

WHEN THE BATF COMES A-CALLIN'

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"There is no wholly satisfactory substitute for brains, but silence does pretty well." Anonymous

Probably one of the least favorite events for any Federal Firearms Licensee (hereafter "FFL") is a visit from the Bureau of Alcohol, Tobacco and Firearms (hereafter "BATF"). This can occur in one of at least six very different ways and your legal rights and recommended responses vary accordingly.

For purposes of the following discussion I will assume that you are a law-abiding licensed dealer or collector who tries to comply honestly with the federal firearms laws. If some of the discussion below seems excessively cautious, or even hostile to BATF, it is based on real world experience with an agency which has been found by Congress, by various federal judges and juries, by other federal and local law enforcement agencies, and even by some Presidents to be inept, indifferent to citizens' rights, and capable of the most outrageous abuses of the law.

BATF operates under the rationale of requiring you to comply with the law. I operate under the rationale of requiring BATF to comply with the law. I required this of BATF as a federal prosecutor for almost 30 years, and I require it as a private citizen and as a lawyer. You should require it as an FFL.

A non-licensee has no legal duty whatsoever to talk to or otherwise cooperate with a BATF agent (or any other governmental official). It is a sad commentary on our times and the state of our federal government (and especially BATF) that the appropriate legal advice from a defense lawyer to a non-licensee confronted by a federal or state law enforcement officer can be capsulized in a single sentence called RULE ONE: Silence is golden; or what part of "no" don't you understand?

If you are an FFL, however, additional considerations come into play.

1. The Tracing Center Inquiry. Most active dealers have had a telephone call from BATF's Tracing Center at some time or other inquiring about the disposition of a firearm whose serial number traces to the dealer. This is usually an inquiry concerning a third party and does not implicate the dealer. It should normally occur during your listed business hours, although emergency traces in high-profile matters could occur at any time of the day or night.

These inquiries are authorized by law in official criminal investigations and as a licensee you have a statutory duty to cooperate by furnishing the requested information. Be aware, however, that the Tracing Center is a part of BATF's criminal enforcement apparatus whose function (and principal interest) is to put people (including firearms dealers) in jail. You should always obtain the full name and telephone number of the caller and note it

in writing. An entry in your bound book alongside the entry for the firearm involved would not be inappropriate. If in doubt about the caller's identity, you should terminate the call and call back before giving any information. Cooperation would include supplying copies of any related documents. Never surrender an original document or legally-possessed firearm (or other property for that matter) except in response to a summons, subpoena, or court order, and then only after obtaining legal advice.

When faced with the prospect of providing information to the government, keep in mind that there are only two legal options: silence or complete truthfulness. Lying (even by partial truths or literal but misleading true answers) is never an option. A false statement to a federal officer in his official capacity is a felony akin to perjury, and usually much easier to prosecute and prove than the matter being investigated. If you cannot speak truthfully without incriminating yourself or injuring your legal interests, then remember RULE ONE.

If the inquiry is about a Title II firearm, you should attempt to determine if the trace was initiated by local law enforcement. If it was, you should remind the caller that the information requested is privileged tax information and that it is a federal felony for BATF to disclose the information outside the agency. Your interest in this aspect is that you do not wish to aid and abet the commission of a felony -- even one committed by a federal official.

Occasionally a tracing inquiry will be made in person by one or more special agents. They are, of course, purely criminal investigators whose only function (and interest) is to put people (including firearms dealers) in jail. Write down the names and badge numbers of all present. If anyone present is not a BATF special agent, inquire why that person is present (and later note the response in writing). If there is more than one agent, inquire why. If anyone refuses to display official identification direct them to immediately leave the premises. If they refuse, call the local sheriff or police and make a trespassing complaint.

Do not allow anyone to search your records, premises or inventory for the information or items being sought. You or your employee do the searching, retrieving and copying. The same rules apply with respect to refusing to turn over original documents or items of personal property. If an agent should physically insist on taking custody of an original record or legally-possessed firearm or other item of property, resist verbally and vigorously, but not physically. Advise him calmly that your first call after he leaves will be to your lawyer and his first call will be to the Inspector General of the Treasury Department. Successive calls will then also be made to BATF's Office of Internal Affairs, the agent's SAC (Special Agent in Charge), the United States Attorney, the FBI and the sheriff -- the latter three to report the theft of your property by a federal agent. Then do it. In short, if an agent is stupid enough to violate your Fourth Amendment right to be secure in your papers and effects in front of God and everybody, then he needs to have his whole day ruined.

A tracing inquiry is usually directed at a third party recipient of a firearm which has passed through your hands at some point and generally is not targeted at you. However, if you sense that the inquiry is, in fact, targeted at you, you should immediately terminate the inquiry, ask the agents to leave the premises (after which they are legally trespassers), request them to put their inquiry in writing, and seek legal counsel. Remember RULE ONE.

Failure to cooperate in a tracing request can put your license at risk, but loss of a license (or the expense of defending it) compares very favorably with a prison sentence (or the cost of defending a criminal indictment). And your license is not realistically at risk if BATF is trying to further a criminal investigation of you through a pretext tracing inquiry. The majority of all inmates talk their way into prison; you have no legal obligation to help put yourself there. This type of confrontation is an IQ test. Don't flunk it; remember RULE ONE.

Clients occasionally inquire about tape-recording their telephone or in-person conversations with BATF employees (and others). This is legal under federal law so long as one party to the conversation (you) knows of the interception. However, state laws vary on the issue and you should be certain that such consensual recording is legal under the law of the state where the recording is taking place. You should never record a conversation (telephone or otherwise) where no one present knows of the interception. This is a felony violation of the federal wiretapping statute, and you are creating the very evidence needed to prove it. You can, of course, legally tape-record any transaction in any jurisdiction when all parties are aware of the taping. Any such tape should itself reflect that all present are aware of the taping.

You should never knowingly consent to your own interview or conversation being tape recorded without making a tape of your own. More important, the taping of your interview is a strong signal to invoke RULE ONE and immediately seek legal counsel.

2. The Third-Party Inquiry. A third-party inquiry is broader than a simple tracing inquiry, but otherwise involves the same principles and recommended reactions. It could be a telephone call, but will ordinarily be a personal visit by one or more special agents who are after more detailed information than just the acquisition and disposition of one or more firearms which have passed into or through your inventory. All other factors remain the same and your responses should be the same as for the in-person tracing inquiry.

Needless to say, if the inquiry is not about a third-party transaction but rather is directed solely at you, invoke RULE ONE and seek legal counsel immediately. Remember, refusing to talk to federal criminal investigators and seeking legal counsel are not admissions of guilt or signs of a guilty conscience. They are manifestations that you are an American citizen aware of your legal rights and an individual who will not be bullied, coerced or frightened into giving up those rights. The agents already believe

you are guilty; their job is to prove it. Your job is to avoid helping them prove it.

3. The Undercover Solicitation. This may be a contact by BATF which, if you are fortunate, you never learn was made. It is a sad fact that a high percentage of non-violent federal gun crimes committed in the United States (perhaps even a majority) are manufactured by BATF -- crimes that would never have occurred but for the fact of an offer from or solicitation by a BATF informant or undercover agent to an unwitting citizen. Technically, most of these BATF-sponsored offenses do not rise to legal entrapment. But they would never have happened if BATF had not planted the idea and created the opportunity. This is done for the simplest and ugliest of all bureaucratic reasons: agent and agency self-preservation and budget and case statistics.

Sometimes you will know you are being shopped -- perhaps by recognizing the agent or perhaps by the sheer stupidity of the approach. You are probably also being recorded, possibly even videotaped. Your response should be precisely the same whether it ultimately turns out that you were speaking to a government microphone or to the village idiot. You should firmly, but not politely, advise the proponent that what he/she is proposing is illegal and that he/she is no longer welcome on your premises or at your table. Then remember RULE ONE. Do not engage in a discussion of the law or alternative solutions to the "customer's" proposal; terminate the conversation. Politeness is not called for when someone is either intentionally or ignorantly soliciting you to commit a federal felony. And your politeness on a federal tape recording in a subsequent criminal prosecution can often be construed as acquiescence in or lack of strong feeling about committing a crime.

Some of my bolder clients, who are truly tired of being harassed this way, are fully prepared to make a citizen's arrest in such circumstances and then call the local sheriff to come collect the offender (attempts and solicitations to commit an offense are also crimes under federal and state law). If this appeals to you, make sure first that the law of your state permits a citizen's arrest. Know the amount of legal force you can use to effect such an arrest. Then cuff the son of a bitch and give him a taste of what he's probably trying to do to you.

A criminal solicitation by someone you've known for years, and who you know cannot be an agent, is especially dangerous. It probably means that your acquaintance has gotten his own tail in a crack and is now making cases for BATF in an attempt to lighten his own load. Finally, bear in mind that an undercover approach may be made by a female agent or by a mixed couple.

4. The Compliance Inspection. Compliance inspections are conducted by inspectors of the regulatory enforcement branch of BATF. These individuals have no criminal law enforcement authority -- or training (although they have recently been issued badges, perhaps in an effort to bolster morale or create an appearance of authority for low-paid personnel). Theoretically, inspectors are charged with the civil and regulatory aspects of firearms law.

They do not have the power of arrest or the authority to serve subpoenas or warrants. Nor may they make seizures of any kind. I say "theoretically" because in some recent instances inspectors have been observed accompanying special agents on raids and even illegally carrying firearms. In short, there are some cop wannabes among the inspector force whose intrinsic suspicion of firearms dealers as criminals must be guarded against.

The legally-authorized purpose of compliance inspections (and pre-licensing inspections) is to ensure that the firearms statutes are generally being complied with by the firearms industry. The true job of inspectors is to spot and correct discrepancies in compliance with federal firearms statutes, to establish the qualifications of license applicants, and to enforce and collect the excise tax on the manufacture and importation of firearms. If an inspector discovers evidence of a criminal violation he is supposed to make a referral to the criminal enforcement branch of BATF (the special agents).

As a licensee you are required to display your license on your licensed premises, to maintain certain required books and records accurately, and to submit to a compliance inspection of your licensed premises, your inventory and your required records as often as once annually.

The only firearms records which you are required by law to maintain, and to submit for inspection, are an acquisition and disposition book (your bound book), original BATF Forms 4473, "Firearms Transaction Record" for each firearm sold, original BATF Forms 5300.35 "Statement of Intent to Obtain a Handgun(s)" (the Brady Act form), and your retained copies (copy 4) of BATF Forms 3310.4, "Report of Multiple Sale or Other Disposition of Pistols and Revolvers" for each multiple sale of handguns. Special occupational taxpayers may also be required to produce their Forms 2, 3, 5, 6 and 10 for firearms on hand. There may be additional state law records required of a dealer, but BATF has no jurisdiction over these records and arguably no jurisdiction to inspect them.

When a BATF inspector shows up for a compliance inspection, require credentials to be displayed by everyone present and note the full name of the inspector(s) in writing. Never permit a special agent or a state or local or non-BATF federal official to participate in a compliance inspection. These individuals have no authority under the inspection laws, and are there for some different (and more ominous) reason. A state official might have independent state-law authority to conduct an inspection or investigation, but he has no right to do it in tandem with a BATF compliance inspection. You should require other inspectors or investigators to get in line so that you can deal with them at a separate time. If they refuse to leave, call the sheriff and swear out a trespassing complaint. If a BATF special agent, a firearms specialist from BATF's Technology Branch in Washington (part of the criminal enforcement branch), or other criminal law enforcement type is present, this is not an ordinary compliance inspection and you should immediately terminate it, direct the individuals to leave and contact legal counsel.

BATF inspectors can inspect at any time during your listed business hours, without prior notice or appointment. If they do not give you advance notice then restrict their inspection activities to your listed hours. If you are subjected to an unannounced inspection, be on guard. You may be under suspicion or you may be dealing with one of the cop wannabes. If the inspector has the courtesy to advise you ahead of time of an intended inspection you are free to, and should, accommodate the time, date and hours of inspection to the inspector's convenience. You should never consent to more than one compliance inspection in any twelve-month period. Require BATF to obtain an inspection warrant and immediately seek legal counsel.

Under general principles of law a compliance inspection must be "reasonable" in terms of time, duration, scope, number of inspectors, lack of disruption to your business, etc. If the inspector is reasonable and professional, you should be too. The process does not have to be adversarial or antagonistic. If the inspector is not reasonable or professional, keep in mind that your license does not require you to talk to him, or to provide him access to your copy machine, rest room, etc. If you are dealing with an idiot, remember RULE ONE -- and let him bring his own copy machine. Also remember that he has no right to use your electricity.

The inspector is legally entitled to inspect all your required records, your business premises, and your firearms inventory. He is legally entitled to inspect nothing else. You should not permit inspection of non-required records unless there is a satisfactory explanation of why it is desired (such as inspecting a purchase or sale invoice for the correct serial number where the bound book and the Form 4473 show different serial numbers for the same firearm). You should not permit inspection of non-business portions of the premises when your home is the licensed premises. (When your business is conducted from your home, you should carefully delineate that portion dedicated to the firearms business and confine the business strictly to that portion of the premises.)

You should accommodate the inspector by making copies of any records desired (within reason). Never permit original records (or firearms or other property) to be removed from the premises without a summons, subpoena or court order, and without seeking legal counsel. The inspector has no power of seizure and may attempt to bluff his way into removing original records or may try to obtain your consent. Do not be bluffed and do not consent. Inspections should be conducted on your premises. (If you store firearms off premises, the inspector is also entitled to inspect such storage facilities.)

A compliance inspection of a special occupational taxpayer will begin with the inspector attempting to reconcile his NFA Branch printout of Title II firearms shown as registered to you in BATF's records with the actual Title II firearms in your possession. He will be unable to do so because of the abysmal state of the national registry. Have mercy on him and help BATF untangle its records. Try to refrain from thinking about whose

records and recordkeeping should really be under audit here. The inspector will also likely need your technical expertise in identifying anything more esoteric than a rifle, pistol or shotgun. Try to conceal your contempt for a "federal firearms inspector" who probably doesn't know a wipe from a baffle, or a lightning link from a drop-in sear, and who may think a Mauser broomhandle is something used by a German hausfrau.

If you are a firearms manufacturer or importer, an inspector may plan to conduct an excise tax audit at the same time as a compliance inspection. The authority for these two types of inspections/audits derive from entirely different legal authorities and they involve entirely separate legal considerations. You should insist that either the audit or the inspection be conducted first and separately. The reasons are expanded on under Paragraph 5, below.

Curio and relic (collector) licensees have the legal option of bringing their records and firearms to the nearest designated BATF office for a compliance inspection. Although I am unaware of any compliance inspection of a collector, this is an option to be considered seriously. The simple truth is that you never want a BATF employee in your home if it can be avoided.

In summary, the firearms regulatory process does not assume you are a criminal, but rather seeks to ensure that dealers generally are complying with the requirements of the law. If bona fide, the process does not require invocation of your various rights to notice, counsel, warning, non-self-incrimination, etc., which all come into play when you are the target of a criminal investigation. Unfortunately, BATF sometimes attempts to avoid these constitutional "inconveniences" by illegally using the access of civil inspectors to further a criminal investigation without alerting the targeted dealer. You should never cooperate in such a subterfuge.

5. The Excise Tax Audit. If you are simply a dealer in firearms or ammunition, you will have no occasion to undergo an excise tax audit. However, if you manufacture or import firearms or ammunition you are subject to audit by the regulatory enforcement branch of BATF.

The manufacturers excise tax on firearms and ammunition is one of the most complex and least understood federal tax statutes. It is said that only three people in the world completely understand it. One is dead, one went mad trying to explain it, and modesty prevents me from naming the third. Suffice to say, however, that BATF, which acquired jurisdiction over the tax from IRS in 1991, is hopelessly inept in administering it.

An excise tax audit is governed by the general principles of the Internal Revenue Code of 1986 and not the National Firearms Act of 1934 or the Gun Control Act of 1968.

You are required to maintain the same records any other taxpayer/return filer is required to maintain: whatever records are necessary to support the figures on your return. There are no

records specifically required by law to be maintained such as those required of dealers by the Gun Control Act. And, absent tax fraud or evasion, there are no criminal penalties for failing to maintain such records. Therefore, the only penalty for failing to keep excise tax records, or to produce them, is that BATF could choose to treat all your sales as taxable events.

As a practical matter a logbook of operable Title I firearms manufactured by you plus any BATF Forms 2 (Title II firearms manufactured by you), and a file of BATF Forms 6A, operable firearms imported by you, accompanied by your bound book showing the same firearms sold by you and sales invoices showing the sale price, would be all the records required for a proper excise tax audit (in addition, perhaps to your retained copies of excise tax returns filed). You should decline to produce any other records for an excise tax audit unless you have an alternative pricing issue under the excise tax regulations or tax-exempt sales (to a government entity, the military, or for export).

You should also be aware that the definition of firearm under the excise tax statute is different from other statutory definitions of "firearm." Excise taxable firearms are only those complete portable firearms which go bang. The tax does not apply to crew-served weapons, silencers, frames or receivers, conversion kits, parts, most destructive devices, etc., etc. The tax only becomes due on a sale or its commercial equivalent. A transfer of a complete Title II firearm which goes bang is not always a sale and does not always trigger the excise tax. Even when it is a sale, it is not taxable if the Title II transfer tax is being paid (a Form 4 transfer). There is also no excise tax due on the manufacture or importation and sale of blank ammunition. I cover these points because BATF inspectors are generally excise-tax illiterate and much excise tax is asserted and collected which is not legally due and owing.

If you are a firearms manufacturer or exporter, you should have competent tax counsel.

6. The Raid. This is an event which means you are in deep, serious. It is the execution of a judicially-issued search and seizure warrant (and occasionally also an arrest warrant) by BATF special agents, frequently accompanied by agents of other federal or local agencies, on premises owned, occupied or inhabited by you.

When a raid team shows up at your premises and announces (usually by breaking down your door, sometimes by killing your dogs and throwing flash bang grenades at your women and children) that they have a federal search warrant, you must instantly do several things. You must first of all mentally assimilate the fact that they are law officers rather than a rampaging motorcycle gang (which they often resemble in both appearance and behavior). Having identified them as law rather than outlaw, you must freeze in place in a non-threatening posture and attempt to stabilize the situation until some of their law-enforcement adrenalin (the most dangerous drug on the street) has bled off. If only a search warrant is involved, you must then recover your wits sufficiently to do the following:

- (A) Try to note and record the identities of as many participants as possible, by name, agency, badge number, and physical description.
- (B) Ask for a copy of the warrant.
- (C) Disable -- not unplug, disable -- your telephones and fax machines.
- (D) Gather your family, children and pets and leave the premises.
- (E) Call your lawyer.

You may be prevented from doing some or all of the above things by legally illiterate agents, but that will simply lay the foundation for your own day in court.

A federal search warrant authorizes only the search of a specified premises and only the seizure of specifically described items. Corollary to the execution of a warrant, the law permits the agents to make a forcible entry if that becomes necessary after knocking and announcing their identity and purpose, to control the premises, and to take reasonable precautions for their own safety -- such as a pat down for weapons of those persons present and assigning an agent to watch over and accompany anyone moving about on the premises. The law authorizes the agents to prevent the destruction of evidence or contraband and it protects them against being assaulted or interfered with. It is a serious federal crime to assault a federal officer or to obstruct execution of the warrant. Don't turn a possible later indictment into a sure one.

Never assist the raiding party in locating the items described in the warrant. They have the right to search, but not the right to find. Do not open locked compartments, safes or rooms for them or provide them with keys or combinations. Do not talk to the raiding officers other than to request identification and a copy of the warrant. Resist the compulsion to show what a good guy you are; these are not your friends and they are not there to help you.

A search warrant does not authorize agents to arrest you or anyone else on the premises (although assaulting the agents or forcibly interfering with the execution of the warrant will justify a warrantless arrest) and it does not authorize them to handcuff you, restrict you to a particular place or prevent you from leaving.

You have a perfect right to leave the premises and should do so immediately. If you are physically prevented from leaving, you have just been falsely arrested in violation of the Fourth Amendment and will have your recovery later in court as well as taking some of the other retaliatory measures promised in Paragraph 2, above. You must get yourself and your family out of the house for several reasons: (A) to avoid the personal insult, humiliation, provocation and indignities which many agents seem to enjoy; (B) to avoid a potential life-threatening situation; and (C) to avoid creating evidence against yourself (RULE ONE). There is no useful purpose your remaining on the premises can serve; if the agents are going to plant evidence or destroy property, they will do it whether or not you are present.

You will need as much information about identities, badge numbers and descriptions as you can manage in the minutes before you leave. These will be useful later when you assert or defend your rights. But they are not a reason to delay leaving the premises promptly. You are legally entitled to a copy of the warrant, but do not remain on the premises if you are refused.

You should disable your telephones and fax machines before leaving in order to prevent the agents from illegally seizing evidence (calls and faxes) which might come in while they are on the premises. Such items did not exist when the warrant was signed and cannot possibly be covered by the warrant. Their seizure will probably therefore be illegal; but it is better to prevent such seizures from even happening. If you are physically prevented from disabling your own property, go somewhere else and place incoming calls to all your lines and keep the circuits open.

Now, call your lawyer.

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