licensing requirements for each item, including requirements for exports to particular countries. License exceptions are not available for these items. Like the AECA, the EAR imposes strict criminal and civil penalties on those persons who violate its provisions.

BIS maintains a licensing system for the export of shotguns and related items to all Member countries of the Organization of American States (OAS), including Mexico and Canada, an action based on the OAS Model Regulations for the Control of the International Movement of Firearms, Their Parts, and Components and Munitions (OAS Model Regulations), which were developed to aid OAS Member countries in implementing CIFTA.<sup>42</sup> Although the Senate has not ratified the Treaty, the United States maintains the above-described export regulations, which are aimed at furthering the goals of CIFTA.<sup>43</sup>

## **OAS Convention on Illicit Firearms Trafficking (CIFTA)**

On November 13, 1997, the OAS adopted the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA). CIFTA is a multilateral treaty designed to prevent, combat, and eradicate illegal transnational trafficking in firearms, ammunition, and explosives. Under CIFTA, a state would be committed to:

- establishing as criminal offenses the illicit manufacturing and trafficking of firearms;

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<sup>40</sup> See 15 C.F.R. § 742.7(a): this regulation requires licenses for the export and re-export of crime control and detection equipment, related technology and software “[i]n support of U.S. foreign policy to promote the observance of human rights throughout the world.”

<sup>41</sup> CIFTA stands for “Convención Interamericana contra la Fabricación y el Trafico Illicitos de Armas de Fuego, Municiones, Explosivos y otros materiales relacionados.”

<sup>42</sup> 15 C.F.R. § 742.17 (a). The full list of OAS countries is set out at 15 C.F.R. § 742.17(e). The text of the Convention is available at <http://www.oas.org/juridico/English/treaties/a-63.html>

<sup>43</sup> See generally *Export of Firearms*, 64 Fed. Reg. 17968 (Apr. 13, 1999) and Senate Treaty Doc. 105-49, at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_cong\\_documents&docid=f:td049.105.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_documents&docid=f:td049.105.pdf); Although the U.S. is a signatory to the treaty, lack of ratification means that the treaty is not legally binding upon the United States.

- setting up and maintaining a system of licenses and authorizations for export, import, and transit of firearms;
- marking firearms at the time of manufacture, and when they are imported;
- sharing information needed by law enforcement when investigating arms trafficking offenses;
- strengthening controls at export points; and
- ensuring that law enforcement personnel receive adequate training.<sup>44</sup>

CIFTA was signed by the United States and 28 other OAS member states on November 14, 1997,<sup>45</sup> and it went into effect on July 1, 1998. As of February 5, 2009, twenty-nine OAS Member states have ratified the Convention, while four other OAS Member states (including the United States) are signatories but have yet to ratify the treaty.<sup>46</sup> President Clinton transmitted the Convention to the Senate on June 9, 1998, with his recommendation “that the Senate give early and favorable consideration to the Convention, and that it give its advice and consent to ratification.”<sup>47</sup> The Senate has not voted on the treaty.

## **ATF Enforcement of U.S. Gun Laws**

According to DOJ, ATF is the lead federal agency responsible for stopping the illegal flow of firearms, or gun trafficking, from the United States to Mexico, given the bureau’s statutory mission and authority.<sup>48</sup> ATF has developed a nationwide strategy to reduce firearms trafficking and violent crime by preventing convicted felons, drug traffickers, and juvenile gang members from acquiring firearms from gun traffickers. These criminals often acquire firearms from a person who otherwise is not prohibited to possess a firearms through straw purchases or by buying a firearm from a corrupt dealer who sells firearms off-the-books in an attempt to escape federal regulation.

Although there is no statutory definition for “gun trafficking” in the GCA, it essentially entails the movement or diversion of firearms from legal to illegal markets.<sup>49</sup> Unlike other forms of contraband, almost all illegal firearms used criminally in the United States were diverted at some

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<sup>44</sup> Matthew Schroeder, “Small Arms, Terrorism, and the OAS Firearms Convention,” Federation of American Scientists, Occasional Paper No. 1, March 2004, *available at*, <http://fas.org/asmp/library/OAS/FullReport.pdf>.

<sup>45</sup> See Message from the President of the United States Transmitting the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition Explosives, and Other Related Materials, Treaty Doc. 105-49, 105<sup>th</sup> Cong., 2d Sess. at III (June 9, 1998) (hereinafter referred to as “Treaty Doc. 105-49”).

<sup>46</sup> See United States Department of State, Bureau of Western Hemisphere Affairs, Fact Sheet on the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, February 5, 2009. Available at <http://www.state.gov/p/wha/rls/fs/2009/114984.htm>. Although the U.S. is a signatory to the treaty, lack of ratification means that the treaty is not legally binding upon the United States.

<sup>47</sup> See Treaty Doc. 105-49 at III.

<sup>48</sup> U.S. Department of Justice, Statement of David Ogden, Deputy Attorney General, before the United States Senate Committee on Homeland Security and Governmental Affairs, “Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities,” March 25, 2009, p.11.

<sup>49</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Project Gunrunner: The Southwest Border Initiative*, ATF P 3317.6, March 2009, available at [http://www.atf.gov/pub/fire-explo\\_pub/p3317\\_6rev2.pdf](http://www.atf.gov/pub/fire-explo_pub/p3317_6rev2.pdf).

point from legal channels of commerce.<sup>50</sup> ATF works to reduce firearms-related crime with two approaches, industry regulation and criminal investigation.

## **ATF Compliance Inspections of Licensed Gun Dealers**

ATF regulates the U.S. firearms industry by inspecting federal firearms licensees (FFLs), or licensed gun dealers, to monitor their compliance with the GCA and NFA, and to prevent the diversion of firearms from legal to illegal channels of commerce. Despite its crime-fighting mission, ATF's business relationships with the firearms industry and larger gun-owning community have been a perennial source of tension, which from time-to-time has been the subject of congressional oversight.<sup>51</sup> Nevertheless, under current law, ATF Special Agents (SAs)<sup>52</sup> and Industry Operations Investigators (IOIs)<sup>53</sup> are authorized to inspect or examine the inventory and records of an FFL *without search warrants* under three scenarios:<sup>54</sup>

- in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL;
- to ensure compliance with the record keeping requirements of the GCA – not more than once during any twelve-month period, or at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or
- when such an inspection or examination is required for determining the disposition of one or more firearms in the course of a criminal investigation.

By inspecting the firearms transfer records that FFLs are required by law to maintain, ATF SAs and IOIs are able to trace crime guns from their domestic manufacturer or importer to the first retail dealer that sold those firearms to persons in the general public, generating vital leads in homicide and other criminal investigations. In addition, by inspecting those records, ATF investigators sometimes discover evidence of corrupt FFLs dealing in firearms “off the books,” straw purchases, and other patterns of illegal behavior.

In July 2004, the DOJ Office of Inspector General (OIG) reported on ATF inspections of FFLs. Among other things, the OIG reported that ATF inspected the operations of 4.5% of the 104,000

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<sup>50</sup> Greg Ridgeway, Glenn L. Pierce, and Anthony A. Braga, et al., *Strategies for Disrupting Illegal Firearms Markets: A Case Study of Los Angeles*, RAND Corporation, 2008, p. 1.

<sup>51</sup> For example, in the 109<sup>th</sup> Congress, the House Judiciary Crime subcommittee held two oversight hearings examining ATF firearms enforcement operations at gun shows in Richmond, Virginia, in 2005. ATF agents reportedly provided state and local law enforcement officers with confidential information from background check forms (ATF Form 4473s), so that officers could perform residency checks on persons who had otherwise legally purchased firearms at those gun shows. Questions were also raised as to whether ATF agents had profiled gun purchasers at those gun shows on the basis of race, ethnicity, and gender. See U.S. Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Oversight Hearing on the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Parts I & II: Gun Show Enforcement, February 15 and 28, 2006. Also see Department of Justice, Office of the Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' Investigative Operations at Gun Shows*, I-2007-007, June 2007.

<sup>52</sup> For FY2009, Congress has provided ATF with funding for 2,504 SAs.

<sup>53</sup> For FY2009, Congress has provided ATF with funding for 789 IOIs.

<sup>54</sup> 18 U.S.C. § 923(g)(1)(B).

FFLs in FY2002.<sup>55</sup> Since then, according to ATF, 10,106 firearms compliance inspections were conducted in FY2007, covering about 9.3% of the nearly 109,000 FFLs in that fiscal year;<sup>56</sup> and 11,169 firearms compliance inspections were conducted in FY2008, covering nearly 10% of the 111,600 FFLs in that fiscal year.<sup>57</sup>

In its FY2010 budget submission to Congress, ATF has reported that there are about 113,000 FFLs nationwide, but nearly half of them (53,472) are licensed collectors.<sup>58</sup> Those collectors *are not* authorized to be “engaged in the business” of dealing firearms,<sup>59</sup> but they are authorized to engage in limited interstate firearms transfers of “curios and relics”<sup>60</sup> without engaging the services of an FFL to facilitate such transfers and related background checks.

## **Straw Purchases and the Ant Run**

A “straw purchase” occurs when a person, who is otherwise eligible to purchase a firearm, purchases a firearm from a federally licensed dealer for another person, who is either prohibited from possessing a firearm or does not want a paper trail linking him to the purchased firearm. Routine, small-scale smuggling of guns across the border often involves a series of straw purchases, during which guns are purchased from FFLs in border states and then sold to a middle man, who then smuggles the guns across the border. Repeated trips across the border of one to three guns, referred to in border parlance as the ant (*hormiga*) run, is a common way firearms are smuggled into Mexico.<sup>61</sup> In the United States, straw purchases are illegal under the GCA.<sup>62</sup> When a person buys a firearm from an FFL, the buyer and the FFL are required to fill out ATF Form 4473. The FFL is required to verify the purchaser’s name, address, date of birth, and other information by examining a state-issued piece of identification, most often a driver’s license. If the purchaser or dealer falsifies any information on the Form 4473, it is a federal offense punishable by no more than 10 years’ imprisonment and/or a fine.<sup>63</sup> It is also illegal for the gun trafficker who sponsored the straw purchase, because it is a federal offense for any person to aid,

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<sup>55</sup> U.S. Department of Justice, Office of the Inspector General, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives*, Report Number I-2004-005, (July 2004), p. xi.

<sup>56</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Congressional Budget Submission, Fiscal Year 2008*, (February 2007), p. 29.

<sup>57</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Congressional Budget Submission, Fiscal Year 2010*, May 2009, p. 5.

<sup>58</sup> *Ibid.*

<sup>59</sup> A person is “engaged in the business” as a firearms dealer if he devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through repetitive purchase and resale of firearms. The term does not apply to a person who makes occasional sales, exchanges, or purchase of firearms for the enhancement of a personal collection or hobby, or who sells all or part of his personal collection of firearms. 18 U.S.C. § 921(a)(21).

<sup>60</sup> See 27 CFR § 478.11 for the definition of “curios and relics,” which generally include firearms that are 50 years old, of museum interest, or derive a substantial amount of their value from the fact that they are novel, rare, bizarre, or because they are associated with some historical figure, period, or event. For a list of “curios and relics,” go to <http://www.atf.gov/firearms/curios/index.htm>.

<sup>61</sup> *Ibid.*

<sup>62</sup> 18 U.S.C. § 921 *et seq.*

<sup>63</sup> 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(2).

abet, counsel, command, or solicit a criminal act;<sup>64</sup> or engage in a conspiracy to defraud the United States. It is also illegal to smuggle firearms out of the United States.<sup>65</sup>

## **Multiple Handgun Sales Reports**

In 1986, as part of the Firearms Owners' Protection Act,<sup>66</sup> Congress amended the GCA to require FFLs to report to the Attorney General (AG) whenever they transferred more than one handgun to any nonlicensee within five consecutive business days.<sup>67</sup> In 1993, as part of the Brady Handgun Violence Prevention Act,<sup>68</sup> Congress amended the GCA to require that FFLs also forward this information to the state police or to the local law enforcement agency that has jurisdiction in the area where the transfer occurred. However, except for information pertaining to persons prohibited from possessing firearms, federal law prohibits state or local law enforcement agencies from disclosing those records to any person or entity, and requires those records be destroyed within 20 days of receipt so that such records cannot be used as a registry of firearms or firearms owners. At the end of every six-month period, the state or local law enforcement agency is required to certify to the AG that the record nondisclosure and destruction requirements were complied with. These provisions were enacted because when multiple handguns are purchased in states with less strict firearm laws and then sold in states with stricter firearm laws, this is often an indicator of interstate firearms trafficking, that is the diversion of firearms from legal to illegal markets.

## **Gun Shows and Private Firearm Transfers**

Private, intrastate firearm transfers are legal in some states at gun shows and flea markets. A person who is not "engaged in the business" of dealing firearms may transfer firearms to another person as long as he does not do so knowingly to a prohibited person, and as long as he does not knowingly transfer a handgun to a person who is not a resident of the state in which the transfer occurs.<sup>69</sup> It is notable that firearms acquired through private transfers, particularly multiple private transfers, are much more difficult to trace. Consequently, there is likely to be a premium for such firearms in illegal markets on both sides of the border, as there would also be for some stolen firearms, because there are no paper trails for these firearms. Southwest border states in which private transfers at gun shows are legal include Texas, New Mexico, Arizona, and California, although gun shows and all private firearm transfers are more strictly regulated in California.<sup>70</sup>

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<sup>64</sup> 18 U.S.C. § 2.

<sup>65</sup> 18 U.S.C. § 554. Depending on the type of firearm, it is also a violation of either the Arms Export Control Act (AECA; 22 U.S.C. § 2778 *et seq.*) or the Export Administration Act of 1979 (EAA; 50 U.S.C. app. §§ 2401-2420) to transport a handgun, rifle, or shotgun across the border into Mexico without proper authorization of the U.S. government.

<sup>66</sup> P.L. 99-308, § 103, May 19, 1986, 100 Stat. 453.

<sup>67</sup> 18 U.S.C. § 923(g)(3).

<sup>68</sup> P.L. 103-159, § 201, November 30, 1993, 107 Stat. 1544.

<sup>69</sup> 18 U.S.C. § 922(a)(5).

<sup>70</sup> See Brady Center to Prevent Gun Violence website on state gun laws, <http://www.stategunlaws.org/>.

## Semiautomatic Assault Weapons

Certain semiautomatic firearms that are often, but not always, based on military designs are very popular with Mexican drug traffickers.<sup>71</sup> Depending on their configuration, some of these firearms formerly qualified by definition as “semiautomatic assault weapons” under an expired provision of federal law. In 1994, Congress banned for 10 years the possession, transfer, or further domestic manufacture of semiautomatic assault weapons (SAWs) and large capacity ammunition feeding devices (LCAFDs) that hold more than 10 rounds that were not legally owned or available prior to the date of enactment (September 13, 1994). The SAW-LCAFD ban expired on September 13, 2004.

The SAW ban statute classified a semiautomatic rifle as an assault weapon if it was able to accept a detachable magazine and included two or more of the following five characteristics: (1) a folding or telescoping stock, (2) a pistol grip, (3) a bayonet mount, (4) a muzzle flash suppressor or threaded barrel capable of accepting such a suppressor, or (5) a grenade launcher.<sup>72</sup> There were similar definitions for pistols and shotguns that were classified as semiautomatic assault weapons.<sup>73</sup> Semiautomatic assault weapons that were legally owned prior to the ban were not restricted and remained available for transfer under applicable federal and state laws.

Oponents of the ban argue that the statutorily defined characteristics of a semiautomatic assault weapon were largely cosmetic, and that these weapons were potentially no more lethal than other semiautomatic firearms that were designed to accept a detachable magazine and were equal or superior in terms of ballistics and other performance characteristics. Proponents of the ban argue that semiautomatic military-style firearms, particularly those capable of accepting large capacity ammunition feeding devices, have no place in the civilian gun stock.

During and following World War II, *assault rifles* were developed to provide a lighter infantry weapon that could fire more rounds, more rapidly. To increase capacity of fire, detachable, self-feeding magazines were developed. These rifles were usually designed to be fired in fully automatic mode, meaning that once the trigger is pulled, the weapon continues to fire rapidly until all the rounds in the magazine are expended, or the trigger is released. Often these rifles were also designed with a “select fire” feature that allowed them to be fired in short bursts (e.g., three rounds per pull of the trigger), or in semiautomatic mode (i.e., one round per pull of the trigger), as well as in fully automatic mode. Semiautomatic firearms by comparison, including semiautomatic assault weapons, fire one round per pull of the trigger.

Following the 1994 Semiautomatic Assault Weapons Ban, manufacturers changed the design of many firearms so that post-ban models did not include the requisite number of characteristics that would have qualified those firearms as “semiautomatic assault weapons.” These measures arguably undercut the ban, as post-ban models included the two hallmarks of an “assault rifle,” the detachable magazine and pistol grip.

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<sup>71</sup> Tobar, “Guns Flow Easily Into Mexico From The U.S.,” *Los Angeles Times*, January 8, 2006, p. A1.

<sup>72</sup> Formerly codified at 18 U.S.C. § 921(a)(30)(B).

<sup>73</sup> Formerly codified at 18 U.S.C. § 921(a)(30)(C) and (D).



## Fully Automatic Machineguns

In the United States, fully automatic machine guns are strictly regulated under the NFA, which levies taxes on all aspects of the manufacture, importation, and distribution of such firearms. It is a felony to receive, possess, or transfer an unregistered NFA firearm.<sup>74</sup> Such offenses are punishable by a fine of up to \$250,000, imprisonment for up to 10 years, and forfeiture of the firearm and any vessel, vehicle, or aircraft used to conceal or convey the firearm.<sup>75</sup> It is a federal offense to convert a semiautomatic firearm to “full-auto” without proper authorization from the Attorney General. Parts kits to convert semiautomatic weapons to fully automatic are available on the U.S. civilian gun market, but these kits are considered machine guns in most instances and are also strictly regulated. In other instances, however, the individual parts in these kits may not be regulated.<sup>76</sup>

## Project Gunrunner: ATF Efforts to Suppress Southwest Border Gun Trafficking

ATF has increased its efforts in recent years to suppress illegal gun trafficking across the Southwest border. As part of these efforts, ATF inspects FFLs to monitor their compliance with U.S. gun laws, and to prevent the diversion of firearms from legal to illegal channels of commerce. ATF reports that there are around 6,700 FFLs in the United States operating in the Southwest border region of Texas, New Mexico, Arizona, and California.<sup>77</sup> ATF also reports that Mexican DTOs are increasingly sending enforcers across the border to hire surrogates (straw purchasers) who buy several “military-style” firearms at a time from FFLs. The DTOs also reportedly favor pistols chambered to accommodate comparatively large cartridges and magazines that are capable of piercing through armor vests typically worn by law enforcement officers. Less frequently, but no less troubling to law enforcement, the DTOs have also sought .50 caliber sniper rifles.

## Funding for Gunrunner<sup>78</sup>

During FY2006 and FY2007, ATF dedicated approximately 100 special agents and 25 industry operations investigators to a Southwest border initiative known as “Project Gunrunner” to disrupt the illegal flow of guns from the United States into Mexico. In FY2007, ATF agents investigated 187 firearms trafficking cases and recommended 465 defendants for prosecution.<sup>79</sup> By the end of

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<sup>74</sup> 26 U.S.C §§ 5861(d) and (j).

<sup>75</sup> 26 U.S.C § 5872; 49 U.S.C §§ 781-788.

<sup>76</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF National Firearms Act Handbook*, ATF E-Publication 5329.8, June 2007, pp. 11-14.

<sup>77</sup> U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, June 2009, p. 20.

<sup>78</sup> For further information, see CRS Report RL34514, *The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF): Budget and Operations*, by William J. Krouse.

<sup>79</sup> Statement of William Hoover, Assistant Director for Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives, before the Subcommittee on the Western Hemisphere, Committee on Foreign Affairs, House of Representatives, concerning “U.S. Obligations under the Merida Initiative,” February 7, 2008.

FY2008, ATF had deployed 146 special agents and 68 industry operations investigators to the Southwest border to bolster that initiative at a conservatively estimated cost of \$32.2 million.<sup>80</sup>

For FY2009, the Administration's budget request for ATF included a single increase of \$948,000 to fund 12 industry operations investigator positions to bolster efforts already underway as part of Gunrunner.<sup>81</sup> In the American Recovery and Reinvestment Act of 2009, Congress has provided ATF with \$10 million to ramp up Gunrunner and \$30 million to assist local law enforcement with counter-narcotics efforts.<sup>82</sup> In the Omnibus Appropriations Act, 2009 (P.L. 111-8), Congress has provided ATF with a FY2009 budget of \$1.054 billion, including another \$5 million for Gunrunner.<sup>83</sup>

In addition, in the Supplemental Appropriations Act, 2009 (P.L. 111-32), Congress appropriated \$14 million for ATF. This amount includes (1) \$4 million to upgrade and share ballistic imaging technology with the Government of Mexico, and (2) \$6 million for other ongoing efforts focused on stemming illegal gun trafficking to Mexico under Project Gunrunner.<sup>84</sup>

The ATF FY2010 budget request<sup>85</sup> includes \$18 million and 92 permanent positions (including 34 agents) to support Project Gunrunner.<sup>86</sup> The House-passed FY2010 Commerce, Justice, Science, and Related Agencies (CJS) appropriations bill (H.R. 2847) would provide ATF with \$1.106 billion, including the requested \$18 million increase for Gunrunner. According to House report language, such an increase would bring total funding for Southwest border firearms trafficking to \$59.9 million, but this amount includes one-time, stimulus funding of \$10 million provided in the American Recovery and Reinvestment Act of 2009 for FY2008.<sup>87</sup> The Senate-reported CJS appropriations bill (also H.R. 2847) would provide ATF with \$1.121 billion for ATF, including the requested amount for Gunrunner. According to Senate report language, the Senate committee recommendation would bring total funding for Southwest border firearms trafficking to \$61 million.<sup>88</sup>

## **ATF Firearms Tracing for Mexican Authorities**

ATF also maintains a foreign attaché in Mexico City to administer an Electronic Trace Submission System (ETSS), also known as the eTrace program, for Mexican law enforcement

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<sup>80</sup> CRS conversation with the Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Legislative Affairs, February 18, 2009.

<sup>81</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Congressional Budget Submission, Fiscal Year 2009 (Feb. 2008)*, Exhibit C – Program Increases/Offsets by Decision Unit.

<sup>82</sup> P.L. 111-5; 123 Stat 115 (2009).

<sup>83</sup> P.L. 111-8; 123 Stat 524 (2009).

<sup>84</sup> This supplemental funding brings total enacted FY2009 funding for ATF to \$1.068 billion.

<sup>85</sup> The ATF FY2010 budget request includes \$1.121 billion for ATF, or a proposed 6.4% increase compared to the FY2008 enacted appropriation.

<sup>86</sup> U.S. Department of Justice, Justice Management Division, *FY2010 Budget and Performance Summary*, (May 2009), p. 139. Available at <http://www.usdoj.gov/jmd/2010summary/>.

<sup>87</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2010*, To accompany H.R. 2847, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., June 12, 2009, H.Rept. 111-149, p. 66.

<sup>88</sup> U.S. Congress, Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies Appropriations, *Departments of Commerce and Justice, and Science, and Related Agencies Appropriations Bill, 2010*, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 25, 2009, S.Rept. 111-34, p. 68.

authorities. Although several sets of trace data have been released by ATF, the Government Accountability Office (GAO) has provided the most comprehensive analysis of ATF trace data. Nevertheless, trace data reported to CRS by ATF is also discussed below, as each set of trace data provides distinct insights into Southwest border firearms trafficking.

### *ATF Briefing for CRS, May 18, 2008*

From FY2005 through FY2007, ATF traced just over 11,700 firearms recovered by Mexican authorities. Although only a fraction of recovered firearms were submitted for tracing, approximately 90% of those firearms were found to have originated in the United States.<sup>89</sup> Of those traced firearms, nearly 75% were reported to be handguns and 25% long guns. At that time there was no public information about the number of those handguns and long guns that were possibly “semiautomatic assault weapons.” However, 25 machine guns were reportedly confiscated, of which six were traced back to U.S. military inventories.<sup>90</sup> In addition, reports indicate that in at least 10 instances, Mexican authorities recovered U.S. manufactured 66 millimeter anti-tank weapons from Mexican DTOs.<sup>91</sup>

Caution should be exercised when drawing conclusions from ATF crime gun trace data. Although it is valid to say that 90% of traced firearms originated in the United States, it would be invalid to conclude that 90% of all guns used in crime in Mexico originated in the United States. Crime gun trace data are useful measurements of crime gun trends; however, the issues of consistent, random, and unbiased data collection have not been adequately addressed through comprehensive tracing and other controls. Hence, it is often not possible to test for statistical significance. Nevertheless, even though a statistically valid percent estimate of US-sourced firearms cannot be made based on trace data, criminal investigations have documented that there is great demand for certain firearms that are available in normal (non-military) commercial channels in the United States and that those firearms have been illegally trafficked to Mexico in large numbers.

### *ATF Briefing for CRS, April 16, 2009*

In January 2008, ATF announced that e-Trace technology would be deployed to nine additional U.S. consulates in Mexico (Merida, Juarez, Monterrey, Nogales, Hermosillo, Guadalajara, Tijuana, Matamoros, and Nueva Laredo).<sup>92</sup> The number of traces performed by ATF for Mexican authorities for FY2008 increased markedly from previous years. During FY2008, ATF reportedly traced 7,743 firearms recovered by Mexican authorities and, of those firearms:

- 63.5% were made in the United States;
- 29.5% were made outside of the United States, but subsequently imported; and

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<sup>89</sup> ATF briefing provided to CRS on May 5, 2008.

<sup>90</sup> Statement of William Hoover, Assistant Director for Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives, before the U.S. House of Representatives, Committee on Foreign Affairs, Subcommittee on the Western Hemisphere, February 7, 2008.

<sup>91</sup> It is likely, however, that these weapons were acquired from sources in Central America, where they were originally sold to the Honduran, El Salvadoran, and Nicaraguan militaries and have since entered the black market. CRS conversation with the Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Legislative Affairs, on February 19, 2009.

<sup>92</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Public Affairs, “ATF Expands Efforts to Combat Illegal Flow of Firearms to Mexico,” Jan. 16, 2008.

- 7% were made outside of the United States and there was no indication that they had been imported into the United States before turning up in Mexico.<sup>93</sup>

Some of those traces were instrumental in developing investigative leads in homicide and gun trafficking cases.<sup>94</sup> As described below, however, GAO has reported a different number of total traces for FY2008 (7,200), and for more years, FY2004 through FY2008, than was previously reported by ATF to CRS.

### ***GAO Report on Firearms Trafficking and Mexico***

In June 2009, GAO released a report on firearms trafficking and U.S. efforts to combat the flow of illegal firearms to Mexico that included an analysis of ATF trace data for FY2004 through FY2008.<sup>95</sup> GAO reported that 23,159 firearms were submitted by Mexican authorities to the ATF for tracing during those years.<sup>96</sup> Of those firearms, 20,060 or 86.6% were successfully traced back to the United States.<sup>97</sup> For the last three years (FY2006 through FY2008), over 90% of firearms recovered in Mexico and traced by ATF were found to have come from the United States.<sup>98</sup> Of those firearms, 68% were manufactured in the United States and 19% were manufactured abroad and imported into the United States.<sup>99</sup> About 70% of traced firearms were found to have come from Texas (39%), California (20%), and Arizona (10%).

It is notable, however, that only a fraction of the firearms recovered by Mexican authorities have been traced. In FY2008, for example, information on about 7,200 of the nearly 30,000 firearms recovered by the Mexican Attorney General's office were submitted to ATF for tracing, because of bureaucratic obstacles and lack of resources.<sup>100</sup> Notwithstanding such limitations, about 25% of firearms recovered in Mexico in FY2008 and traced back to the United States were semiautomatic variants of the AK-47 and AR-15 rifles according to GAO.<sup>101</sup>

From FY2004 through FY2008, 70 machine guns were submitted for tracing, or .30% of the total number of firearms submissions (23,159), and one of these machineguns was traced back to the Mexican government.<sup>102</sup> While GAO did not report how many of these machine guns were traced back to the U.S. military inventories, it was reported that over these years 160 firearms of all types, or .70% of the total, had been traced back to those inventories. Nevertheless, according to U.S. officials interviewed by GAO, "there have not been any indications of significant trafficking in firearms from U.S. military personnel or U.S. military arsenals."<sup>103</sup>

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<sup>93</sup> ATF briefing provided to CRS on April 16, 2009.

<sup>94</sup> Ibid.

<sup>95</sup> U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, June 2009, 83 pp.

<sup>96</sup> Ibid., p. 18.

<sup>97</sup> Ibid., p. 15.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., p. 16.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid., p. 17.

<sup>102</sup> Ibid., pp. 18-19.

<sup>103</sup> Ibid., p. 19.

GAO recommended that the U.S. Attorney General direct the ATF Director to regularly update ATF's reporting on aggregate firearms trafficking data and trends, and that the U.S. Attorney General and Secretary of Homeland Security ensure the systematic gathering and reporting of data related to results of efforts to combat firearms trafficking, including related firearms seizures, investigations and prosecutions.<sup>104</sup>

### **Merida and Appropriations Authorizations for ATF**

In the 110<sup>th</sup> Congress, the House passed H.R. 6028, the Mérida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008 on June 10, 2008.<sup>105</sup> This bill would have authorized a total of \$73.5 million over three years, FY2008-FY2010, to increase the number of ATF positions dedicated to Project Gunrunner (\$45 million) and assign ATF agents to Mexico (\$28.5 million). The Senate, however, took no action on this bill. Senator Jeff Bingaman introduced the Southwest Border Violence Reduction Act of 2008 (S. 2867), a bill that also included authorizations for increased ATF resources. Representatives Henry Cuellar and Ciro Rodriguez introduced similar bills (H.R. 5863 and H.R. 5869).

In the 111<sup>th</sup> Congress, Senator Bingaman and Representative Rodriguez have reintroduced their Southwest Border Violence Reduction bills (S. 205/H.R. 495). Representative Rodriguez has also introduced the Border Reinforcement and Violence Reduction Act of 2009 (H.R. 1448), a bill that would authorize the appropriations of \$15 million for each year, FY2010 and FY2011, for Project Gunrunner. In addition, Representative Sheila Jackson Lee introduced the Border Security, Cooperation, and Act Now Drug Prevention Act (H.R. 1900), a bill that would authorize the Attorney General to deploy additional federal agents, including ATF agents, to states in the event that a governor should declare an "international border security emergency."

## **Prosecution of Firearms Trafficking Cases and Related Statutes**

Currently, U.S. firearm laws govern the possession and transfer of firearms and create penalties for the violation of such laws. However, as will be illustrated below, because there are no laws that specifically punish firearms trafficking or conspiracy to traffic firearms, law enforcement and prosecutors must work with existing federal statutes to tackle illegal gun trafficking. The following are examples from the southwest border region that are demonstrative of the kinds of gun trafficking cases being prosecuted, and the federal statutes that are often implicated in such cases.<sup>106</sup> These particular examples come from the Southern District of Texas, though other U.S.

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<sup>104</sup> *Ibid.*, p. 59.

<sup>105</sup> For further information, see CRS Report R40135, *Mérida Initiative for Mexico and Central America: Funding and Policy Issues*, by Clare Ribando Seelke and June S. Beittel.

<sup>106</sup> Prosecuting cases that involve gun trafficking also occurs on the state level. For example, the Arizona Attorney General's Office charged one man with one count of fraudulent schemes and artifices, the commission of which carries a maximum 12.5 year sentence. The defendant was linked to a huge stash of firearms, including two .50-caliber rifles—all of which were associated with the drug-war violence in Juarez, Mexico. See Sean Holstege and Lindsey Collom, "Key suspect arrested in gunrunning," *The Arizona Republic*, April 4, 2008, at 1.

Attorney Offices such as the U.S. Attorney's Office for the District of Arizona and the Southern District of California handle similar cases that involve firearms trafficking.<sup>107</sup>

Overall, from these cases, we can see that evidence from long investigations generally leads to the conclusion that persons are engaged in firearms trafficking. In these instances, defendants are often prosecuted and convicted under provisions of statutes like the GCA that make it unlawful for certain persons to be in possession of firearms; govern the transaction process of obtaining firearms (e.g., straw purchases); and contain penalties for the use of a firearm in a crime of violence or drug trafficking crime, or penalties for knowingly or fraudulently smuggling goods that would be contrary to U.S. law and regulation.

## **McAllen, Texas—Possession and Receiving of Illegal Firearms**

In February 2008, the U.S. Attorney's Office for the Southern District of Texas (USAO-SDTex) released information that four men had been arrested by ATF agents in connection with a 10-month long investigation that fell under ATF's Project Gunrunner.<sup>108</sup> Collectively, the defendants were charged with 26 counts of being in violation of federal firearms statutes. From the GCA, the statutes at issue in the indictment included:

- 18 U.S.C. §§ 924(c)(1)(B)(i)-(ii), which imposes not more than 30 years' imprisonment if the firearm possessed by the person—who is convicted under the firearm statute—is a short-barreled rifle, short-barreled shotgun, machinegun, destructive device, or that such a firearm has a silencer or muffler;
- 18 U.S.C. § 922(o), which makes it unlawful for any person to transfer or be in possession of a machinegun; and
- 18 U.S.C. § 922(g)(1), which makes it unlawful for any person, who has been convicted in any court of a crime punishable by more than one year of imprisonment, "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

These offenses are punishable by a fine and/or not more than 10 years' imprisonment.<sup>109</sup> Statutes from the NFA that were at issue in this case included (1) 26 U.S.C. § 5861(d), which makes it unlawful for any person to receive or possess a firearm that is not registered to him in the National Firearms Registration and Transfer Record; and (2) 26 U.S.C. § 5861(e), which makes it unlawful to transfer a firearm in violation of the requirements of the National Firearms Act. These

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<sup>107</sup> E.g., in June 2009, the U.S. Attorney's Office for the Southern District of California announced that one man was sentenced to serve 211 months in prison for drug possession with intent to distribute and carrying a firearm in relation to a drug trafficking crime (18 U.S.C. § 924(c)). In December 2008, the U.S. Attorney's Office for the District of Arizona announced that one man received an enhanced sentence for being an armed career criminal found guilty of being a felon in possession of a firearm (18 U.S.C. § 922(g)). The defendant was one of several individuals investigated by Phoenix law enforcement and ATF agents for illegal firearms and narcotics trafficking in central Phoenix.

<sup>108</sup> U.S. Department of Justice, U.S. Attorney's Office, Southern District of Texas, "Starr County Men Charged With Selling Machine Guns, Silencers, and Other Firearms," press release, Feb. 7, 2008. A fifth man was still at large at the time of the release.

<sup>109</sup> 18 U.S.C. § 924(a)(2).

offenses are punishable by a fine of not more than \$10,000 and/or imprisonment of not more than 10 years.<sup>110</sup>

## **Brownsville, Texas— Conspiracy to Make False Statements and Straw Purchases**

In October 2008, the USAO-SDTex announced that one defendant, who had already pleaded guilty to charges against him, was sentenced to prison for trafficking in firearms.<sup>111</sup> The defendant pleaded guilty to conspiracy to make false statements in firearms transactions. This defendant paid four other persons to make firearms purchases on his behalf (a.k.a., “straw purchases”). While the judge concluded that the defendant was the organizer in this case and engaged in trafficking firearms to Mexico, this lead defendant was prosecuted under two provisions, which together made up the charge against him. They were: (1) 18 U.S.C. § 371, which makes it an offense to engage in a conspiracy to commit any offense or defraud the United States, and (2) 18 U.S.C. § 924(a)(1)(A), which makes it unlawful for a person to “knowingly make any false statement or representation with respect to the information required ... to be kept in the records of a person licensed under this chapter.” Each of these offenses carries a penalty of not more than five years’ imprisonment and/or a fine. In this case, the defendant, who organized these transactions, was sentenced to 46 months in prison to be followed by a three year term of supervised release. The four other co-defendants, who made the purchases on behalf of the lead defendant, were each prosecuted and sentenced under 18 U.S.C. § 924(a)(1)(A) for making false statements on the forms that are required to be filled out in connection with a firearms purchase. The sentences of these four co-defendants range from probation and home confinement to time in federal prison.<sup>112</sup>

## **Victoria, Texas— Smuggling of Firearms**

In December 2008, the USAO-SDTex along with the ATF announced that one individual, as a result of an investigation through Project Gunrunner, pleaded guilty to eight counts of various federal firearms statutes.<sup>113</sup> According to the USAO’s release, the individual had purchased more than 500 firearms over the last several years and smuggled them into Mexico for resale. The ATF’s investigation revealed that the individual would purchase specific firearms for customers in Mexico by placing orders with numerous firearm dealers throughout Texas, and listing himself as the “actual buyer.” Additionally, the individual would file a Texas tax exemption form indicating the firearms were for resale in order to avoid payment of sales taxes on his purchase. This individual would then smuggle the firearms, via a compartment in the motor home he used, to make deliveries to various locations in central Mexico.<sup>114</sup>

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<sup>110</sup> 26 U.S.C. § 5871.

<sup>111</sup> U.S. Department of Justice, U.S. Attorney’s Office, Southern District of Texas, “Brownsville Man Sentenced to Prison for Firearms Trafficking,” press release, Oct. 2, 2008.

<sup>112</sup> One of the co-defendants was also sentenced for conspiracy and making false statements, but received a less severe sentence than his co-defendants of 6 months in federal prison and 4 months in a community corrections center (halfway house).

<sup>113</sup> U.S. Department of Justice, U.S. Attorney’s Office, Southern District of Texas, “Victoria Resident Pleads Guilty to Numerous Federal Firearms Violations,” press release, Dec. 31, 2008.

<sup>114</sup> *Ibid.* According to the USAO, a search of the motor home resulted in the discovery and seizure of ammunition, gun orders, Mexican immigration documents, and other evidence of firearms trafficking.

The firearms statutes implicated in this case of firearms trafficking to Mexico were: (1) 18 U.S.C. § 924(a)(1)(A) and 18 U.S.C. § 924(a)(2), each of which provides a fine and/or not more than 5 or 10 years' imprisonment, respectively, to those who knowingly make a false statement or representation with respect to information required or in connection with the sale of a firearm from a licensed dealer; (2) 18 U.S.C. § 554, which carries a penalty of not more than 10 years in prison and/or a fine if a person "fraudulently or knowingly exports ... or attempts to export ... from the United States any merchandise, article, or object contrary to any law or regulation of the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise ... prior to [its] exportation knowing [it] to be intended for exportation contrary to any law or regulation of the United States";<sup>115</sup> (3) 18 U.S.C. § 924(b), which imposes a fine and/or imprisonment for not more than 10 years on any person who "ships, transports, or receives a firearm or ammunition in interstate or foreign commerce" *and* who either has "intent to commit therewith an offense punishable by imprisonment for a term exceeding one year," or has "knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith"; and (4) 18 U.S.C. § 924(a)(1)(D), which imposes a fine and/or imprisonment of not more than five years for any other willful violation of the provisions (in this case 18 U.S.C. § 922(a)(1)(A)-dealing in firearms without a license). All of these provisions carry a maximum fine of \$250,000 and a maximum of three years of supervised release following completion of the sentence imposed.

## **U.S. Law Enforcement Challenges and Southwest Border Gun Trafficking**

It is important to first note the subtle difference between trafficking and smuggling as it relates to firearms. Generally, trafficking occurs when a commercial item is diverted out of the lawful chain of commerce into illegal markets for unlawful purposes whereas smuggling, arguably a subset of trafficking, occurs when an item, legal or illegal, is imported or exported in violation of the law.<sup>116</sup> It is worth noting that under current law there is a specific provision in the GCA that makes it illegal for any person to smuggle firearms *into* the United States, intending to engage in or promote conduct that violates state or federal drug laws, or that constitutes a crime of violence. Doing so is punishable by not more than 10 years' imprisonment and/or fine.<sup>117</sup> However, there is no corresponding provision that specifically prohibits *smuggling firearms out of* the United States for the purposes of drug trafficking and related violent crime, even though laws like the AECA and EAR regulate the exportation of firearms. Instead, those caught smuggling firearms out of the

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<sup>115</sup> This defendant's exporting of firearms without a license was contrary to the AECA.

<sup>116</sup> In contrast to firearms statutes, federal drug statutes define narcotics trafficking, *see* 21 U.S.C. § 1907(3) (defining "narcotics trafficking" as "any illicit activity to cultivate, produce, manufacture, distribute, sell, finance or transport narcotic drugs, controlled substances, or listed chemicals"). 18 U.S.C. § 554 makes it a crime, punishable by not more than 10 years in prison, to smuggle goods *from* the United States if a person "fraudulently or knowingly exports or sends from the United States, or attempts to export ... any merchandise, article or object contrary to any law or regulation ... or receives, conceals, buys, sells, or in any manner facilitates the transportation ... of such merchandise ... prior to exportation, knowing the same to be intended for exportation contrary to any law"; 18 U.S.C. § 545 makes it a crime, punishable by not more than 20 years in prison, to smuggle goods *into* the United States.

<sup>117</sup> 18 U.S.C. 924(k)(3). Notably, this provision that penalizes smuggling of firearms provides a lesser penalty compared to 18 U.S.C. § 545, which makes it punishable by not more than 20 years' imprisonment and/or a fine to "knowingly and willfully, with intent to defraud the United States, smuggle or clandestinely introduce or attempt to smuggle ... into the United States any merchandise which should have been invoiced."



United States are typically charged under a general smuggling provision as seen in the case that occurred in Victoria, Texas.

Persons intending to smuggle trafficked firearms across the border often carry only a small number of firearms at a time under the guise that those firearms are their personal property. Moreover, if those persons are not otherwise prohibited from possessing a firearm, it may be extremely difficult to establish a criminal offense until they actually cross the border. Consequently, one of the challenges for investigators and prosecutors is that trafficking often involves a smaller quantity of guns so traffickers can avoid detection of their illicit activities or, if caught with a small quantity of guns, have a more believable claim that the guns in their possession are personal firearms. These circumstances arguably underscore the need for the ATF to follow up trafficking leads as expeditiously as possible in order to prevent wider trafficking schemes from expanding and proliferating.

The examples highlighted from the U.S. Attorney's Office illustrate that because there are no laws specifically devoted to targeting wider firearms trafficking schemes, investigators and prosecutors work with criminal provisions in the GCA and NFA to charge gun traffickers with multiple violations. In many cases, gun traffickers are prosecuted under various provisions of these statutes; such provisions include prohibitions against dealing firearms without a federal license,<sup>118</sup> or federally licensed dealers dealing off the books.<sup>119</sup> It is also unlawful for any person "to sell or otherwise dispose" of a firearm to another they "know or have reasonable cause to believe" is a person who is prohibited from possessing firearms under federal law.<sup>120</sup> Likewise, there are provisions that make it unlawful to make false statements on the forms necessary to complete a firearms transaction with an FFL.<sup>121</sup> Thus, persons who engage in straw purchases could be prosecuted if they are found to be lying on the ATF Form or transferring a firearm to a person whom they know or have reasonable cause to believe is prohibited from possessing a firearm under federal law. There is not, however, a provision that makes it *specifically* unlawful for a person, who, knowing they are a person prohibited from possessing firearms, to direct another person to buy a firearm for them, for example. In sum, the existing statutory scheme does not include firearm specific federal provisions that would cover the wider criminal conspiracies often involved in gun trafficking schemes that include multiple straw purchases and other federal violations. Such provisions would arguably assist law enforcement by allowing them to cast a wider net to investigate and prosecute those who are engaged early on in gun trafficking schemes.

The recent GAO report on firearms trafficking discusses some of the federal firearms laws that may present challenges to U.S. efforts to combat arms trafficking to Mexico.<sup>122</sup> The report

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<sup>118</sup> 18 U.S.C. § 922(a)(1)(A). Violating this provision is punishable by a fine or imprisonment for five years, or both, under 18 U.S.C. § 924(a)(1)(D).

<sup>119</sup> Under 18 U.S.C. § 922(m), it is unlawful for a federally licensed dealer to make a false entry in, fail to make an entry in, or fail to properly maintain records the licensee is required to keep. Besides maintaining the ATF Form 4473 for approved transfers, federally licensed dealers are required to maintain a bound log book of all firearms transactions. Failing to properly record a firearms transaction is punishable by a fine or one year in prison, or both, under 18 U.S.C. § 924(a)(1)(C) and (D).

<sup>120</sup> 18 U.S.C. § 922(d).

<sup>121</sup> 18 U.S.C. § 922(a)(6). Both the dealer and the buyer are required to fill out an ATF Form 4473, on which the buyer (transferee) attests to the dealer (transferor) that he is buying the firearm for himself and that he is not otherwise prohibited from possessing a firearm. Knowingly making a false statement on a ATF Form 4473 is punishable under 18 U.S.C. § 924(a)(2) by a fine or imprisonment for ten years or both.

<sup>122</sup> U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, June 2009, p. 24. [hereinafter referred to as GAO Firearms (continued...)]

identifies three key challenges related to (1) restrictions on collecting and reporting information on firearms purchases, (2) a lack of required background checks for private firearms sales, and (3) limitations on reporting requirements for multiple sales.

Currently, the ATF relies heavily on its firearms tracing program to identify individuals involved in firearms trafficking schemes and to detect trafficking patterns. Arguably, however, ATF's ability to trace firearms is limited, because the U.S. government is prohibited by law from maintaining a national registry of firearms.<sup>123</sup> According to the GAO report, key law enforcement officials have stated that "restrictions on establishing a federal firearms registry can lengthen the time and resources required by ATF to complete a crime gun trace and can limit the success of some traces."<sup>124</sup> Furthermore, the report mentioned that secondary, or used, firearms are commonly trafficked to Mexico. Officials noted that, "while ATF may be able to trace a firearm to the first retail purchaser, it generally has no knowledge of any secondhand firearms purchases from gun shows or pawnshops ... without conducting further investigation" because federal law currently "permits the private transfer of certain firearms from one unlicensed individual to another [also described as "secondary transactions"] in places such as at gun shows, without requiring any record ... be maintained by the unlicensed individuals, an FFL, or other law enforcement authority."

Related to private transactions, the GAO report highlighted that the lack of required background checks for private firearms sales may also be problematic in efforts to combat gun trafficking.<sup>125</sup> Pursuant to the Brady Handgun Violence Prevention Act, background checks are mandatory for all nonlicensed persons seeking to obtain firearms from FFLs, subject to certain exceptions.<sup>126</sup> The private sales of firearms from one individual to another, including private sales at gun shows,

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(...continued)

Trafficking report.]

<sup>123</sup> 18 U.S.C. § 926 (prohibits the promulgation of any rule that would have the contents of the records maintained by FFLs be controlled, transferred, or managed by the United States or any State and prevents creation of firearms registry). For FY1979 and thereafter, Congress has included a proviso in the ATF salaries and expenses appropriations language that states that no funds shall be used "in connection with consolidating or centralizing, within the Department of Justice, the records, or any portion thereof, of acquisition or disposition of firearms maintained by Federal firearms licensees." For latest proviso, see the Omnibus Appropriations Act, 2009 (P.L. 111-8; 123 Stat. 574). In addition, in the Brady Handgun Violence Prevention Act (P.L. 103-159; 107 Stat. 1542), Congress prohibited the use of any information generated by the system established under the National Instant Criminal Background Check System to be used to establish any system for the registration of firearms, firearms owners, or firearms transactions or disposition, except for information related to background checks on prohibited persons (107 Stat. 1542).

<sup>124</sup> GAO Firearms Trafficking report, p. 25.

<sup>125</sup> Congress has considered legislation to close the "gun show loophole," and several related bills have been introduced in recent Congresses. For example, in the 106<sup>th</sup> Congress, Senator Frank Lautenberg successfully amended a juvenile justice bill (S. 254) with such a proposal, and the Senate passed this bill on May 20, 1999. Representative John Conyers successfully offered a similar amendment to a house juvenile justice bill (H.R. 2122) on June 18, 1999, but the House did not pass this bill. In the 108<sup>th</sup> Congress, Senator John McCain successfully offered a similar amendment to a firearms industry protection act on March 2, 2004, but the Senate floor manager pulled this bill before a final vote could be taken. Senator McCain introduced the Gun Show Loophole Closing Act during the 107<sup>th</sup> and 108<sup>th</sup> Congresses. In addition, Representative Michael Castle has introduced the Gun Show Loophole Closing Act from the 107<sup>th</sup> to the 111<sup>th</sup> Congresses. Senator Lautenberg has introduced the Gun Show Background Check Act in both the 110<sup>th</sup> and 111<sup>th</sup> Congresses. For gun show proposals in the 111<sup>th</sup> Congress, see S. 843 and H.R. 2324. See CRS Report RL32842, *Gun Control Legislation*, by William J. Krouse.

<sup>126</sup> 18 U.S.C. 922(t).

are not subject to the background check requirement, and consequently do not require the seller to determine whether the purchaser is a felon or other prohibited person, such as an illegal alien.<sup>127</sup>

Last, the GAO report pointed out that federal law requires FFLs to report multiple sales to the Attorney General whenever they transfer more than one handgun to any nonlicensee within 5 consecutive business days (See above section “Multiple Handgun Sales Reports”). ATF officials noted that this federal reporting requirement “has provided critical leads for some investigations of arms trafficking” and “helps expedite the time required by ATF to complete a crime gun trace.”<sup>128</sup> A similar reporting requirement, if enacted, for multiple long gun sales—particularly for rifles and shotguns capable of accepting large capacity ammunition feeding devices<sup>129</sup>—would arguably provide ATF and other federal law enforcement with early warning of potential firearms trafficking schemes as 27% of firearms recovered in Mexico and traced from FY2004 to FY2008 were long guns.<sup>130</sup> Absent is information regarding how many of those long guns were part of a multiple sales purchase.

Although the GAO report underscored these three areas of federal law as potential hindrances to law enforcement’s ability to combat firearms trafficking, Congress has passed laws on several occasions that prohibit the establishment of a registry of firearms or firearms owners (see footnote 123) and past legislative proposals to more strictly regulate private, intrastate firearm transfers at gun shows have been considered on the House and Senate floors, but have not been enacted (see footnote 125). With regard to multiple long gun reporting requirements, past legislative proposals of this nature and current law are limited to handguns. Notwithstanding Congress’ reluctance historically to adopt such proposals, the next section analyzes three anti-firearms trafficking measures introduced in the 110<sup>th</sup> Congress.

## Previously Proposed Anti-Gun Trafficking Measures

Although no anti-gun trafficking measures have been introduced during the 111<sup>th</sup> Congress thus far, a few were introduced during the 110<sup>th</sup> Congress. These proposals would have strengthened provisions of the GCA, arguably, by repealing certain limitations on the release of ATF firearm trace data; requiring comprehensive crime gun tracing nationally; establishing new recordkeeping requirements on second-hand firearms sold or traded back to FFLs, with a focus on identifying stolen firearms; increasing penalties for licensed and non-licensed persons for violating certain provision of the GCA; and establishing a federal one-handgun-per-month limit for transfers between FFLs and non-licensed persons.

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<sup>127</sup> However, under 18 U.S.C. § 922(d), it is unlawful for *any person* to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that such person is a prohibited person under 18 U.S.C. 922(g).

<sup>128</sup> GAO Firearms Trafficking report, p. 28.

<sup>129</sup> Before the 1994 semiautomatic assault weapons ban was allowed to sunset on September 13, 2004, a large capacity ammunition feeding device was defined as a “magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.” See former 18 U.S.C. § 921(a)(31).

<sup>130</sup> GAO Firearms Trafficking report, p. 28.

## **Anti-Gun Trafficking Penalties Enhancement Act of 2007 (S. 77 and H.R. 1895)**

In January 2007, Senator Charles Schumer introduced S. 77, the Anti-Gun Trafficking Penalties Enhancement Act of 2007. This proposal would have:

- repealed ATF appropriations limitations that restrict the disclosure of information stored in the Firearms Trace System database or multiple handgun sales reports;
- required federal, state, and local law enforcement agencies that recovered a firearm that was determined to have been stolen or used in a crime to report this information to ATF, so that it could be included in the Firearms Trace System database;<sup>131</sup>
- amended the Attorney General’s (AG) authority to conduct unannounced inspections of FFLs, so that he could conduct such inspections “at any time that” he “may reasonably require”;
- made certain offenses under the GCA predicate offenses under the Racketeer Influenced and Corrupt Organizations Act,<sup>132</sup> including (1) disposal of a firearm to a prohibited person, (2) possession of a firearm or ammunition by a prohibited person, (3) knowingly handling firearms or ammunition for an employer who is known to be a prohibited person, and (4) shipping or receiving firearms while under felony indictment; and
- increased the maximum term of imprisonment for those violations from not more than 10 years to not more than 20 years.

Representative Carolyn McCarthy also introduced a similar proposal—H.R. 1895. This bill included all the provisions in S. 77, except for the provision that would have granted the AG additional inspection authority and the provision that would have increased the maximum penalty for certain violations.

## **Detectives Nemorin and Andrews Anti-Gun Trafficking Act of 2008 (H.R. 4818)**

In December 2007, Representative Peter King introduced H.R. 4818, the Detectives Nemorin and Andrews Anti-Gun Trafficking Act of 2008. This proposal would have amended the GCA by creating a new subsection at 18 U.S.C § 924—Penalties. This amendment would have created a new separate “gun trafficking” crime punishable by a fine and/or imprisonment of not more than 20 years for committing a certain offense under the GCA under one of two conditions.

The first set of conditions would have been the offering for sale, transfer, or barter of two or more handguns, semiautomatic assault weapons,<sup>133</sup> short-barreled shotguns, short-barreled rifles, or

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<sup>131</sup> Currently, federal, state, local, and tribal law enforcement agencies *may* submit information to the FBI for inclusion in the National Crime Information Center’s stolen gun file. FFLs, on the other hand, are *required* to report the theft or loss of firearms to ATF and local police within 48 hours following discovery. 18 U.S.C. § 923(g)(6).

<sup>132</sup> 18 U.S.C. §§ 1961-1968.

<sup>133</sup> As previously mentioned, a statutory definition for “semiautomatic assault weapon” no longer exists. The 1994 (continued...)

machineguns, of which at least one was transported, received or possessed by that person and stolen or had the importer's or manufacturer's serial number removed. The second set of conditions would have been the offering for sale, transfer, or barter of two or more handguns, semiautomatic assault weapons, short-barreled shotguns, short-barreled rifles, or machineguns, of which at least one was offered by sale, transfer, or barter, to another who is either prohibited by federal or state law from possessing a firearm, not 18 years of age, is in a school zone, or is not a resident of the state in which he has attempted to acquire the firearms.

If someone committed an offense already punishable by the GCA,<sup>134</sup> each of which carries its own penalty, under either of these conditions, such a person could be prosecuted under this separate gun trafficking crime and face a fine and/or imprisonment of not more than 20 years. This bill was silent as to whether the sentences for the proposed "gun trafficking" crime and the individual predicate GCA offenses, if a person was prosecuted under both provisions, would have been served consecutively or concurrently. It appears that such matter would have likely been influenced by the U.S. Sentencing Commission guidelines.

This bill also included numerous other provisions oriented toward gun trafficking. Among other things, the bill would have: (1) increased funding for Project Safe Neighborhoods; (2) required the AG to give a biennial report to Congress on firearms tracing and prosecutions; (3) required the FBI to give ATF access to its stolen gun files maintained in its National Crime Information Center; (4) required the AG to establish a "national instant stolen gun check system"; and (5) made it unlawful to transport, possess, or receive a firearm that had the importer's or manufacturer's serial number removed, obliterated, or altered, regardless of one's awareness of this fact.

## **End Gun Trafficking Act (S. 3634)**

In 2008, Senator Frank Lautenberg introduced S. 3634, the End Gun Trafficking Act. This bill would have prohibited FFLs from selling or otherwise disposing of a handgun to a non-licensee,

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(...continued)

Semiautomatic Assault Weapons (SAW) Ban, which expired in 2004, had defined, for example, a rifle as a semiautomatic assault weapon if it was able to accept a detachable magazine and included two or more of the following five characteristics: (1) a folding or telescopic scope, (2) a pistol grip, (3) a bayonet mount, (4) a muzzle flash suppressor or threaded barrel capable of accepting such a suppressor, or (5) a grenade launcher. (Former 18 U.S.C. § 921(a)(30)). Similar definitions existed for semiautomatic pistols and shotguns.

<sup>134</sup> The GCA offenses in title 18 that would have been implicated in this new gun trafficking crime were: (1) § 922(a)(1)(A), unlawful to willfully engage in business of dealing firearms without a license; (2) § 922(a)(3), unlawful for non-licensee to willfully transport or receive a firearm obtained in another state into his state of residence; (3) § 922(a)(6), unlawful to knowingly make a materially false statement to a FFL; (4) § 922(b)(2), unlawful for a FFL to willfully deliver a firearm to a person where the purchase or possession would violate state law; (5) § 922(b)(3), unlawful for a FFL to willfully deliver a firearm to a person residing in a state other than the FFL's; (6) § 922(b)(5), unlawful for FFL to willfully dispose of a firearm without making entries required by law; (7) § 922(d), unlawful for any person to knowingly dispose a firearm to a prohibited person; (8) § 922(g), unlawful for any prohibited person to knowingly receive or possess firearm or ammunition; (9) § 922(i), unlawful for any person to knowingly transport or ship a stolen firearm; (10) § 922(j), unlawful for any person to knowingly receive, possess, conceal, store, barter, sell, or dispose of stolen firearm; (11) § 922(k), unlawful for any person to knowingly transport, ship, or receive a firearm that has obliterated or altered serial number; (12) § 922(m), unlawful for a FFL to knowingly make a false entry in or properly maintain records required by law; (13) § 922(n), unlawful for any person to willfully ship or receive firearms or ammunition if under indictment for felony; (14) § 924(c), unlawful for any person to use or carry a firearm during or in relation to a federal crime of violence or drug trafficking crime; (15) § 924(h), unlawful for any person to transfer a firearm knowing it will be used to commit a crime of violence or drug trafficking crime.

if the FFL knew or had reasonable cause to believe that the non-licensee had purchased a handgun in the previous 30-day period. With some exceptions, this bill would have also prohibited any unlicensed person from purchasing more than one handgun during any 30-day period. A violation of these prohibitions would have been punishable by a fine and/or imprisonment of not more than 10 years. S. 3634 also would have repealed the multiple handgun sales report requirement and would have authorized the AG to issue rules and regulations to ensure that the National Instant Criminal Background Check System (NICS) would be able to identify whether a prospective transferee had received a handgun from a FFL within the previous 30 days. Finally, this bill would have repealed the annual appropriations limitations for FY2004-FY2008 that prohibited the expenditure of any appropriated funding to maintain NICS records on approved transfers for more than 24 hours, and allow records to be kept for not less than 180 days.

## **Policy Questions Regarding Southwest Border Gun Trafficking**

In congressional testimony, U.S. authorities have asserted a moral obligation on the part of the United States to address gun trafficking on the Southwest border.<sup>135</sup> Yet, as described above, much of the information about Southwest border gun trafficking remains incomplete. Questions that may arise include:

- **Southwest Border Gun Trafficking.** Have federal authorities conducted any recent military, small arms trafficking investigations between the United States and Mexico? If so, can details of those investigations be provided? Have any of those investigations involved heavy machine guns, grenades, bazookas, or anti-tank weapons? What is known about the scope of such small arms trafficking in Central America and Mexico? Are gun shows a major source of such armaments?
- **ATF Trace Data and Trafficking.** What do the trace data show concerning gun trafficking from the United States to Mexico? Can these data measure the scope of illegal gun trafficking between the two countries? Of the firearms recovered in Mexico and traced back to the United States during FYs 2005-2008, how many of these traces were later used in straw purchase investigations in the United States? How often have firearms been traced back to gun shows and corrupt federal firearms licensees? Of those traced firearms, is it known how many of those firearms would meet the definition of “semiautomatic assault weapon” under prior federal law? What do the data tell us about illegal, military small arms trafficking? Do the current “Tiahrt” restrictions on trace data encumber the ATF from assisting Mexican and U.S. law enforcement authorities in fighting drug-related violent crime?<sup>136</sup>

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<sup>135</sup> Statement of Thomas A. Shannon, Assistant Secretary of State, Bureau of Western Hemisphere Affairs, U.S. Department of State, before House Foreign Affairs Committee, Western Hemisphere Subcommittee, “Hearing on U.S. and Latin American Security,” February 7, 2008.

<sup>136</sup> Added to the ATF appropriations from FY2004 through FY2008, the Tiahrt firearms trace data restriction prohibits the use of any funding appropriated for ATF to disclose firearm trace or multiple handgun sales report data for any purpose other than supporting “bona fide” criminal investigations or agency licensing proceedings. Moreover, the language of the restriction includes the phrase, “in fiscal year 2008 and thereafter,” which makes the limitation (continued...)

- **Inter-American Gun Trafficking Convention.** For what reasons has the ratification of this convention not been acted upon by the Senate? Will its ratification be a priority for the 111<sup>th</sup> Congress?
- **Gun Trafficking Statute.** Is the existing federal statutory scheme adequate to target and prosecute the ongoing gun trafficking that is occurring on the Southwest Border? Considering the scale and proliferation of gun trafficking, is there a need to create a more complex statute that specifically targets the conduct that often occurs in gun trafficking?

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permanent law according to the Government Accountability Office. See U.S. Government Accountability Office, “Bureau of Alcohol, Tobacco, Firearms, and Explosives—Prohibition in the 2008 Consolidated Appropriations Act,” July 15, 2008.