



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Firearms and Explosives Industry Division

Washington, DC 20226

www.atf.gov

200000:EME

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Re: Federal Register Notice, OMB Number 1140-0020, Proposed Collection of Information
Relating to Revision of ATF Form 4473 (5300.9) (April 7, 2016)

Dear Mr. Beveridge:

This responds to the comments you submitted to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) dated June 6, 2015 [sic], regarding ATF's revised collection of information on ATF Form 4473 under OMB Number 1140-0020. ATF submitted the revised information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. ATF responds as follows.

ATF's Authority to Publish Form 4473 and Relevant Definition

You first commented that ATF is not the appropriate agency for drafting, modifying or amending ATF Form 4473, or for defining or clarifying what constitutes an "unlawful user of or addicted to any controlled substance" because the Drug Enforcement Administration (DEA) is the agency empowered to interpret that term.

ATF disagrees with your assertion that it is not the agency responsible for defining the term "unlawful user of or addicted to any controlled substance" under 18 U.S.C. § 922(g)(3). While the DEA may have been delegated authority to interpret provisions of the Controlled Substances Act (21 U.S.C., Chapter 13), ATF is the agency responsible for interpreting the provisions of the Gun Control Act (GCA), including section 922(g)(3).

By way of background, the first Form 4473 was issued by ATF's predecessor agency in 1968 for use by licensed importers, manufacturers and dealers. In 1972, ATF became an independent Bureau under the U.S. Department of the Treasury and Form 4473 was revised to reflect that change. ATF was expressly delegated the authority to perform the functions, exercise the powers, and carry out the duties of the Secretary of the Treasury in the administration and

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enforcement of the GCA, among other laws. *See* 37 FR 11696-97 (June 10, 1972). In 2002, Congress passed Section 1111 of the Homeland Security Act (codified at 28 U.S.C. § 599A) which transferred ATF to the U.S. Department of Justice. Among other authorities, that Act expressly conferred on ATF the responsibility for investigating criminal and regulatory violations of the GCA, and any other function related to the investigation of violent crime delegated by the Attorney General. The Attorney General expressly delegated to ATF the authority to “[i]nvestigate, administer, and enforce the laws related to ... firearms ... and perform other duties as assigned by the Attorney General, including exercising the functions and powers of the Attorney General” under the GCA. 28 C.F.R. § 0.130(a)(1). Indeed, after the Brady law was passed, ATF used its delegated authority to promulgate implementing regulations, including the definitions for the various prohibited persons in section 922(g).¹

ATF also exercised its delegated authority to issue Form 4473. The GCA at 18 U.S.C. § 923(g)(1)(A) states, in relevant part, that each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of sale or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe. Additionally, 18 U.S.C. § 926(a) authorizes the Attorney General to prescribe rules and regulations that are necessary to carry out the provisions of the GCA. Based on these authorities, ATF as the delegate of the Attorney General promulgated 27 C.F.R. § 478.124, which states, in relevant part, that a licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose of any firearm to an unlicensed person unless the licensee records the transaction on a firearms transaction record, Form 4473. ATF also promulgated 27 C.F.R. § 478.21(a) which provides the following:

The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in each form shall be furnished as required by this part.

Thus, ATF’s authority to promulgate rules and issue Form 4473 is well-established, and has been upheld in court.²

¹ *See* 62 FR 34634 (June 27, 1997) (Definitions for Prohibited Persons); 63 FR 58271 (October 29, 1998) (Final Rule implementing Public Law 103-159 Relating to the Permanent Provisions of the Brady Act).

² *See, e.g., Armalite v. Lambert*, 512 F. Supp. 2d 1070, 1081 (N.D. Ohio 2007), *aff’d*, 544 F.3d 644 (6th Cir. 2008) (rejecting a challenge to ATF’s authority requiring completion of certain items on ATF Form 4473, in light of 18 U.S.C. §§ 923(g)(1)(A) and 926(a)); *RSM v. Herbert*, 2006 U.S. Dist. LEXIS 97237 (D.Md. 2006), *aff’d*, 466 F.3d 316 (4th Cir. 2006) (ATF has authority, pursuant to section 926, to promulgate rules necessary to carry out the provisions of Chapter 44, and is accorded great deference to its longstanding interpretations of law); and *Nat’l Rifle Ass’n v. Brady*, 914 F.2d 475, 479 (4th Cir. 1990) (ATF had authority under section 926 to promulgate and implement such regulations as are necessary to carry out the purposes of the Gun Control Act, and is entitled to deference in determining which regulations are necessary).

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Proposed Revision to Question 11.e

In its notice, ATF proposes to revise Form 4473 to include a warning that marijuana use or possession remains unlawful under Federal law regardless of whether it has been decriminalized for medicinal or recreational purposes in the State where the transferee resides. In your comment, you requested that ATF specifically find that users of state-licensed physician prescribed marijuana for medicinal purposes are not “unlawful users of or addicted to any controlled substance,” pursuant to 18 U.S.C. § 922(g)(3) and 27 C.F.R. § 478.11.

ATF cannot accept your suggestion. As ATF explained in its Open Letter to All Federal Firearms Licensees dated September 21, 2011, marijuana is expressly listed in the Controlled Substances Act (and ATF regulations) as a controlled substance. 21 U.S.C. § 812(c)(Schedule I)(c)(10); 27 C.F.R. § 478.11. Controlled substances in Schedule I are defined as having “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1). There are no exceptions for medical purposes.³

Because marijuana cannot be prescribed by a licensed physician consistent with Federal law, anyone who currently uses it, whether for “medical” purposes or otherwise, is by definition an “unlawful user of a controlled substance”.⁴ Recognizing this impossibility, most, if not all of the States that permit the use of medical marijuana have carefully avoided using the word “prescribe” in their laws in favor of authorizing individuals to use medical marijuana when *advised* or *recommended* by a physician. *See, e.g.,* Cal. Health & Safety § 11362.5(b)(1)(A); Nev. Rev. St. § 453A.210; Ore. Rev. Stat. § 475B.415(2)(a). Since it cannot be prescribed, the revised Form 4473 properly warns marijuana users and possessors of their potential violation of section 922(g)(3), and the instruction does not conflict with ATF regulations.⁵

ATF’s Regulatory Definition of “Unlawful User”

Finally, in your comments (p.7, note 7) you allege that ATF revised its regulatory definition of “unlawful user of or addicted to any controlled substance” by not recognizing that a patient may use state-licensed prescribed marijuana for medicinal purposes. You further asserted that ATF failed to provide 90-days public notice and comment as required to amend GCA rules, pursuant to 18 U.S.C. § 926(b).

³ *See U.S. v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (“[M]arijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana.”).

⁴ *See also Wilson v. Holder*, 7 F.Supp.2d 1104, 1118 n.3 (D.Nev. 2014) (“Plaintiff’s argument that the policy in the Open Letter violates the Second Amendment because ‘more than half of the U.S. population’ uses marijuana is absurd at best. The mere fact that many people engage in illegal activity does not alter the illegal nature of the activity. Furthermore, the fact that the use of marijuana may be legal under the laws in some states does not later the illegality of this use under federal law.”)

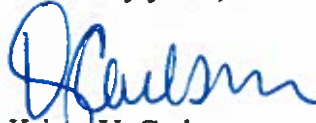
⁵ As to commenter’s suggested alternative that ATF delay until DEA makes a determination whether marijuana should be “removed from or rescheduled under the CSA,” ATF will revisit the form instructions if that occurs.

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As explained previously, ATF's form instruction is fully consistent with the regulatory definition of "unlawful user." Moreover, since ATF did not create or amend a rule or regulation, 90-days public notice was not required pursuant to section 926(b). Nonetheless, even though the current notice does not make any changes to any promulgated rules or regulations, there was, in fact, a 90-day notice and comment period – one 60-day period, followed by a current 30-day period – in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3506(c)(2)(A), 3507(b). *See* 81 FR 20424 (April 7, 2016); 81 FR 48847 (July 26, 2016). Thus, all persons were given formal notice and had a substantial opportunity to comment on the revised Form 4473, as you have, which should address any concerns regarding transparency and participation.

We trust the foregoing has been responsive to your comments.

Sincerely yours,



Krissy Y. Carlson

Chief, Firearms and Explosives Industry Division