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July 15, 2008

The Honorable John Culberson
House of Representatives

Subject: *Bureau of Alcohol, Tobacco, Firearms, and Explosives—Prohibition in the 2008 Consolidated Appropriations Act*

Dear Mr. Culberson:

In a letter dated May 14, 2008, you requested our opinion on whether a proviso included in the 2008 Consolidated Appropriations Act regarding the disclosure of certain information maintained by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is permanent law. Letter from Representative John Culberson to Gene Dodaro, Acting Comptroller General, May 14, 2008. The proviso prohibits using appropriated funds to disclose part or all of the contents of ATF's Firearms Trace System database, except to certain parties. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. B, title II, 121 Stat. 1844, 1903–04 (Dec. 26, 2007) (2008 proviso). This proviso is similar to one appearing in ATF's 2006 appropriation, which we found in a prior opinion to be permanent law.[1] *See* Department of Justice Appropriations Act, 2006, Pub. L. No. 109-108, title I, 119 Stat. 2290, 2295 (Nov. 22, 2005) (2006 proviso). For the reasons stated below, we conclude that the 2008 proviso is permanent law.[2]

BACKGROUND

ATF maintains a Firearms Trace System database containing information related to guns recovered in connection with a crime, and ATF conducts firearms traces for

[1] B-309704, Aug. 28, 2007.

[2] Our practice when rendering decisions is to obtain a factual record from the relevant federal agency and to elicit the legal position, if any, of the agency on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this regard, ATF responded to our office in this matter, advising that ATF views the proviso as permanent. Letter from Stephen R. Rubenstein, Chief Counsel, ATF, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, June 19, 2008 (Rubenstein Letter).

other law enforcement agencies. B-309704, Aug. 28, 2007. The 2006 proviso states, in part, that "no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database" to anyone other than a federal, state, or local law enforcement agency or a prosecutor in connection with a criminal investigation or prosecution. Pub. L. No. 109-108, title I, 119 Stat. 2290, 2296. In our opinion addressing the 2006 proviso, we held that when the phrase "this or any other act" is coupled with the phrase "with respect to any fiscal year," Congress intends the provision in question to be permanent because of the forward-looking effect of the phrase. B-309704, Aug. 28, 2007. We concluded that the 2006 proviso is permanent law.

The 2008 Consolidated Appropriations Act contains a similar proviso stating, among other things, that "beginning in fiscal year 2008 and thereafter, no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database" except to "a Federal, State, local, tribal, or foreign law enforcement agency. . . or a Federal agency for a national security or intelligence purpose. . . ." Pub. L. No. 110-161, div. B, title II. The 2008 proviso also allows for the sharing or exchange of firearms trace information among and between law enforcement agencies, federal, state, or local prosecutors, and federal national security, intelligence, or counterterrorism officials. *Id.* Finally, the 2008 proviso states that ATF may publish "statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations." *Id.*

DISCUSSION

Appropriations acts are by their nature nonpermanent legislation, and provisions in appropriations acts are presumed effective only for the covered fiscal year. B-309704, Aug. 28, 2007. Congress, of course, has the power to enact permanent legislation in an appropriations act. *Id.* When the language or nature of an appropriations act provision makes it clear that such was the intent of Congress, we will construe the provision as permanent legislation. B-288511, Aug. 22, 2001.

The most important factor in ascertaining Congress's intent is the language of the statute itself. B-309704, Aug. 28, 2007. In this regard, the clearest indication that Congress intended a provision to be permanent is the presence in the provision of "words of futurity" clearly indicating such intent. *Id.* For example, the United States Court of Appeals for the Second Circuit found words of futurity in the phrase "this subsection shall apply to fiscal year 1999 and each fiscal year thereafter." *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 146 (2nd Cir. 2002). The court concluded that such language constituted permanent legislation because it contained "unambiguous language of permanence . . . [that] clearly and expressly indicates that it is intended to be permanent." *Id.*

The 2008 proviso states that "beginning in fiscal year 2008 and thereafter, no funds appropriated under this or any other act" may be used to disclose part or all of the contents of the Firearms Trace System database. By using the phrase "in fiscal year

2008 and thereafter," Congress has clearly indicated that the proviso is intended to be permanent. We read the plain meaning of the phrase as applying the prohibition to fiscal year 2008 and to fiscal years after 2008, in other words, "in fiscal year 2008 and each fiscal year thereafter." We therefore conclude that the 2008 proviso is permanent law.

Although both the 2006 and 2008 provisos are permanent law, Congress changed the 2008 proviso from the 2006 proviso in several respects. In this regard, ATF has identified "three principal modifications" to the 2006 proviso that are contained in the 2008 proviso. Rubenstein Letter, at 2. First, the 2008 proviso allows trace data to be shared with tribal and foreign law enforcement agencies and federal agencies for national intelligence purposes. Second, it allows information to be shared or exchanged among and between law enforcement agencies and prosecutors. Third, it provides for the release of certain statistical aggregate data.

In these three areas, ATF could be faced with circumstances in which it would be impossible to comply with the both the 2006 and 2008 provisos because the two provisos directly conflict. For example, a disclosure to a tribal law enforcement agency is allowed under the 2008 proviso but would not be permitted under the 2006 proviso.

With regard to the provisos in question here, to the extent the three areas identified in the 2008 proviso irreconcilably conflict with the 2006 proviso, the 2008 proviso controls. While repeals by implication are disfavored, such repeals may be warranted where two statutes irreconcilably conflict. *See Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); B-240610, Feb. 2, 1989. To resolve such conflicts, we and the federal courts apply a "last-in-time rule," namely, that the statute enacted last supersedes the previously enacted statute to the extent of the conflict. *Posadas*, 296 U.S. at 503; B-303268, Jan. 3, 2005. Both the 2006 and 2008 provisos directly address the narrow subject of how disclosure of information contained in the same database will be restricted. The 2008 proviso, as discussed, specifically authorizes disclosure in some circumstances that would not be permitted under the 2006 proviso. Under applicable canons of statutory construction, because of the irreconcilable conflict, the 2008 proviso will supersede the 2006 proviso with respect to disclosures addressed by these three areas in the 2008 proviso.

CONCLUSION

The proviso in the 2008 Consolidated Appropriations Act prohibiting ATF from using appropriated funds to disclose data in the Firearms Trace System database to unauthorized parties is permanent law. Because it was passed later in time, the 2008

proviso will supersede the 2006 proviso to the extent that the two are in irreconcilable conflict.

Sincerely yours,



Gary L. Kepplinger
General Counsel