

# United States Senate

WASHINGTON, DC 20510

March 11, 2022

The Honorable Merrick Garland  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

The Honorable Marvin Richardson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms &  
Explosives  
99 New York Avenue, NE  
Washington, D.C. 20226

Attorney General Garland and Acting Director Richardson:

We write to express our grave concern over the Bureau of Alcohol, Tobacco, Firearms & Explosives' (ATF) continued pattern of enforcing secret guidance. This secret guidance was brought to our attention by those who have received recent threatening letters<sup>1</sup> where the ATF makes blanket threats based on the recipient allegedly purchasing and possessing various firearms accessories, none of which are illegal based on any statute or regulation. These letters are in addition to an internal ATF email ordering seizure of various items and referring to those in possession as "defendants."<sup>2</sup> We find this pattern of secret regulation incredibly troubling.

In the letters, the ATF claims--without offering any explanation as to why--that popular item known as "solvent traps" and "forced reset triggers" (FRT) are unregistered silencers and machine guns, respectively, and therefore subject to regulation under the National Firearms Act (NFA), 26, U.S.C. §§5801-5872. One such letter threatens that "[p]ossession of any of the unregistered silencer devices could result in prosecution for criminal violation of Federal law" and instructs recipients to contact their local ATF field office within 30 days to "coordinate the abandonment of any silencers."<sup>3</sup> The transfer or possession of an unregistered silencer or machine gun carries with it a penalty of up to ten years in prison.<sup>4</sup>

Similarly, an ATF email dated January 26, 2022 ordered ATF agents to search out and demand "voluntary" surrender of two models of forced reset triggers, or otherwise "[i]f the manufacturer/seller refuses to abandon the items, please take custody of the items, and seize them for forfeiture." The ATF email referred to those law-abiding citizens in possession of such triggers as "defendants." Despite the significant criminal consequences attached to the unlawful manufacture, sale and possession of NFA items, ATF has never issued any public guidance differentiating a silencer from a solvent trap, or informing the public that it considers certain forced reset triggers to be machine guns. Notwithstanding the glaring absence of any such *public*

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<sup>1</sup> See Letter from Keith Krolczyk, Acting Special Agent in Charge, Bureau of Alcohol, Tobacco, Firearms, and Explosives (December 8, 2021).

<sup>2</sup> E-mail from Jennifer Cicolani, Chief, ATF Field Management Staff, to All ATF Field Offices (Jan. 26, 2022).

<sup>3</sup> See Letter from Keith Krolczyk, Acting Special Agent in Charge, Bureau of Alcohol, Tobacco, Firearms, and Explosives (December 8, 2021).

<sup>4</sup> 26 U.S.C. § 5871.

guidance, the classification of a solvent trap as a silencer is contrary to the plain language of 18 U.S.C. §921(a)(24).

In addition to the ATF's threatening letters, it has recently come to our attention that ATF has formulated secret *internal* guidance documents "to assist ATF personnel tasked with differentiating so-called 'solvent-traps' from firearm silencers" and to assist "with identifying certain machinegun conversion devices commonly referred to as" FRTs.<sup>5</sup> These documents contain summaries of the standards that the Firearms and Ammunition Technology Division purportedly uses to classify items.<sup>6</sup> Disturbingly, ATF made these documents available only to those tasked with enforcing the law, rather than those who strive to comply with it. Indeed, ATF marked these documents as "Law Enforcement Sensitive" to conceal them from the firearms industry and the American public.

We find the ATF's attempt to conceal its interpretations of the law disturbing. In a free society, "Every citizen is presumed to know the law."<sup>7</sup> Thus, as the Supreme Court has said, "'it needs no argument to show that all should have free access' to [the law's] contents,"<sup>8</sup> including, in addition to the text of a statute, to those materials which constitute "the authentic exposition and interpretation of the law."<sup>9</sup>

Our government, including the ATF, has a duty to inform Americans what they must do to comply with federal law, especially when the conduct involves the exercise of an enumerated constitutional right and violations could result in a penalty of up to ten years in prison. The use of "secret" law is anathema to our system of government. The United States Court of Appeals for the Seventh Circuit said, "[a] designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian régimes."<sup>10</sup> Yet, that is exactly what the ATF has done in this and other cases.<sup>11</sup>

With this attempted secret regulation, the ATF shows an abject disregard for the fundamental principles of due process and accountable governance. Federal agencies cannot enforce the law in this manner.

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<sup>5</sup> See ATF Technical Bulletin 2020-01; ATF Technical Bulletin 2017-02; ATF Technical Bulletin 22-01.

<sup>6</sup> We are only aware of three of these technical bulletins, but the numbering system indicates a series of these are published each year. One of these bulletins is almost five years old.

<sup>7</sup> *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (citation omitted); see also *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" (citation omitted)).

<sup>8</sup> *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507 (cleaned up).

<sup>9</sup> *Banks v. Manchester*, 128 U.S. 244, 253 (1888); see also *Public.Resource.Org, Inc.*, 140 S. Ct. at 1508 ("That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties."); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735 (1st Cir. 1980) (discussing "the right of the public to know the law to which it is subject").

<sup>10</sup> *United States v. Pulungan*, 569 F.3d 326, 328 (7th Cir. 2009).

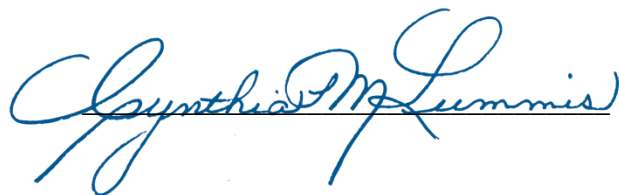
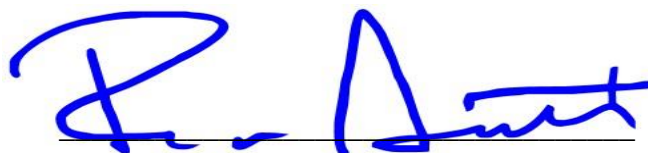
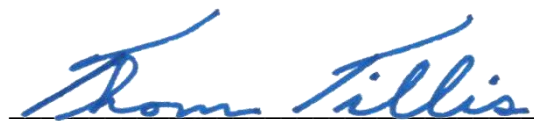
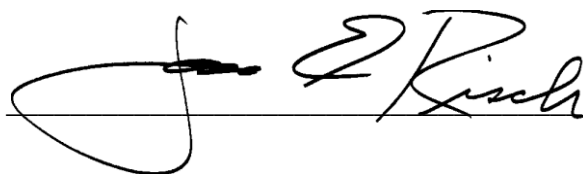
<sup>11</sup> See Letter to Attorney General Barr and Acting Director Lombardo from fourteen U.S. Senators (November 23, 2020) ("We write to share our concerns about the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) practice of relying on non-public standards in its regulation of the importation of ArmaLite Rifle (AR) styled pistols and pistol stabilizing braces, and ask for your attention to this important matter.")

In light of the above, we respectfully request that the U.S. Department of Justice and the ATF provide the following no later than March 25, 2022:

- All internal instructions, directives, or guidance to any and all employees and/or contractors assigned to or working with the Firearms & Ammunition Technology Division containing criteria, factors, or “indicators” to be used to make the determination of whether a “solvent trap” is classified as a silencer subject to regulation under the National Firearms Act.
- All internal instructions, directives, or guidance to any and all employees and/or contractors assigned to or working with the Firearms & Ammunition Technology Division containing criteria, factors, or “indicators” to be used to make the determination of whether a “forced reset trigger” is classified as a machine gun subject to regulation under the National Firearms Act.
- Copies of all publications through which the ATF has made such guidance and criteria available to ATF Agents, including all Firearms & Ammunition Technology Division Technical Bulletins issued regarding “solvent traps” and “forced reset triggers”, including copies of each.
- An explanation as to how these bulletins are used by law enforcement.
- An explanation as to why documents with similar guidance have not been made available to the public.

The ATF is charged by law with enforcing the nation’s federal firearms laws and providing regulatory oversight of the firearms industry. ATF simply has no authority to conceal public guidance and then enforce it on unsuspecting Americans. The ATF must issue only those regulations authorized by Congress, provide notice of the proposed regulations, and then provide the American people with an opportunity to comment before a new rule goes into effect.

Sincerely,



Cindy Hyde-Smith

Marsha Blackburn

Tommy Tuberville

Kami Lamey

John Boozman

Bill Hagerty

Liz Cheney

John Hower

John Barrasso

Mike Crapo

Chuck Shadley

Ben Sasse

Jim Risch

Julie Blum