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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 2022R-17; AG Order No.]

RIN 1140-AA58

Definition of "Engaged in the Business" as a Dealer in Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice ("Department") is amending Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") regulations to implement the provisions of the Bipartisan Safer Communities Act that broaden the definition of when a person is considered "engaged in the business" ("EIB") as a dealer in firearms other than a gunsmith or pawnbroker. This final rule incorporates the BSCA's definitions of "predominantly earn a profit" ("PEP") and "terrorism," and amends the regulatory definitions of "principal objective of livelihood and profit" and "engaged in the business" to ensure each conforms with the BSCA's statutory changes and can be relied upon by the public. The rule also clarifies what it means for a person to be "engaged in the business" of dealing in firearms and to have the intent to "predominantly earn a profit" from the sale or disposition of firearms. In addition, it clarifies the term "dealer" and defines the term "responsible person." These clarifications and definitions assist persons in understanding when they are required to have a license to deal in firearms. Consistent

with the Gun Control Act ("GCA") and existing regulations, the rule also defines the term "personal collection" to clarify when persons are not "engaged in the business" because they make only occasional sales to enhance a personal collection or for a hobby, or if the firearms they sell are all or part of a personal collection. This rule further addresses the procedures that former licensees, and responsible persons acting on behalf of such licensees, must follow when they liquidate business inventory upon revocation or other termination of their license. Finally, the rule clarifies that a licensee transferring a firearm to another licensee must do so by following the verification and recordkeeping procedures in the regulations, rather than by using a Firearms Transaction Record, ATF Form 4473.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Helen Koppe, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Washington DC 20226; telephone: (202) 648-7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This rulemaking finalizes the proposed rule implementing the provisions of the Bipartisan Safer Communities Act, Pub. L. 117–159, sec. 12002, 136 Stat. 1313, 1324 (2022) ("BSCA"), that amended the definition of "engaged in the business" in the GCA at 18 U.S.C. 921(a)(21)(C), as well as the Department's plan in response to Executive Order 14092 of March 14, 2023 (Reducing Gun Violence and Making Our Communities Safer), 88 FR 16527 (Mar. 17, 2023). Section 12002 of the BSCA broadened the definition of "engaged in the business" under 18 U.S.C. 921(a)(21)(C) by eliminating the requirement that a person's "principal objective" of purchasing and reselling firearms must include both "livelihood and profit" and replacing it with a requirement that the person must intend "to predominantly earn a profit." The BSCA therefore removed the requirement to consider income for "livelihood" when determining that a person is "engaged in the business" of dealing in firearms at wholesale or retail. The definition of "to predominantly earn a profit" now focuses only on whether the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain.

These regulations implement this statutory change and provide clarity to persons who remain unsure of whether they are engaged in the business as a dealer in firearms with the predominant intent of obtaining pecuniary gain. This rulemaking will result in more persons who are already engaged in the business of dealing in firearms becoming licensed and deter others from engaging in the business of dealing in firearms without a license. As more persons become licensed under this rule, those licensees will conduct more background checks to prevent prohibited persons from purchasing or receiving firearms, consistent with the longstanding requirements of the GCA for persons who are

engaged in the business of dealing in firearms. Those additional licensees will also respond to trace requests when those firearms are later found at a crime scene. At the same time, neither the BSCA nor this rule purports to require every private sale of a firearm to be processed through a licensed dealer. Individuals may continue to engage in intrastate private sales without a license, provided that such individuals are not "engaged in the business" and the transactions are otherwise compliant with law.

This final rule accomplishes these important public safety goals of the GCA, as amended by the BSCA, in several ways. First, the rule finalizes an amendment to the regulatory definition of "dealer" to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying domestic or international activities are conducted.

Second, the rule finalizes an amendment to the regulatory definition of "engaged in the business" to define the terms "purchase" and "sale" as they apply to dealers to include any method of payment or medium of exchange for a firearm, including services or illicit forms of payment (e.g., controlled substances). For further clarity, this final rule defines the term "resale" to mean "selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person." This change aligns the regulatory text with the intent element in 18 U.S.C. 921(a)(21)(C) and makes clear that the term "resale" refers to the sale of a firearm, including a stolen firearm, any time after any prior sale has occurred.

Third, because performing services can also be a medium of exchange for firearms, the rule finalizes an amendment to existing regulations that codifies ATF's historical exclusion for auctioneers who provide only auction services on commission to assist in liquidating firearms at an "estate-type" auction.

Fourth, the rule clarifies who is required to be licensed as a wholesale or retail firearms dealer by finalizing a list of specific activities demonstrating when an unlicensed person's buying and reselling of firearms presumptively rises to the level of being "engaged in the business" as a dealer. It also finalizes a separate set of presumptions indicating when a person has the intent "to predominantly earn a profit" through the repetitive purchase and resale of firearms. The activities described in these presumptions are not an exclusive list of activities that may indicate that someone is "engaged in the business" or intends "to predominantly earn a profit." These presumptions will provide clarification and guidance to persons who are potentially subject to the license requirement and will apply in administrative and civil proceedings. The presumptions will be used, for example, to help a fact finder determine in civil asset forfeiture proceedings whether seized firearms should be forfeited to the Government and in administrative licensing proceedings to determine whether to deny or revoke a Federal firearms license. These presumptions do not apply in any criminal proceedings but may be useful to judges in such proceedings when, for example, they decide how to instruct juries regarding permissible inferences.

At the same time, the final rule expressly recognizes that individuals who purchase firearms for the enhancement of a personal collection or a legitimate hobby are permitted by the GCA to occasionally buy and sell firearms for those purposes, or occasionally resell to a licensee or to a family member for lawful purposes, without the need to obtain a license. It also makes clear that persons may liquidate all or part of a personal collection, liquidate firearms that are inherited, or liquidate pursuant to a court order, without the need to obtain a license. Evidence of these activities may also be used

to rebut the presumptions discussed above in a civil or administrative proceeding. Relatedly, the rule finalizes the proposed definition of the term "personal collection" (or "personal collection of firearms" or "personal firearms collection") to reflect common definitions of the terms "collection" and "hobby." While firearms accumulated primarily for personal protection are not included in the definition of "personal collection," the final rule makes clear that nothing in this rule shall be construed as precluding a person from lawfully acquiring a firearm for self-protection or other lawful personal use.

Finally, to help address the problem of licensees who improperly liquidate their business inventory of firearms without performing required background checks or maintaining required records after their license is terminated (e.g., revocation, denial of renewal, expiration, or voluntary surrender), the rule finalizes the proposed regulations on discontinuing business. These regulations clarify the statutory requirements under 18 U.S.C. 923(c) regarding "former licensee inventory"—a new term defined to mean those firearms that remain in the possession of a former licensee (or a "responsible person" of the former licensee, as also defined in the rule) at the time the license is terminated. The rule also finalizes an amendment to the regulations that makes clear that a licensee who transfers a firearm to another licensee is required to do so by following the licensee verification and recordkeeping procedures in the regulations, rather than by using a Firearms Transaction Record, ATF Form 4473 ("Form 4473").

II. Background

Subsections in Section II

A. Advance notice of proposed rulemaking (1979)

B. Firearms Owners' Protection Act of 1986

C. Executive action to reduce gun violence (2016)

D. Bipartisan Safer Communities Act (2022)

E. Executive Order 14092 (2023)

The Attorney General is responsible for enforcing the GCA. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA. *See* 18 U.S.C. 926(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA to the Director of ATF ("Director"), subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1), (c)(1); 28 CFR 0.130(a)(1)–(2); Treasury Department Order No. 221, sec. (1), (2)(d), 37 FR 11696, 11696–97 (June 10, 1972). Accordingly, the Department and ATF have promulgated regulations necessary to implement the GCA. *See* 27 CFR part 478.

The GCA, at 18 U.S.C. 922(a)(1)(A), makes it unlawful for any person, except a licensed dealer, to "engage in the business" of dealing in firearms.[1] The GCA further provides that no person shall engage in the business of dealing in firearms until the person has filed an application with ATF and received a license to do so. 18 U.S.C. 923(a). The required application must contain information necessary to determine eligibility for licensing and must include a photograph, fingerprints of the applicant, and a license fee for each place in which the applicant is to do business. 18 U.S.C. 923(a). The fee for dealers in firearms other than destructive devices is currently set by the GCA at $200 for the first three-year period and $90 for a renewal period of three years. 18

[1] Persons who engage in the business of manufacturing or importing firearms must also be licensed. 18 U.S.C. 922(a)(1)(A), 923(a). Once licensed, importers and manufacturers may also engage in the business of dealing, but only at their licensed premises and only in the same type of firearms their license authorizes them to import or manufacture. *See* 27 CFR 478.41(b).

U.S.C. 923(a)(3)(B); 27 CFR 478.42(c)(2). Among other items, the Application for Federal Firearms License, ATF Form 7 (5310.12)/7CR (5310.16) ("Form 7"), requires the applicant to include a completed Federal Bureau of Investigation ("FBI") Form FD-258 ("Fingerprint Card") and a photograph for all responsible persons, including sole proprietors. *See* ATF Form 7, Instruction 6.

Significantly, under the GCA since 1998, once licensed, firearms dealers have been required to conduct background checks on prospective firearm recipients through the FBI's National Instant Criminal Background Check System ("NICS") to prevent prohibited persons from receiving firearms. *See* 18 U.S.C. 922(t). They have also been required to maintain firearms transaction records for crime gun tracing purposes. *See* 18 U.S.C. 922(b)(5); 923(g)(1)(A). Persons who willfully engage in the business of dealing in firearms without a license are subject to a term of imprisonment of up to five years, a fine of up to $250,000, or both. 18 U.S.C. 922(a)(1)(A); 924(a)(1)(D); 3571(b)(3). Any firearms involved or used in any such willful violation may be subject to administrative or civil seizure and forfeiture. *See* 18 U.S.C. 924(d)(1). In addition, ATF may deny license applications submitted by persons who have willfully engaged in the business of dealing in firearms without a license, 18 U.S.C. 923(d)(1)(C), and ATF may revoke or deny renewal of a license if a licensee has aided and abetted others in willfully engaging in the business of dealing in firearms without a license, 18 U.S.C. 923(e)–(f).

A. Advance Notice of Proposed Rulemaking (1979)

The term "dealer" is defined by the GCA, 18 U.S.C. 921(a)(11)(A), and 27 CFR 478.11, and includes "any person engaged in the business of selling firearms at wholesale or retail." However, as originally enacted, Congress did not define the term "engaged in

the business" in the GCA.[2] Nor did ATF define the term "engaged in the business" in the original GCA implementing regulations.[3] ATF published an Advance Notice of Proposed Rulemaking ("ANPRM") in the *Federal Register* in 1979 in an effort to "develop a workable, commonly understood definition of ['engaged in the business']." *See* 44 FR 75186, 75186–87 (Dec. 19, 1979) ("1979 ANPRM"); 45 FR 20930 (Mar. 31, 1980) (extending the comment period for 30 more days). The ANPRM specifically referenced the lack of a common understanding of "engaged in the business" by the courts and requested comments from the public and industry on how the term should be defined and the feasibility and desirability of defining it. 1979 ANPRM at 75186–87.

ATF received 844 comments in response, of which approximately 551, or 65.3 percent, were in favor of ATF defining "engaged in the business."[4] This included approximately 324 firearms dealers in favor of defining the term. However, at the time, ATF believed that none of the suggested definitions appeared "to be broad enough to cover all possible circumstances and still be narrow enough to be of real benefit in any particular case."[5] One possible definition ATF considered would have established a threshold number of firearms sales per year to serve as a baseline for when a person would qualify as a dealer. The suggested threshold numbers ranged from "more than one" to "more than 100" per year. ATF did not adopt a numerical threshold because it would have potentially interfered with tracing firearms by persons who avoided obtaining a license (and therefore kept no records) by selling firearms under the minimum

[2] *See generally* Pub. L. 90–618, 82 Stat. 1213 (1968).
[3] 33 FR 18555 (Dec. 14, 1968).
[4] Memorandum for Assistant Director, Regulatory Enforcement, ATF, from Chief, Regulations and Procedures Division, ATF, *Re: Evaluation of Comments Received Concerning a Definition of the Phrase "Engaged in the Business," Notice No. 331*, at 1–2 (June 9, 1980); *id.* at attach. 1.
[5] *Id.* at 2.

threshold.[6] Ultimately, ATF decided not to proceed further with rulemaking at that time. Congress also had not yet acted on then-proposed legislation—the McClure-Volkmer bill (discussed below)—which, among other provisions, would have defined "engaged in the business."[7] For additional reasons why the Department has not adopted a minimum number of sales, see Section III.D of this preamble.

B. Firearms Owners' Protection Act of 1986

Approximately six years later, the McClure-Volkmer bill was enacted as part of the Firearms Owners' Protection Act ("FOPA"), Pub. L. 99–308, 100 Stat. 449 (1986). FOPA added a statutory definition of "engaged in the business" to the GCA. As applied to a person selling firearms at wholesale or retail, it defined the term "engaged in the business" in 18 U.S.C. 921(a)(21)(C) as "a person who 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 the repetitive purchase and resale of firearms."[8] The term excluded "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms."[9] FOPA further defined the term "with the principal objective of livelihood and profit" to mean "that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."[10] Congress amended FOPA's definition of "with the principal objective of

[6] *See id.*.
[7] *Id*. at 4.
[8] Pub. L. 99–308, sec. 101, 100 Stat. at 450.
[9] *Id.*
[10] *Id.*

livelihood and profit" a few months later, clarifying that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism."[11]

The legislative history of FOPA reflects that the statutory definitions' purposes were to clarify that individuals who make only occasional firearms sales for a hobby to enhance their personal collection are not required to obtain a license and to benefit law enforcement "by establishing clearer standards for investigative officers and assisting in the prosecution of persons truly intending to flout the law."[12] The legislative history also reveals that Congress did not intend to limit the licensing requirement only to persons for whom selling or disposing of firearms is a principal source of income or a principal business activity. The Committee Report stated that "this provision would not remove the necessity for licensing from part-time businesses or individuals whose principal income comes from sources other than firearms, but whose main objective with regard to firearm transfers is profit, rather than hobby."[13] Thus, for example, "[a] sporting goods or retail store which derived only a part of its income from firearm sales, but handled such sales for the 'principal objective of livelihood and profit,' would still require a license."[14]

Two years after its enactment, FOPA's definition of "engaged in the business" was incorporated into ATF's implementing regulations at 27 CFR 178.11 (now 478.11) in defining the term "Dealer in firearms other than a gunsmith or a pawnbroker."[15] At

[11] Pub. L. 99–360, sec. 1(b), 100 Stat. 766, 766 (1986).
[12] S. Rep. No. 98–583, at 8 (1984).
[13] *Id.* The Committee Report further explained that a statutory reference to pawnbrokers in the definition of "engaged in the business" was deleted because "all pawnbrokers whose business includes the taking of any firearm as security for the repayment of money would automatically be a 'dealer.'" *Id.* at 9.
[14] *Id.* at 8.
[15] 27 CFR 178.11 (1988).

the same time, consistent with the statutory text and legislative history, ATF amended the regulatory definition of "dealer" to clarify that the term includes "any person who engages in such business or occupation on a part-time basis."[16]

With respect to "personal collections," FOPA included a provision, codified at 18 U.S.C. 923(c), that expressly authorized licensees to maintain and dispose of private firearms collections separately from their business operations. However, under FOPA, as amended, the "personal collection" provision was and remains subject to three limitations.

First, if a licensee records the disposition (*i.e.*, transfer) of any firearm from their business inventory into a personal collection, that firearm legally remains part of the licensee's business inventory until one year has elapsed after the transfer date. Should the licensee wish to sell or otherwise dispose of any such "personal" firearm during that one-year period, the licensee must re-transfer the applicable firearm back into the business inventory.[17] A subsequent transfer from the business inventory would then be subject to the recordkeeping and background check requirements of the GCA applicable to all other firearms in the business inventory. *See* 27 CFR 478.125(e); 478.102(a).

Second, if a licensee acquires a firearm for, or disposes of any firearm from, a personal collection for the purpose of willfully evading the restrictions placed upon licensees under the GCA, that firearm is deemed part of the business inventory. Thus, as explained in FOPA's legislative history, "circuitous transfers are not exempt from otherwise applicable licensee requirements."[18]

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[16] *Id.*
[17] 27 CFR 478.125a(a); *see also* S. Rep. No. 98–583, at 13.
[18] S. Rep. No. 98–583, at 13.

Third, even when a licensee has made a bona fide transfer of a firearm from their personal collection, section 923(c) requires the licensee to record the description of the firearm in a bound volume along with the name, place of residence, and date of birth of an individual transferee, or if a corporation or other business entity, the transferee's identity and principal and local places of business.[19] ATF incorporated these statutory provisions into its FOPA implementing regulations in 1988.[20]

As explained in the NPRM, courts interpreting the FOPA definition of "engaged in the business" found a number of factors relevant to assessing whether a person met that definition. 88 FR 61995. For example, in one leading case, the U.S. Court of Appeals for the Third Circuit listed the following nonexclusive factors for consideration to determine whether the defendant's principal objective was livelihood and profit (*i.e.*, economic): (1) quantity and frequency of the sales; (2) location of the sales; (3) conditions under which the sales occurred; (4) defendant's behavior before, during, and after the sales; (5) price charged for the weapons and the characteristics of the firearms sold; and (6) intent of the seller at the time of the sales. *United States v. Tyson*, 653 F.3d 192, 200–01 (3d Cir. 2011). In a separate case, the Third Circuit stated, "[a]lthough the definition explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi*, it does not establish a specific quantity or frequency requirement. In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances

[19] *See* 18 U.S.C. 923(c).
[20] *See* 53 FR 10480 (Mar. 31, 1988); 27 CFR 178.125a (1988) (now 478.125a). The existing regulations, 27 CFR 478.125(e) and 478.125a, which require dealers to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms, were upheld by the Fourth Circuit in *National Rifle Ass'n v. Brady*, 914 F.2d 475, 482–83 (4th Cir. 1990).

surrounding the acts alleged to constitute engaging in business. This inquiry is not limited to the number of weapons sold or the timing of the sales." *United States v. Palmieri*, 21 F.3d 1265, 1268 (3d Cir.), *vacated on other grounds*, 513 U.S. 957 (1994).[21]

C. Executive Action to Reduce Gun Violence (2016)

On January 4, 2016, President Obama announced several executive actions to reduce gun violence and to make communities across the United States safer. Those actions included two clarifications by ATF of "principles" relating to licensees, consistent with relevant court rulings: (1) that a person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted, and (2) that there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement.[22]

To provide this clarification, ATF published in 2016, and updated in 2023, a guidance document entitled *Do I Need a License to Buy and Sell Firearms?*, ATF Publication 5310.2.[23] The guidance assists unlicensed persons in understanding whether they will likely need to obtain a license as a dealer in firearms. Since its original

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[21] *See also United States v. Brenner*, 481 F. App'x 124, 127 (5th Cir. 2012) ("Needless to say, in determining the character and intent of firearms transactions, the jury must examine all circumstances surrounding the transaction, without the aid of a 'bright-line rule.'" (quoting *Palmieri*, 21 F.3d at 1269)); *United States v. Bailey*, 123 F.3d 1381, 1392 (11th Cir. 1997) ("In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business." (quoting *Palmieri*, 21 F.3d at 1268)); *United States v. Nadirashvili*, 655 F.3d 114, 119 (2d Cir. 2011) ("[T]he government need not prove that dealing in firearms was the defendant's primary business. Nor is there a 'magic number' of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers." (quoting *United States v. Carter*, 801 F.2d 78, 81–82 (2d Cir. 1986))).

[22] *See* Press Release, The White House *FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer* (Jan. 4, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.

[23] *See generally* ATF, *Do I Need a License to Buy and Sell Firearms?* (Jan. 2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf; ATF, *Do I Need a License to Buy and Sell Firearms?* (Aug. 2023), https://www.atf.gov/file/100871/download.

publication in 2016, the guidance has explained that "there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement."[24] ATF intends to further update the guidance once it issues this final rule.

D. Bipartisan Safer Communities Act (2022)

Over 35 years after FOPA's enactment, and 29 years after passage of the Brady Handgun Violence Protection Act of 1993 (Brady Act),[25] on June 25, 2022, President Biden signed into law the BSCA. Section 12002 of the BSCA broadened the definition of "engaged in the business" under 18 U.S.C. 921(a)(21)(C) by eliminating the requirement that a person's "principal objective" of purchasing and reselling firearms must include both "livelihood and profit" and replacing it with a requirement that the person must deal in firearms "to predominantly earn a profit." The GCA now provides that, as applied to a wholesale or retail dealer in firearms, the term "engaged in the business" means "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." However, the BSCA definition did not alter the longstanding FOPA exclusions for "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." 18 U.S.C. 921(a)(21)(C).

These BSCA amendments were enacted after tragic mass shootings at a grocery store in Buffalo, New York; at an elementary school in Uvalde, Texas; and between

[24] ATF, *Do I Need a License to Buy and Sell Firearms?* 5 (Jan. 2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.

[25] Pub. L. 103–159, 107 Stat. 1536 (1993). The Brady Act created NICS, which became operational on November 30, 1998.

Midland and Odessa, Texas.[26] In the third incident, the perpetrator had previously been adjudicated by a court as a mental defective and was prohibited from possessing firearms under 18 U.S.C. 922(g)(4).[27] After being denied a firearm from a licensed sporting goods store, he circumvented the NICS background check process by purchasing the AR-15 variant rifle he used in the shooting from an unlicensed individual without having to undergo a background check.[28] The private seller later pled guilty to dealing in firearms without a license and to filing a false tax return due to his failure to report that major source of income.[29]

According to the Congressional Research Service ("CRS"), the BSCA's sponsors believed that "there was confusion about the GCA's definition of 'engaged in the business,' as it pertained to individuals who bought and resold firearms repetitively for profit, but possibly not as the principal source of their livelihood."[30] CRS has explained that the sponsors "maintain[ed] that [the BSCA's] changes clarify who should be

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[26] *Buffalo Supermarket Shooting Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. Times (May 14, 2022), https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting; Mark Osborne et al., *At Least 19 Children, 2 Teachers Dead After Shooting at Texas Elementary School*, ABC News (May 25, 2022), https://abcnews.go.com/US/texas-elementary-school-reports-active-shooter-campus/story?id=84940951; Acacia Coronado & Alex Samuels, *Death Toll in Midland-Odessa Mass Shooting Climbs to Eight, Including the Shooter*, Texas Tribune (Aug. 31, 2019), https://www.texastribune.org/2019/08/31/odessa-and-midland-shooting-30-victims-reports-say/.

[27] Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR-15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms; *Prison for Man Who Sold Texas Shooter Seth Ator AR-15 Used in Midland-Odessa Massacre*, CBS News (Jan. 7, 2021), https://www.cbsnews.com/texas/news/prison-for-man-sold-texas-shooter-seth-ator-ar-15-midland-odessa-massacre/.

[28] Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR-15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms.

[29] *Id.*

[30] William J. Krouse, Cong. Rsch. Serv., IF12197, *Firearms Dealers "Engaged in the Business"* 2 (2022), https://crsreports.congress.gov/product/pdf/IF/IF12197.

licensed, eliminating a 'gray' area in the law, ensuring that one aspect of firearms commerce is more adequately regulated."[31]

As now defined by the BSCA, the term "to predominantly earn a profit" means that "the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection." 18 U.S.C. 921(a)(22). The statutory definition further provides that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." *Id.* In the BSCA, Congress amended "engaged in the business" only with respect to dealers in firearms; it did not amend the various definitions of "engaged in the business" in 18 U.S.C. 921(a)(21) with respect to licensed gunsmiths, manufacturers, or importers.[32]

E. Executive Order 14092 (2023)

[31] *Id.*; *see also* 168 Cong. Rec. H5906 (daily ed. June 24, 2022) (statement of Rep. Jackson Lee) ("[O]ur bill would . . . further strengthen the background check process by clarifying who is engaged in the business of selling firearms and, as a result, is required to run background checks."); 168 Cong. Rec. S3055 (daily ed. June 22, 2022) (statement of Sen. Murphy) ("We clarify in this bill the definition of a federally licensed gun dealer to make sure that everybody who should be licensed as a gun owner is. In one of the mass shootings in Texas, the individual who carried out the crime was mentally ill. He was a prohibited purchaser. He shouldn't have been able to buy a gun. He was actually denied a sale when he went to a bricks-and-mortar gun store, but he found a way around the background check system because he went online and found a seller there who would transfer a gun to him without a background check. It turned out that seller was, in fact, engaged in the business, but didn't believe the definition applied to him because the definition is admittedly confusing. So we simplified that definition and hope that will result—and I believe it will result—in more of these frequent online gun sellers registering, as they should, as federally licensed gun dealers which then requires them to perform background checks."); Letter for Director, ATF, et al., from Sens. John Cornyn and Thom Tillis at 2–3 (Nov. 1, 2022) ("Cornyn/Tillis Letter") ("The BSCA provides more clarity to the industry for when someone must obtain a federal firearms dealers license. In Midland and Odessa, Texas, for example, the shooter—who at the time was prohibited from possessing or owning a firearm under federal law—purchased a firearm from an unlicensed firearms dealer."); Comments on the Rule from 17 U.S. Senators and 149 Representatives, p.4 (Nov. 30 and Dec. 1, 2023).

[32] The BSCA retained the existing term "with the principal objective of livelihood and profit," which still applies to persons engaged in the business as manufacturers, gunsmiths, and importers. That definition became 18 U.S.C. 921(a)(23), and Congress renumbered other definitions in section 921 accordingly.

On March 14, 2023, President Biden issued Executive Order 14092, "Reducing Gun Violence and Making Our Communities Safer." That order requires the Attorney General to submit a report to the President describing actions taken to implement the BSCA and to "develop and implement a plan to: (i) clarify the definition of who is engaged in the business of dealing in firearms, and thus required to become Federal firearms licensees (FFLs), in order to increase compliance with the Federal background check requirement for firearm sales, including by considering a rulemaking, as appropriate and consistent with applicable law; [and] (ii) prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms."[33]

III. Notice of Proposed Rulemaking

Subsections in Section III

A. Definition of "Dealer"

B. Definition of "Engaged in the business" — "Purchase" and "Sale"

C. Definition of "Engaged in the business" as applied to auctioneers

D. Presumptions that a person is "Engaged in the business"

E. Definition of "Personal collection," "personal collection of firearms," and "personal firearms collection"

F. Definition of "Responsible person"

G. Definition of "Predominantly earn a profit"

H. Disposition of business inventory after termination of license

I. Transfer of firearms between FFLs and Form 4473

[33] *Reducing Gun Violence and Making Our Communities Safer*, E.O. 14092, secs. 2, 3(a)(i)–(ii), 88 FR 16527, 16527–28 (Mar. 14, 2023).

On September 8, 2023, the Department published in the *Federal Register* a Notice of Proposed Rulemaking ("NPRM") entitled "Definition of 'Engaged in the Business' as a Dealer in Firearms," 88 FR 61993, proposing changes to various regulations in 27 CFR part 478. The comment period for the proposed rule concluded on December 7, 2023.

To implement the new statutory language in the BSCA, the NPRM proposed to amend paragraph (c) of the regulatory definition of "engaged in the business," 27 CFR 478.11, pertaining to a "dealer in firearms other than a gunsmith or pawnbroker," to conform with 18 U.S.C. 921(a)(21)(C) by removing the phrase "with the principal objective of livelihood and profit" and replacing it with the phrase "to predominantly earn a profit." The rule also proposed to amend § 478.11 to conform with new 18 U.S.C. 921(a)(22) by adding the statutory definition of "predominantly earn a profit" as a new regulatory definition. Additionally, the rule proposed to move the regulatory definition of "terrorism," which currently exists in the regulations under the definition of "principal objective of livelihood and profit," to a new location. This is because the statutory definitions of "to predominantly earn a profit" (18 U.S.C. 921(a)(22)) and "with the principal objective of livelihood and profit" (18 U.S.C. 921(a)(23)) both provide that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism" and include identical definitions of "terrorism."

To further implement the BSCA's changes to the GCA, the rule proposed to clarify when a person is "engaged in the business" as a dealer in firearms at wholesale or retail by: (a) clarifying the definition of "dealer"; (b) defining the terms "purchase" and "sale" as they apply to dealers; (c) clarifying when a person would not be engaged in the

business of dealing in firearms as an auctioneer; (d) clarifying when a person is purchasing firearms for, and selling firearms from, a personal collection; (e) setting forth conduct that is presumed to constitute "engaging in the business" of dealing in firearms and presumed to demonstrate the intent to "predominantly earn a profit" from the sale or disposition of firearms, absent reliable evidence to the contrary; (f) adding a single definition for the terms "personal collection," "personal firearms collection," and "personal collection of firearms"; (g) adding a definition for the term "responsible person"; (h) clarifying that the intent to "predominantly earn a profit" does not require the person to have received pecuniary gain, and that intent does not have to be shown when a person purchases or sells a firearm for criminal or terrorism purposes; (i) addressing how former licensees, and responsible persons acting on behalf of former licensees, must lawfully liquidate business inventory upon revocation or other termination of their license; and (j) clarifying that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of 27 CFR part 478, rather than using a Form 4473 when firearms are transferred to other licensees, including transfers by a licensed sole proprietor to that person's personal collection.

A. Definition of "Dealer"

The NPRM noted that, in enacting the BSCA, Congress expanded the definition of "engaged in the business" "as applied to a dealer in firearms," as noted above. 18 U.S.C. 921(a)(21)(C). Consistent with the text and purpose of the GCA, ATF regulations have long defined the term "dealer" to include persons engaged in the business of selling firearms at wholesale or retail, or as a gunsmith or pawnbroker, on a part-time basis. 27 CFR 478.11 (definition of "dealer"). The NPRM explained that, due to the BSCA

amendments, as well as continual confusion and non-compliance before and after the BSCA was passed, the Department has further considered what it means to be a "dealer" engaged in the firearms business in light of new technologies, mediums of exchange, and forums in which firearms are bought and sold with the predominant intent of obtaining pecuniary gain.

The NPRM further stated that, since 1968, advancements in manufacturing (e.g., 3D printing) and distribution technology (e.g., Internet sales) and changes in the marketplace for firearms and related products (e.g., large-scale gun shows) have changed the various ways individuals shop for firearms, and therefore have created a need for further clarity in the regulatory definition of "dealer."[34] The proliferation of new communications technologies and e-commerce has made it simple for persons intending to make a profit to advertise and sell firearms to a large potential market at minimal cost and with minimal effort, using a variety of means, and often as a part-time activity. The proliferation of sales at larger-scale gun shows, flea markets, similar events, and online has also altered the marketplace since the GCA was enacted in 1968.

Therefore, in light of the BSCA's changes to the GCA and to provide additional guidance on what it means to be engaged in the business as a "dealer" within the diverse modern marketplace for firearms, the NPRM proposed to amend the regulatory definition of "dealer" in 27 CFR 478.11 to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities are conducted. This includes at any domestic or international public or private marketplace or premises. The proposed definition would provide nonexclusive examples of such existing marketplaces: a gun

[34] *See* Cornyn/Tillis Letter at 3 ("Our legislation aims at preventing someone who is disqualified from owning or possessing a firearm from shopping around for an unlicensed firearm dealer.").

show[35] or event,[36] flea market,[37] auction house,[38] or gun range or club; at one's home; by mail order;[39] over the Internet;[40] through the use of other electronic means (e.g., an online

[35] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 9 (July 2017), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-newsletter-july-2017/download (gun show guidelines); ATF, *Important Notice to Dealers and Other Participants at This Gun Show*, ATF Information 5300.23A 1 (Sept. 2021) https://www.atf.gov/firearms/docs/guide/important-notice-dealers-and-other-participants-gun-shows-atf-i-530023a/download (licensees may only sell firearms at qualifying gun shows within the State in which their licensed business premises is located); Rev. Rul. 69-59 (IRS RRU), 1969-1 C.B. 360, 1969 WL 18703 ("[A] licensee may not sell firearms or ammunition at a gun show held on premises other than those covered by his license. He may, however, have a booth or table at such a gun show at which he displays his wares and takes orders for them, provided that the sale and delivery of the firearms or ammunition are to be lawfully effected from his licensed business premises only and his records properly reflect such transactions.").

[36] *See, e.g.*, ATF, *How May a Licensee Participate in the Raffling of Firearms by an Unlicensed Organization?*, https://www.atf.gov/firearms/qa/how-may-licensee-participate-raffling-firearms-unlicensed-organization (last reviewed May 22, 2020); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 8–9 (June 2021), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download (addressing conduct of business at firearm raffles); Letter for Pheasants Forever, from Acting Chief, Firearms Programs Division, ATF at 1–2 (July 9, 1999) (addressing nonprofit fundraising banquets); ATF, *FFL Newsletter* 4–5 (Feb. 1999), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-1999/download (addressing dinner banquets).

[37] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 5–6 (June 2010), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-june-2010 (flea market guidelines); *see also United States v. Allman*, 119 F. App'x. 751, 754 (6th Cir. 2005) ("Illegal gun transactions at flea markets are not atypical."); *United States v. Orum*, 106 F. App'x 972 (6th Cir. 2004) (defendant illegally displayed and sold firearms at flea markets and gun shows).

[38] *See Selling Firearms—Legally: A Q&A with the ATF*, Auctioneer, June 2010, at 22–27.

[39] *See, e.g.*, *United States v. Buss*, 461 F. Supp. 1016 (W.D. Pa. 1978) (upholding jury verdict that defendant engaged in the business of dealing in firearms without a license through mail order sales).

[40] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 8 (June 2021), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download (addressing internet sales of firearms); ATF Intelligence Assessment, *Firearms and Internet Transactions* (Feb. 9, 2016); Mayors Against Illegal Guns, *Felon Seeks Firearm, No Strings Attached: How Dangerous People Evade Background Checks and Buy Illegal Guns Online* 14 (Sept. 2013), https://www.nyc.gov/html/om/pdf/2013/felon_seeks_firearm.pdf; Mayor Michael Bloomberg, City of New York, *Point, Click, Fire: An Investigation of Illegal Online Gun Sales* 2 (Dec. 2011); *United States v. Focia*, 869 F.3d 1269, 1274 (11th Cir. 2017) (affirming defendant's conviction for engaging in the business without a license by dealing firearms through the "Dark Web").

broker,[41] online auction,[42] text messaging service,[43] social media raffle,[44] or website[45]); or at any other domestic or international public or private marketplace or premises. Many of these examples were referenced by courts, even before the BSCA expansion, as well as in ATF regulatory materials and common, publicly available sources. These examples in the NPRM were designed to clarify that firearms dealing requires a license in whatever place or through whatever medium the firearms are purchased and sold,

[41] A broker who actually purchases the firearms from the manufacturer, importer, or distributor, accepts payment for the firearms from the buyer, and has them shipped to the buyer from a licensee, must be licensed as a dealer because they are repetitively purchasing and reselling their firearms to predominantly earn a profit. Although individual dealers may sell firearms through online services sometimes called "brokers," like a magazine or catalog company that only advertises firearms listed by known sellers and processes orders for them for direct shipment from the distributor to their buyers, these "brokers" are not themselves considered "dealers." This is because these online "brokers" do not purchase the firearms for consideration, but only collect a commission or fee for providing contracted services to market and process the transaction for the seller. *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 3 (Sept. 2016), https://www.atf.gov/firearms/docs/newsletter/ffl-newsletter-september-2016/download; ATF, 2 *FFL Newsletter: Federal Firearms Licensee Information Service* 6–7 (Mar. 2013), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2013-volume-2/download; *see also Fulkerson v. Lynch*, 261 F. Supp. 3d 779, 783–86, 788–89 (W.D. Ky. 2017) (denying summary judgment to applicant whose license was denied by ATF for previously willfully engaging in the business of dealing without a license as an online broker and granting summary judgement to the Government).

[42] *See, e.g.*, Press Release, DOJ, *Minnesota Man Indicted for Dealing Firearms Without a License* (Feb. 18, 2016), https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license (defendant dealt in firearms through websites such as GunBroker.com, an online auction website).

[43] *See, e.g.*, Press Release, DOJ, *Odenton, Maryland Man Exiled to 8 Years in Prison for Firearms Trafficking Conspiracy* (Apr. 27, 2017), https://www.justice.gov/usao-md/pr/odenton-maryland-man-exiled-8-years-prison-firearms-trafficking-conspiracy (defendant texted photos of firearms for sale to his customer and discussed prices).

[44] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 9 (June 2021), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download ("Social media gun raffles are gaining popularity on the internet. In most instances, the sponsor of the event is not a Federal firearms licensee, but will enlist the aid of a licensee to facilitate the transfer of the firearm to the raffle winner. Often, the sponsoring organization arranges to have the firearm shipped from a distributor to a licensed third party and never takes physical possession of the firearm. If the organization's practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must obtain a Federal firearms license.").

[45] *See, e.g.*, Press Release, DOJ, *Snapchat Gun Dealer Convicted of Unlawfully Manufacturing and Selling Firearms* (Oct. 4, 2022), https://www.justice.gov/usao-edca/pr/snapchat-gun-dealer-convicted-unlawfully-manufacturing-and-selling-firearms; Press Release, DOJ, *Sebring Resident Sentenced to Prison for Unlawfully Dealing Firearms on Facebook* (Nov. 7, 2016), https://www.justice.gov/usao-sdfl/pr/sebring-resident-sentenced-prison-unlawfully-dealing-firearms-facebook.

including the Internet and locations other than a traditional brick and mortar store.[46] However, regardless of the medium through or location at which a dealer buys and sells firearms, to obtain a license under the GCA, the dealer must still have a fixed premises in a State from which to conduct business subject to the license and comply with all applicable State and local laws regarding the conduct of such business.[47] 18 U.S.C. 922(b)(2); 923(d)(1)(E)–(F).

The NPRM explained that, even though an applicant must have a business premises in a particular State to obtain a license, under the GCA, firearms purchases or sales requiring a license in the United States may involve conduct outside of the United States. Specifically, 18 U.S.C. 922(a)(1)(A) has long prohibited any person without a license from shipping, transporting, or receiving any firearm in foreign commerce while in the course of being engaged in the business of dealing in firearms,[48] and 18 U.S.C.

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[46] *See* Letter for Outside Counsel to National Association of Arms Shows, from Chief, Firearms and Explosives Division, ATF, *Re: Request for Advisory Opinion on Licensing for Certain Gun Show Sellers* at 1 (Feb. 17, 2017) ("Anyone who is engaged in the business of buying and selling firearms, regardless of the location(s) at which those transactions occur is required to have a Federal firearms license. ATF will issue a license to persons who intend to conduct their business primarily at gun shows, over the internet, or by mail order, so long as they otherwise meet the eligibility criteria established by law. This includes the requirement that they maintain a business premises at which ATF can inspect their records and inventory, and that otherwise complies with local zoning restrictions."); Letter for Dan Coats, U.S. Senator, from Deputy Director, ATF, at 1–2 (Aug. 22, 1990) (an FFL cannot be issued at a table or booth at a temporary flea market); ATF Internal Memorandum #23264 (June 15, 1983) (same).

[47] *See Abramski v. United States*, 573 U.S. 169, 172 (2014) ("The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's 'business premises' by prohibiting, except in limited circumstances, the sale of a firearm 'to a person who does not appear in person' at that location."); *National Rifle Ass'n*, 914 F. 2d at 480 (explaining that FOPA did not eliminate the requirement that a licensee have a business premises from which to conduct business "which exists so that regulatory authorities will know where the inventory and records of a licensee can be found"); *Meester v. Bowers*, No. 12CV86, 2013 WL 3872946 (D. Neb. July 25, 2013) (upholding ATF's denial of license in part because the applicant failed to "have 'premises from which he conducts business subject to license,'" in violation of 18 U.S.C. 923(d)(1)(E)).

[48] *See, e.g.*, *United States v. Baptiste*, 607 F. App'x 950, 953 (11th Cir. 2015) (upholding section 922(a)(1) conviction where firearms purchased in the United States were to be resold in Haiti); *United States v. Murphy*, 852 F.2d 1, 7–8 (1st Cir. 1988) (same with firearms to be resold in Ireland); *United States v. Hernandez*, 662 F.2d 289, 291 (5th Cir. 1981) (same with firearms to be resold in Mexico). *But see United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981) (reversing conviction for purchasing firearms for resale in

924(n) prohibits travelling from a foreign country to a State in furtherance of conduct that constitutes a violation of section 922(a)(1)(A).

The NPRM further noted that, as recently amended by the BSCA, the GCA now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. 18 U.S.C. 924(k)(2). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see* 18 U.S.C. 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for resale in another country are now engaging in conduct that is unlawful under the GCA. Consistent with the BSCA's new prohibition, 18 U.S.C. 924(k)(2), and the longstanding prohibition on "ship[ping], transport[ing], or receiv[ing] any firearm in interstate or foreign commerce" without a license, 18 U.S.C. 922(a)(1)(A), the rule proposed to clarify in the definition of "dealer" that purchases or sales of firearms as a wholesale or retail dealer may occur either domestically or internationally.

B. Definition of Engaged in the Business—"Purchase" and "Sale"

To further clarify the regulatory definition of a dealer "engaged in the business" with the predominant intent of earning a profit through the repetitive purchase and resale of firearms in 27 CFR 478.11, the NPRM also proposed to define, based on common dictionary definitions and relevant case law, the terms "purchase" and "sale" (and

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Lebanon on the basis that there was no mention of exporting firearms in the GCA or any suggestion of congressional concern about firearm violence in other countries).

derivative terms thereof, such as "purchases," "purchasing," "purchased," and "sells," "selling," or "sold"). Specifically, the rule proposed to define "purchase" (and derivative terms thereof) as "the act of obtaining a firearm in exchange for something of value,"[49] and the term "sale" (and derivative terms thereof, including "resale") as "the act of providing a firearm in exchange for something of value."[50] The term "something of value" was proposed to include money, credit, personal property (e.g., another firearm[51] or ammunition[52]), a service,[53] a controlled substance,[54] or any other medium of exchange[55] or valuable consideration.[56]

Defining these terms to include any method of payment for a firearm would clarify that persons cannot avoid the licensing requirement by, for instance, bartering or

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[49] This definition is consistent with the common meaning of "purchase," which is "to obtain (as merchandise) by paying money or its equivalent." Webster's Third New International Dictionary 1844 (1971); *see also Purchase*, Black's Law Dictionary 1491 (11th ed. 2019) ("Webster's Third") ("The acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.").

[50] This definition is consistent with the common meaning of "sale," which is "a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." Webster's Third at 2003. The related term "resale" means "the act of selling again." *Id.* at 1929.

[51] *See, e.g.*, *United States v. Brenner*, 481 F. App'x, 125-26 (5th Cir. 2012) (defendant unlicensed dealer sold a stolen firearm traded to him for another firearm); *United States v. Gross*, 451 F.2d 1355, 1356, 1360 (7th Cir. 1971) (defendant "had traded firearms [for other firearms] with the object of profit in mind").

[52] *See, e.g.*, *United States v. Huffman*, 518 F.2d 80, 81 (4th Cir. 1975) (defendant traded large quantities of ammunition in exchange for firearms).

[53] *See, e.g.*, *United States v. 57 Miscellaneous Firearms*, 422 F. Supp. 1066, 1070–71 (W.D. Mo. 1976) (defendant obtained the firearms he sold or offered for sale in exchange for carpentry work he performed).

[54] *See, e.g.*, *United States v. Schaal*, 340 F.3d 196, 197 (4th Cir. 2003) (defendants traded many of their stolen firearms for drugs); *Johnson v. Johns*, No. 10-CV-904(SJF), 2013 WL 504446, at *1 (E.D.N.Y. Feb. 5, 2013) (on at least one occasion, petitioner, who was engaged in the unlicensed dealing in firearms through straw purchasers, compensated a straw purchaser with cocaine base).

[55] *See, e.g.*, *Focia*, 869 F.3d at 1274 (defendant sold pistol online to undercover ATF agent for 15 bitcoins).

[56] The term "medium of exchange" generally means "something commonly accepted in exchange for goods and services and recognized as representing a standard of value," Webster's Third at 1403, and "valuable consideration" is "an equivalent or compensation having value that is given for something (as money, marriage, services) acquired or promised and that may consist either in some right, interest, profit, or benefit accruing to one party or some responsibility, forbearance, detriment, or loss exercised by or falling upon the other party," *id*. at 2530. *See, e.g.*, *United States v. Berry*, 644 F.2d 1034, 1036 (5th Cir. 1981) (defendant sold firearms in exchange for large industrial batteries to operate his demolition business); *United States v. Reminga*, 493 F. Supp. 1351, 1357 (W.D. Mich. 1980) (defendant traded his car for three guns that he later sold or traded).

providing or receiving services in exchange for firearms with the predominant intent to earn pecuniary gain even where no money is exchanged. It would also clarify that a person must have a license to engage in the business of dealing in firearms even when the medium of payment or consideration is unlawful, such as exchanging illicit drugs or performing illegal acts for firearms, and that it is a distinct crime to do so without a license.

C. Definition of Engaged in the Business as Applied to Auctioneers

Because the definitions of "purchase" and "sale" broadly include services provided in exchange for firearms, both as defined by common dictionaries and as proposed in the NPRM, the Department further proposed to make clear that certain persons who provide auctioneer services are not required to be licensed as dealers. ATF has long interpreted the statutory definition of "engaged in the business" as excluding auctioneers who provide only auction services on commission by assisting in liquidating firearms at an "estate-type" auction.[57] The new definition in the BSCA does not alter that interpretation. The Department proposed to incorporate this longstanding interpretation into the regulations while otherwise clarifying the regulatory definition of "engaged in the business."

[57] *See* ATF, *Does an Auctioneer Who Is Involved in Firearms Sales Need a Dealer's License?*, https://www.atf.gov/firearms/qa/does-auctioneer-who-involved-firearms-sales-need-dealer-license (last reviewed July 10, 2020); ATF, *ATF Federal Firearms Regulations Reference Guide*, ATF Publication 5300.4, Q&A L1, at 207–08 (2014), https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download; ATF, *FFL Newsletter* 3 (May 2001), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-may-2001/download; ATF Ruling 96-2, *Engaging in the Business of Dealing in Firearms (Auctioneers)* (Sept. 1996), https://www.atf.gov/file/55456/download; ATF, *FFL Newsletter* 7 (1990), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-1990-volume-1/download; Letter for Editor, CarPac Publishing Company, from Acting Assistant Director (Regulatory Enforcement), ATF, at 1–2 (July 26, 1979).

As the NPRM explained, in this context, the auctioneer is generally providing services only as an agent of the owner or individual executor of an estate who is liquidating a personal collection. The firearms are within the estate's control and the sales are made on the estate's behalf. This limited exclusion from the definition of "engaged in the business" as a dealer is conditioned on the auctioneer not purchasing the firearms or taking them on consignment such that the auctioneer has the exclusive right and authority to sell the firearms at a location, time, and date to be selected by the auctioneer. If the auctioneer were to regularly engage in any of that conduct, the auctioneer would need to have a dealer's license because that person would be engaged in the business of purchasing and reselling firearms to earn a profit. An "estate-type" auction as described above differs from liquidating firearms by means of a "consignment-type" auction, in which the auctioneer is paid to accept firearms into a business inventory and then resells them in lots or over a period of time. In this "consignment-type" auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification.[58] Therefore, under "consignment-type" auctions, an auctioneer would need to be licensed.

D. Presumptions that a Person is Engaged in the Business

The NPRM pointed out that the Department has observed through its enforcement efforts, regulatory functions, knowledge of existing case law, and subject-matter expertise that persons who are engaged in certain firearms purchase-and-sale activities are more likely than not to be "engaged in the business" of dealing in firearms at wholesale or retail. These activities have been observed through a variety of criminal, civil, and administrative enforcement actions and proceedings brought by the

[58] ATF Rul. 96-2 at 1.

Department, including: (1) ATF inspections of prospective and existing wholesale and retail dealers of firearms who are, or intend to be, engaged in the business;[59] (2) criminal investigations and the resulting prosecutions (*i.e.*, cases) of persons who engaged in the business of dealing in firearms without a license;[60] (3) civil and administrative actions under 18 U.S.C. 924(d) to seize and forfeit firearms intended to be sold by persons engaged in the business without a license;[61] (4) ATF cease and desist letters issued to prevent section 922(a)(1)(A) violations;[62] and (5) ATF administrative proceedings under 18 U.S.C. 923 to deny licenses to persons who willfully engaged in the business of dealing in firearms without a license, or to revoke or deny renewal of existing licenses held by licensees who aided and abetted that misconduct.[63] In addition, numerous courts have identified certain activities or factors that are relevant to determining whether a person is "engaged in the business" .[64] The rule, therefore, proposed to establish

[59] In Fiscal Year 2022, for example, ATF conducted 11,156 qualification inspections of new applicants for a license, and 6,979 compliance inspections of active licensees. *See* ATF, *Fact Sheet- Facts and Figures for Fiscal Year 2022* (Jan. 2023), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2022.

[60] *See* footnotes 67 through 80 and 82 through 83, *infra*. The Department reviewed criminal cases from FY18 to FY23 that it investigated (closed), or is currently investigating (open/pending), involving violations of 18 U.S.C. 922(a)(1)(A) and 923(a).

[61] *See, e.g.*, *United States v. Four Hundred Seventy Seven (477) Firearms*, 698 F. Supp. 2d 890, 890–91 (E.D. Mich. 2010) (civil forfeiture of firearms intended to be sold from an unlicensed gun store); *United States v. One Bushmaster, Model XM15-E2 Rifle*, No. 06-CV-156 (WDO), 2006 WL 3497899, at *1 (M.D. Ga. Dec. 5, 2006) (civil forfeiture of firearms intended to be sold by an unlicensed person who acquired an unusually large amount of firearms quickly for the purpose of selling or trading them); *United States v. Twenty Seven (27) Assorted Firearms*, No. SA-05-CA-407-XR, 2005 WL 2645010, at *1 (W.D. Tex. Oct. 13, 2005) (civil forfeiture of firearms intended to be sold at gun shows without a license).

[62] Over the years, ATF has issued numerous letters warning unlicensed persons not to continue to engage in the business of dealing in firearms without a license, also called "cease and desist" letters. *See, e.g.*, *United States v. Kubowski*, 85 F. App'x 686, 687 (10th Cir. 2003) (defendant served cease and desist letter after selling five handguns and one rifle to undercover ATF agents).

[63] *See, e.g.*, *In the Matter of Scott*, Application Nos. 9-93-019-01-PA-05780 and 05781 (Seattle Field Division, Apr. 3, 2018) (denied applicant for license to person who purchased and sold numerous handguns within one month); *In the Matter of S.E.L.L. Antiques*, Application No. 9-87-035-01-PA-00725 (Phoenix Field Division, July 14, 2006) (denied applicant who repetitively sold modern firearms from unlicensed storefront).

[64] *See* footnote 21, *supra*, and accompanying text. These cases—like the investigations, administrative actions, letters, and other examples cited in this paragraph—predate the BSCA's enactment but continue to

rebuttable presumptions in certain contexts to help unlicensed persons, industry operations personnel, and others determine when a person is likely "engaged in the business" requiring a dealer's license.[65]

These rebuttable presumptions would not shift the burden of persuasion in any proceeding from the Government. In addition, while the criteria set forth in the proposed rule may be useful to a court in a criminal proceeding—for example, to inform appropriate jury instructions regarding permissible inferences[66]—the proposed regulatory text made clear that the presumptions do not apply to criminal proceedings.

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be relevant to determining whether a person is "engaged in the business" because the BSCA expanded the definition of that term to cover additional conduct.

[65] The GCA and implementing regulations already incorporate rebuttable presumptions in other contexts. *See* 18 U.S.C. 922(b)(3) (A "licensed manufacturer, importer or dealer shall be presumed, for purposes of [selling to out of state residents], in the absence of evidence to the contrary, to have had actual knowledge of the States laws and published ordinances of both States"); 27 CFR 478.96(c)(2) (same); *see also* 27 CFR 478.12(d) ("The modular subpart(s) identified in accordance with 478.92 with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be part of the frame or receiver of a weapon or device."); 478.12(f)(1) ("Any such part [previously classified by the Director] that is identified with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be the frame or receiver of the weapon."); 478.92(a)(1)(vi) ("firearms awaiting materials, parts, or equipment repair to be completed are presumed, absent reliable evidence to the contrary, to be in the manufacturing process").

[66] Courts determine which jury instructions are appropriate in the criminal cases before them. While rebuttable presumptions may not be presented to a jury in a criminal case, jury instructions may include, for example, reasonable permissive inferences. *See Francis v. Franklin*, 471 U.S. 307, 314 (1985) ("A permissive inference suggests to the jury a possible conclusion to be drawn if the [Government] proves predicate facts, but does not require the jury to draw that conclusion."); *County Court of Ulster County v. Allen*, 442 U.S. 140, 166–67 (1979) (upholding jury instruction that gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion); *Baghdad v. Att'y Gen. of the U. S.*, 50 F.4th 386, 390 (3d Cir. 2022) ("Unlike mandatory presumptions, permissive inferences . . . do not shift the burden of proof or require any outcome. They are just an 'evidentiary device . . . [that] allows—but *does not require*—the trier of fact to infer' that an element of a crime is met once basic facts have been proven beyond a reasonable doubt."); *Patton v. Mullin*, 425 F.3d 788, 803–07 (10th Cir. 2005) (upholding jury instruction that created a permissive inference rather than a rebuttable presumption); *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994) (same); *United States v. Washington*, 819 F.2d 221, 225–26 (9th Cir. 1987) (same); *Lannon v. Hogan*, 719 F.2d 518, 520–25 (1st Cir. 1983) (same); *United States v. Gaines*, 690 F.2d 849 (11th Cir. 1982) (same); *cf.*, *e.g.*, *United States v. Antonoff*, 424 F. App'x 846, 848 (11th Cir. 2011) (recognizing the permissive inference of current drug use in ATF's definition of "unlawful user" in 27 CFR 478.11 as support for affirming the district court's finding that the defendant's drug use was "contemporaneous and ongoing" for sentencing purposes); *United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006) (upholding application of a sentencing enhancement based on the permissive inference of current drug use in 27 CFR 478.11); *United States v. Stanford*, No. 11-10211-01-EFM, 2012 WL 1313503

The Department considered, but did not propose in the NPRM, an alternative that would have set a minimum numerical threshold of firearms sold by a person within a certain period. That approach was not proposed for several reasons. First, while selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity, neither the courts nor the Department have recognized a set minimum number of firearms purchased or resold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is "engaged in the business" of dealing in firearms. Even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license. For example, even under the previous statutory definition, courts have upheld convictions for dealing without a license when few firearms, if any, were actually sold, when other factors were also present, such as the person representing to others a willingness and ability to repetitively purchase firearms for resale. *See, e.g.*, *United States v. King*, 735 F.3d 1098, 1107 n.8 (9th Cir. 2013) (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that "Section 922(a)(1)(A) does not require an actual sale of firearms").[67] On the other hand, courts have stated that an isolated

(D. Kan. Apr. 16, 2012) (holding that evidence of defendant's arrest was admissible by relying, in part, on the definition of "unlawful user" in 27 CFR 478.11).

[67] *See also* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?*, https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf (Jan. 2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf; *Nadirashvili*, 655 F.3d at 120–21 (holding that, despite defendants' knowledge of only a single firearms transaction, there was sufficient evidence to prove they had aided and abetted unlawfully dealing in firearms without a license because they knew that their co-defendant "held himself 'out generally as a source of firearms' and was ready to procure them for his customer"); *United States v. Kevin Shan*, 361 F. App'x 182, 183 (2d Cir. 2010) (holding that evidence that defendant sold two firearms within roughly a month and acknowledged he had a source of supply for other weapons was sufficient to affirm conviction for dealing firearms without a license); *United States v. Zheng Jian Shan*, 80 F. App'x 31 (9th Cir. 2003) (holding that evidence of sale of weapons in one transaction

firearm transaction would not require a license when other factors were not present.[68] Second, in addition to the tracing concerns expressed by ATF in response to comments on the 1979 ANPRM, a person could structure their transactions to avoid a minimum threshold by spreading out their sales over time. Finally, the Department does not believe there is currently a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered "engaged in the business."

Rather than establishing a minimum threshold number of firearms purchased or sold, the NPRM proposed to clarify that, absent reliable evidence to the contrary, a person would be presumed to be engaged in the business of dealing in firearms when the person: (1) sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms; (2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time; (3) repetitively purchases for the purpose of resale, or sells or offers for sale firearms—(A) through straw or sham businesses, or individual straw purchasers or sellers; or (B) that cannot lawfully be purchased or possessed, including: (i) stolen firearms (18 U.S.C. 922(j)); (ii) firearms with the licensee's serial number removed,

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where the defendant was willing and able to find more weapons for resale was sufficient to affirm conviction); *Murphy*, 852 F.2d at 8 ("[T]his single transaction was sufficiently large in quantity, price and length of negotiation to constitute dealing in firearms.").

[68] *United States v. Carter*, 203 F.3d 187, 191 (2d Cir. 2000) ("A conviction under 18 U.S.C. § 922(a) ordinarily contemplates more than one isolated gun sale."); *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975) ("Swinton's sale [of one firearm] to Agent Knopp, standing alone, without more, would not have been sufficient to establish a violation of Section 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms. The unrebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns." (internal citation omitted)).

obliterated, or altered (18 U.S.C. 922(k); 26 U.S.C. 5861(i)); (iii) firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or (iv) machineguns or other weapons defined as firearms under 26 U.S.C. 5845(a) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d)); (4) repetitively sells or offers for sale firearms—(A) within 30 days after they were purchased; (B) that are new, or like new in their original packaging; or (C) that are of the same or similar kind (*i.e.*, make/manufacturer, model, caliber/gauge, and action) and type (*i.e.*, the classification of a firearm as a rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm); (5) as a former licensee (or responsible person acting on behalf of the former licensee), sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal collection in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or (6) as a former licensee (or responsible person acting on behalf of a former licensee), sells or offers for sale firearms that were transferred to a personal collection of such former licensee or responsible person prior to the time the license was terminated, unless: (A) the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, of the United States Code; and (B) one year has passed from the date of transfer to the personal collection.

The proposed rule provided that any one circumstance or a combination of the circumstances set forth above would give rise to a rebuttable presumption that the person is engaged in the business of dealing in firearms and would need to be licensed under the

GCA. The activities set forth in these proposed rebuttable presumptions would not be exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. Further, as previously noted, while the criteria may be useful to courts in criminal prosecutions when instructing juries regarding permissible inferences, the presumptions outlined above would not be applicable to such criminal cases.

At the same time, the Department recognized in the NPRM that certain transactions were not likely to be sufficient to support a presumption that a person is engaging in the business of dealing in firearms. For this reason, the proposed rule also included examples of when a person would not be presumed to be engaged in the business of dealing in firearms. Specifically, under the proposed rule, a person would not be presumed to be engaged in the business when the person transfers firearms only as bona fide gifts[69] or occasionally[70] sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby—unless their conduct also demonstrates a predominant intent to earn a profit.

The NPRM noted that the rebuttable presumptions are supported by the Department's investigative, regulatory, and enforcement experience,[71] as well as conduct

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[69] The Department interprets the term "bona fide gift" to mean a firearm given in good faith to another person without expecting any item, service, or anything of value in return. *See* Form 4473, at 4, Instructions to Question 21.a. (Actual Transferee/Buyer) ("A gift is not bona fide if another person offered or gave the person . . . money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm."); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 2 (June 2021), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download (same).

[70] While the GCA does not define the term "occasional," that term is commonly understood to mean "of irregular occurrence; happening now and then, infrequent." *Occasional*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/occasional (last visited Apr. 4, 2024) (defining "occasional" in "American English").

[71] See the discussion at the beginning of Section III.D "Presumptions that a Person is 'Engaged in the Business.'"

that the courts have found to require a license even before the BSCA expanded the definition of "engaged in the business." Moreover, these proposed presumptions are consistent with the case-by-case analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in firearms without a license. The Department observed in the NPRM that the fundamental purposes of the GCA would be severely undermined if persons were allowed to repetitively purchase and resell firearms to predominantly earn a profit without conducting background checks, keeping records, and otherwise complying with the license requirements of the GCA. The Department therefore proposed criteria for when a person is presumed to be "engaged in the business" to strike an appropriate balance that captures persons who should be licensed under the GCA, as amended, without limiting or regulating activity that is truly a hobby or enhancement of a personal collection.

The first proposed presumption—that a person would be presumed to be engaged in the business when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms—reflects that the definition of "engaged in the business" in 18 U.S.C. 921(a)(21)(C) does not require that a firearm actually be sold by a person so long as the person is holding themself out as a dealer. This is because the relevant definition of "engaged in the business," 18 U.S.C. 921(a)(21)(C), defines the phrase by reference to

the intent "to predominantly earn a profit through the repetitive purchase and resale of firearms" even if those firearms are not actually repetitively purchased and resold.[72]

The second presumption proposed—that a person is engaged in the business when spending more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time—reflects that persons who spend more money or its equivalent on purchases of firearms for resale than their reported gross income are likely to be primarily earning their income from those sales, which is even stronger evidence of an intent to profit than merely supplementing one's income.[73] Alternatively, such persons may be using funds derived from criminal activities to purchase firearms, for example, including funds provided by a co-conspirator to repetitively purchase and resell the firearms without a license or for other criminal purposes, or funds that were laundered from past illicit firearms transactions. Such illicit and repetitive firearm purchase and sale activities do not require

[72] *See United States v. Ochoa*, 726 F. App'x 651, 652 (9th Cir. 2018) ("[Section] 922(a)(1)(A) reaches those who hold themselves out as sources of firearms."); *United States v. Mulholland*, 702 F. App'x 7, 12 (2d Cir. 2017) ("The definition does not extend to a person who makes occasional sales for a personal collection or hobby, *id.*, and the government need only prove that a person was 'ready and able to procure [firearms] for the purpose of selling them from time to time.'" (quoting *Nadirashvili*, 655 F.3d at 199)); *King*, 735 F.3d at 1107 (defendant attempted to sell one of the 19 firearms he had ordered, and represented to the buyer that he was buying, selling, and trading in firearms and could procure any item in a gun publication at a cheaper price); *Shan*, 361 F. App'x at 183 ("[D]efendant sold two firearms within roughly one month and . . . Shan acknowledged on tape that he had a source of supply for other weapons."); *Shan*, 80 F. App'x at 32 ("[T]he evidence leaves little doubt as to Shan's ability to seek and find weapons for resale"); *Carter*, 801 F.2d at 82 ("[T]he statute reaches 'those who hold themselves out as a source of firearms.'" (quoting *United States v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981)).

[73] *See, e.g.*, *Focia*, 869 F.3d at 1282 ("And finally, despite efforts to obtain Focia's tax returns and Social Security information, agents found no evidence that Focia enjoyed any source of income other than his firearms sales. This evidence overwhelmingly demonstrates that Focia's sales of firearms were no more a hobby than working at Burger King for a living could be described that way."); *United States v. Valdes*, 681 F. App'x 874, 879 (11th Cir. 2017) (defendant who engaged in the business of dealing in firearms without a license did not report income on tax returns from firearms sales online and at gun shows); Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR-15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms (defendant convicted of filing a false tax return that concealed his income from firearms sales).

proof of profit for the Government to prove the requisite intent under 18 U.S.C. 921(a)(22), which states that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

The first presumption proposed within the third category listed above—that a person would be presumed to be engaged in the business when repetitively purchasing, reselling, or offering to sell firearms through straw or sham businesses or individual straw purchasers or sellers—reflects that persons who conceal their transactions by setting up straw or sham businesses or hiring "middlemen" to conduct transactions on their behalf are often engaged in the business of dealing in firearms without a license.[74]

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[74] *See Abramski*, 573 U.S. at 180 ("[C]onsider what happens in a typical straw purchase. A felon or other person who cannot buy or own a gun still wants to obtain one. (Or, alternatively, a person who could legally buy a firearm wants to conceal his purchase, maybe so he can use the gun for criminal purposes without fear that police officers will later trace it to him."); *Bryan v. United* States, 524 U.S. 184, 189 (1998) (defendant used straw purchasers to buy pistols in Ohio for resale in New York); *Ochoa*, 726 F. App'x at 652 ("[W]hile the evidence demonstrated that Ochoa did not purchase and sell the firearms himself, it was sufficient to demonstrate that he had the princip[al] objective of making a profit through the repetitive purchase and sale of firearms, even if those purchases and sales were carried out by others."); *United States v. Hosford*, 843 F.3d 161, 163 (4th Cir. 2016) (defendant purchased firearms through a straw purchaser who bought them at gun shows); *MEW Sporting Goods, LLC. v. Johansen*, 992 F. Supp. 2d 665, 674–75 (N.D.W.V. 2014), *aff'd*, 594 F. App'x 143 (4th Cir. 2015) (corporate entity disregarded where it was formed to circumvent firearms licensing requirement); *King*, 735 F.3d at 1106 (defendant felon could not "immunize himself from prosecution" for dealing without a license by "hiding behind a corporate charter" (quotation marks omitted)); *United States v. Fleischli*, 305 F.3d 643, 652 (7th Cir. 2002) ("In short, a convicted felon who could not have legitimately obtained a manufacturer's or dealer's license may not obtain access to machine guns by setting up a sham corporation."); *National Lending Group, L.L.C. v. Mukasey*, No. CV 07-0024, 2008 WL 5329888, at *10–11 (D. Ariz. Dec. 19, 2008), *aff'd*, 365 F. App'x 747 (9th Cir. 2010) (straw ownership of corporate pawn shops); *United States v. Paye*, 129 F. App'x 567, 570 (11th Cir. 2005) (defendant paid straw purchaser to buy firearms for him to sell); *Casanova Guns, Inc. v. Connally*, 454 F.2d 1320, 1322 (7th Cir. 1972) ("[I]t is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provisions of a statute."); *XVP Sports, LLC v. Bangs*, No. 2:11CV379, 2012 WL 4329258, at *5 (E.D. Va. Sept. 17, 2012) ("unity of interest" existed between firearm companies controlled by the same person); *Virlow LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:06-CV-375, 2008 WL 835828, *3–7 (W.D. Mich. Mar. 28, 2008) (corporate form disregarded where a substantial purpose of the formation of the company was to circumvent the statute restricting issuance of firearms licenses to convicted felons); Press Release, DOJ, *Utah Business Owner Convicted of Dealing in Firearms Without a License and Filing False Tax Returns* (Sept. 23, 2016), https://www.justice.gov/opa/pr/utah-business-owner-convicted-dealing-firearms-without-license-and-filing-false-tax-returns (defendant illegally sold firearms under the auspices of a company owned by another Utah resident).

The second presumption proposed under the third category—that a person would be presumed to be engaged in the business when repetitively purchasing, reselling, or offering to sell firearms that cannot lawfully be possessed—reflects that such firearms are actively sought by criminals and earn higher profits for the illicit dealer. The dealer is therefore taking on additional labor and risk with the intent of increasing profits. Such dealers will often buy and sell stolen firearms[75] and firearms with obliterated serial numbers[76] because such firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing.[77] They sometimes sell unregistered National Firearms Act ("NFA") weapons[78] and unlawfully imported firearms because those firearms are more difficult to obtain, cannot be traced through the National Firearms Registration and Transfer Record, and may sell for a substantial profit.[79] Although these

[75] *See, e.g.*, *United States v. Fields*, 608 F. App'x 806, 809 (11th Cir. 2015); *United States v. Calcagni*, 441 F. App'x 916, 917 (3d Cir. 2011); *United States v. Simmons,* 485 F.3d 951, 953 (7th Cir. 2007); *United States v. Webber*, 255 F.3d 523, 524–25 (8th Cir. 2001); *Carter*, 801 F.2d at 83–84; *United States v. Perkins*, 633 F.2d 856, 857–58 (8th Cir. 1981); *United States v. Kelley*, No. 22C2780, 2023 WL 2525366, at *1 (N.D. Ill. 2023); *United States v. Logan*, 532 F. Supp. 3d 725, 726 (D. Minn. 2021); *United States v. Southern*, 32 F. Supp. 2d 933, 937 (E.D. Mich. 1998).

[76] *See, e.g.*, *United States v. Ilarraza*, 963 F.3d 1, 6 (1st Cir. 2020); *Fields*, 608 F. App'x at 809; *United States v. Barrero*, 578 F. App'x 884, 886 (11th Cir. 2014); *Brenner*, 481 F. App'x at 126; *United States v. Teleguz*, 492 F.3d 80, 82 (1st Cir. 2007); *United States v. Bostic*, 371 F.3d 865, 869 (6th Cir. 2004); *United States v. Kitchen*, 87 F. App'x 244, 245 (3d Cir. 2004); *United States v. Ortiz*, 318 F.3d 1030, 1035 (11th Cir. 2003); *United States v. Rosa*, 123 F.3d 94, 96 (2d Cir. 1997); *United States v. Twitty*, 72 F.3d 228, 234 n.2 (1st Cir. 1995); *United States v. Collins*, 957 F.2d 72, 73 (2d Cir. 1992); *United States v. Hannah*, No. CRIM.A.05-86, 2005 WL 1532534, at *3 (E.D. Pa. 2005).

[77] *See Twitty*, 72 F.3d at 234 n.2 (defendant resold firearms with obliterated serial numbers, which were "probably designed in part to increase the selling price of the weapons"); *Brenner*, 481 Fed. App'x at 126 (firearm traded to defendant was stolen); *Hannah*, 2005 WL 1532534, at *3 (holding that the defendant engaged in the business of dealing in firearms without a license in part because, on two occasions, "the defendant informed the buyers to obliterate the serial numbers so he would not 'get in trouble'").

[78] The National Firearms Act of 1934, 26 U.S.C. 5801 *et seq.*, regulates certain firearms, including short-barreled rifles and shotguns, machineguns, silencers, and destructive devices. NFA provisions still refer to the "Secretary of the Treasury." *See generally* 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, this final rule refers to the Attorney General throughout.

[79] *See, e.g.*, *United States v. Fridley*, 43 F. App'x 830, 831–32 (6th Cir. 2002) (defendant purchased and resold unregistered machineguns); *United States v. Idarecis*, 164 F.3d 620, 1998 WL 716568, at *1 (2d Cir. 1998) (unpublished table decision) (defendant converted rifles to machineguns and obliterated the serial numbers on the firearms he sold).

presumptions addressing repetitive straw purchase transactions and contraband firearms sales are intended to establish when persons are most likely to have the requisite intent to "predominantly earn a profit" under 18 U.S.C. 921(a)(21)(C), such cases are also supported by 18 U.S.C. 921(a)(22), which does not require the Government to prove an intent to profit where a person repetitively purchases and disposes of firearms for criminal purposes. These presumptions are also implicitly supported by 18 U.S.C. 923(c), which deems any firearm acquired or disposed of with the purpose of willfully evading the restrictions placed on licensed dealers under the GCA to be business inventory, not part of a personal collection. Indeed, concealing the identity of the seller or buyer of a firearm, or the identification of the firearm, undermines the requirements imposed on legitimate dealers to conduct background checks on actual purchasers (18 U.S.C. 922(t)) and maintain transaction records (18 U.S.C. 923(g)(1)–(2)) through which firearms involved in crime can be traced.

The first presumption proposed under the fourth category listed above—repetitive sales or offers for sale of firearms within 30 days from purchase—reflects that firearms for a personal collection are not likely to be repetitively sold within such a short period of time from purchase.[80] That conduct is more consistent with treatment as business

[80] *See, e.g.*, Press Release, DOJ, *Minnesota Man Indicted for Dealing Firearms Without a License* (Feb. 18, 2016), https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license (defendant sold firearms he purchased through online websites, and the average time he actually possessed a gun before offering it for sale was only nine days); Press Release, DOJ, *Ex-Pasadena Police Lieutenant Sentenced to One Year in Federal Prison for Unlicensed Selling of Firearms and Lying on ATF Form* (Feb. 25, 2019), https://www.justice.gov/usao-cdca/pr/ex-pasadena-police-lieutenant-sentenced-one-year-federal-prison-unlicensed-selling (defendant resold 79 firearms within six days after he purchased them); *United States v. D'Agostino*, No. 10-20449, 2011 WL 219008, at *3 (E.D. Mich. Jan. 20, 2011) (some of the weapons defendant sold at gun shows were purchased "a short time earlier"); *United States v. One Assortment of 89 Firearms*, 511 F. Supp. 133, 137 (D.S.C. 1980) ("That several sales of firearms occur in a reasonably short space of time is evidence of dealing in firearms.").

inventory.[81] Likewise, under the second and third presumptions proposed under this category, the Department has observed through its investigative and regulatory experience that persons who repetitively sell firearms in new condition or in like-new condition in their original packaging,[82] or firearms of the same or similar kind and type,[83]

[81] Further support for this 30-day presumption comes from the fact that, while many retailers do not allow firearm returns, some retailers and manufacturers do allow a 30-day period within which a customer who is dissatisfied with a firearm purchased for a personal collection or hobby can return or exchange the firearm. Dissatisfied personal collectors and hobbyists—persons not intending to engage in the business—are more likely to return new firearms rather than to incur the time, effort, and expense to resell them within that period of time. *See, e.g.*, Learn about the 30 Day Money Back Guarantee*: How to Return Your Firearm*, Walther Arms, https://waltherarms.com/connect/guarantee# (last visited Apr. 4, 2024); *Retail Policies*, Center Target Sports, https://centertargetsports.com/retail-range/ (last visited Feb. 29, 2024) ("When you purchase any gun from Center Target Sports, we guarantee your satisfaction. Use your gun for up to 30 days and if for any reason you're not happy with your purchase, return it to us within 30 days and receive a store credit for the FULL purchase price."); *Warranty & Return Policy*, Century Arms (Mar. 6, 2019), https://www.centuryarms.com/media/wysiwyg/Warranty_and_Return_v02162021.pdf ("Customer has 30 days to return surplus firearms, ammunition, parts, and accessories for repair/replacement if the firearm does not meet the advertised condition."); *I Love You PEW 30 Day Firearm Guarantee*, Alphadog Firearms, https://alphadogfirearms.com/i-love-you-pew/ (last visited Feb. 29, 2024) ("Original purchaser has 30 calendar days to return any new firearm purchased for store credit."); *Return Exceptions Policy*, Big 5 Sporting Goods, https://www.big5sportinggoods.com/static/big5/pdfs/Customer-Service-RETURN-EXCEPTIONS-POLICY-d.pdf (last visited Feb. 29, 2024) ("Firearm purchases must be returned to the same store at which they were purchased. No refunds or exchanges unless returned in the original condition within thirty (30) days from the date of release."); *Returns, Transfers & Consignments*, DFW Gun Range & Academy, https://www.dfwgun.com/memberships/store-policies.html (last visited Feb. 29, 2024) (30-day return policy); *Return Policy*, RifleGear, https://www.riflegear.com/t-returns.aspx (last visited Feb. 29, 2024) (30-day return policy); *Gun-Buyer Remorse Is a Thing of the Past*, Stoddard's Range and Guns, https://stoddardsguns.com/stoddards-commitment/ (last visited Feb. 29, 2024) (30-day return policy); *Palmetto State Armory's Hassle-Free Return Policy*, AskHandle, https://www.askhandle.com/blog/palmetto-state-armory-return-policy (last visited Feb, 29, 2024) (30-day return policy); *Instructions for Returns/Repairs*, Rock River Arms, https://www.rockriverarms.com/index.cfm?fuseaction=page.display&page_id=34 (last visited Feb. 29, 2024) (30-day return policy); *"No Regrets" Policy*, Granite State Indoor Range, https://www.granitestaterange.com/our-pro-shop/ (last visited Apr. 4, 2024) (30-day return policy).

[82] *See, e.g.*, *Carter*, 203 F.3d at 189 & n.1 (defendant admitted to willfully shipping and transporting 11 handguns in the course of engaging in the business of dealing in firearms without a license that were contained in their original boxes); *Brenner*, 481 F. App'x at 127 (defendant frequently referred to firearms as "coming in" and "brand new"); *United States v. Van Buren*, 593 F.2d 125, 126 (9th Cir. 1979) (defendant's "gun displays were atypical of those of a collector because he exhibited many new weapons, some in the manufacturers' boxes"); *United States v. Powell*, 513 F.2d 1249, 1250 (8th Cir. 1975) (defendant acquired and sold six "new" or "like new" shotguns over several months); *United States v. Posey*, 501 F.2d 998, 1002 (6th Cir. 1974) (defendant offered firearms for sale, some of them in their original boxes); *United States v. Day*, 476 F.2d 562, 564, 567 (6th Cir. 1973) (60 of the 96 guns to be sold by defendant were new handguns still in the manufacturer's original packages).

[83] *See, e.g.*, Press Release, DOJ, *FFL Sentenced for Selling Guns to Unlicensed Dealers* (May 27, 2022), https://www.justice.gov/usao-ndtx/pr/ffl-sentenced-selling-guns-unlicensed-dealers (defendant regularly sold large quantities of identical firearms to unlicensed associates who sold them without a license); *Shipley*, 546 F. App'x at 453 (defendant sold mass-produced firearms of similar make and model that were "not likely to be part of a personal collection").

are not as likely to be repetitively selling such firearms from a personal collection. In contrast with sales from a personal collection, persons engaged in the business who are selling from a business inventory can earn the greatest profit by selling firearms in the best (*i.e.*, in a new) condition, or by selling the particular makes and models of firearms that their customers most want.

The presumption proposed under the fifth category listed above—that a former licensee, or responsible person acting on behalf of such former licensee, is engaged in the business when they sell or offer for sale firearms that were in business inventory upon license termination—recognizes that the licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a "personal collection" or otherwise as a personal firearm. Consistent with the GCA's plain language under section 921(a)(21)(C), this presumption recognizes that former licensees who thereafter intend to predominantly earn a profit from selling firearms that they had previously purchased for resale can still be "engaging in the business" after termination of their license. The GCA does not authorize former licensees to continue to be "engaged in the business" without a license even if the firearms were purchased while the person had a license.

The final presumption proposed—that a former licensee (or responsible person acting on behalf of the former licensee) is engaged in the business when they sell or offer for sale firearms that were transferred to the personal inventory of such former licensee or responsible person prior to the time the license was terminated, unless the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44 of title 18 and one year has passed since the transfer—is

consistent with 18 U.S.C. 923(c) of the GCA, which deems firearms transferred from a licensee's business inventory to their personal collection or otherwise as a personal firearm as business inventory until one year after the transfer.[84] This provision indicates a congressional determination that one year is a sufficient period for a former licensee to wait before a firearm that is purchased for personal use can be considered part of a personal collection or otherwise as a personal firearm, as opposed to business inventory being resold for profit.

In the NPRM, the Department noted that these presumptions may be rebutted in an administrative or civil proceeding with reliable evidence demonstrating that a person is not "engaged in the business" of dealing in firearms.[85] If, for example, there is reliable evidence that an individual purchased a few collectible firearms from a licensed dealer where "all sales are final" and then resold those firearms back to the licensee within 30 days because the purchaser was not satisfied, the presumption that the unlicensed reseller is engaged in the business (arising from the evidence of repetitive sales or offers for sale of firearms within 30 days from purchase) may be rebutted. Similarly, the presumption that a person who repetitively resells firearms of the same make and model within one

[84] Even if one year has passed from the date of transfer, business inventory transferred to a personal collection or otherwise as a personal firearm of a former licensee (or responsible person acting on behalf of that licensee) prior to termination of the license cannot be treated as part of a personal collection or as a personal firearm if the licensee received or transferred those firearms with the intent to willfully evade the restrictions placed upon licensees by the GCA (e.g., willful violations as cited in a notice of license revocation or denial of renewal). This is because, under section 923(c), any firearm acquired or disposed of with intent to willfully evade the restrictions placed upon licensees by the GCA is automatically business inventory. Therefore, because the firearms are statutorily deemed to be business inventory under either of these circumstances, a former licensee (or responsible person acting on behalf of such licensee) who sells such firearms is presumed to be engaged in the business, requiring a license.

[85] An example of an administrative proceeding where rebuttable evidence might be introduced would be where ATF denied a firearms license application, pursuant to 18 U.S.C. 923(d)(1)(C) and (f)(2), on the basis that the applicant was presumed under this rule to have willfully engaged in the business of dealing in firearms without a license. An example of a civil case would be an asset forfeiture proceeding, brought in a district court pursuant to 18 U.S.C. 924(d)(1), on the basis that the seized firearms were intended to be involved in willful conduct presumed to be engaging in the business without a license under this rule.

year of their purchase is "engaged in the business" could be rebutted based on evidence that the person is a collector who occasionally sells one specific kind and type of curio or relic firearm to buy another one in better condition to "trade-up" or enhance the seller's personal collection.[86] Another example in which evidence may rebut the presumption would be the occasional sale, loan, or trade of an almost-new firearm in its original packaging to a family member for lawful purposes, such as for their use in hunting, without the intent to earn a profit or to circumvent the requirements placed on licensees.[87]

E. Definition of "Personal collection," "personal collection of firearms," and "personal firearms collection"

The NPRM explained that the statutory definition of "engaged in the business" excludes "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." 18 U.S.C. 921(a)(21)(C). To clarify this definitional exclusion, the proposed rule would: (1) add a single definition for the terms "personal collection," "personal collection of firearms," and "personal firearms collection"; (2) explain how those terms apply to licensees; and (3) make clear that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H, rather than using ATF Form 4473, when they acquire firearms from other licensees, including a sole proprietor who transfers a firearm to their personal collection or otherwise as a personal firearm in accordance with 27 CFR 478.125a.

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[86] *See Palmieri*, 21 F.3d at 1269 ("The fact finder must determine whether the transactions constitute hobby-related sales or engagement in the business of dealing from the nature of the sales and in light of their circumstances.").

[87] *See, e.g.*, *Clark v. Scouffas*, No. 99-C-4863, 2000 WL 91411, at *3 (N.D. Ill. Jan. 19, 2000) (license applicant was not a "dealer" who was "engaged in the business" as defined under section 921(a)(21)(C) where he only sold a total of three .38 Special pistols—two to himself, and one to his wife—without any intent to profit).

Specifically, the NPRM proposed to define "personal collection," "personal collection of firearms," and "personal firearms collection" as "personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (*e.g.*, noncommercial, recreational activities for personal enjoyment such as hunting, or skeet, target, or competition shooting)." This reflects a common definition of the terms "collection" and "hobby."[88] The phrase "or for a hobby" was adopted from 18 U.S.C. 921(a)(21)(C), which excludes from the definition of "engaged in the business" firearms acquired "for" a hobby. The NPRM also expressly excluded from the definition of "personal collection" "any firearm purchased for resale or made with the predominant intent to earn a profit." 18 U.S.C. 921(a)(21)(C).

The NPRM further explained that, under the GCA, 18 U.S.C. 923(c), and its implementing regulations, 27 CFR 478.125(e) and 478.125a, a licensee who acquires firearms for a personal collection is subject to certain additional requirements before the firearms can become part of a "personal collection."[89] Accordingly, the proposed rule further explained how that term would apply to firearms acquired by a licensee (*i.e.*, a person engaged in the business as a licensed manufacturer, licensed importer, or licensed

[88] *See* Webster's Third at 444, 1075, 1686 (defining the term "personal" to include "of or relating to a particular person," "collection" to include "an assembly of objects or specimens for the purposes of education, research, or interest", and "hobby" as "a specialized pursuit . . . that is outside one's regular occupation and that one finds particularly interesting and enjoys doing"); *Personal*, Merriam-Webster, https://www.merriam-webster.com/dictionary/personal (last visited Mar. 1, 2024) (defining the term "personal" to include "of, relating to, or affecting a particular person"); *Collection*, Merriam-Webster, https://www.merriam-webster.com/dictionary/collection (last visited Mar. 1, 2024) (defining "collection" to include "an accumulation of objects gathered for study, comparison, or exhibition or as a hobby"); *Hobby*, Merriam-Webster, https://www.merriam-webster.com/dictionary/hobby (last visited Mar. 1, 2024) (defining "hobby" as a "pursuit outside one's regular occupation engaged in especially for relaxation"); *see also Idarecis*, 164 F.3d 620, 1998 WL 716568, at *4 ("There is no case authority to suggest that there is a distinction between the definition of a collector and of a [personal] collection in the statute.").

[89] The GCA, 18 U.S.C. 923(c), and its implementing regulations, also require that all firearms "disposed of" from a licensee's personal collection, including firearms acquired before the licensee became licensed, that are held for at least one year and that are sold or otherwise disposed of, must be recorded as a disposition in a personal bound book. *See* 18 U.S.C. 923(c); 27 CFR 478.125a(a)(4).

dealer under the GCA), by defining "personal collection," "personal collection of firearms," or "personal firearms collection," when applied to licensees, to include only firearms that were: (1) acquired or transferred without the intent to willfully evade the restrictions placed upon licensees by chapter 44, title 18, United States Code;[90] (2) recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);[91] (3) recorded as a disposition from the licensee's business inventory to their personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e); (4) stored separately from, and not commingled with the business inventory, and appropriately identified as "not for sale" (e.g., by attaching a tag), if on the business premises;[92] and (5) maintained in such personal collection (whether on or off the business premises) for at least one year from the date the

[90] *See* ATF, *May a Licensee Create a Personal Collection to Avoid the Recordkeeping and NICS Background Check Requirements of the GCA?*, https://www.atf.gov/firearms/qa/may-licensee-create-personal-collection-avoid-recordkeeping-and-nics-background-check (last reviewed July 15, 2020).

[91] *See* ATF, *Does a Licensee Have to Record Firearms Acquired Prior to Obtaining the License in Their Acquisition and Disposition Record?*, https://www.atf.gov/firearms/qa/does-licensee-have-record-firearms-acquired-prior-obtaining-license-their-acquisition (last reviewed July 15, 2020); ATF, *ATF Federal Firearms Regulations Reference Guide*, ATF P 5300.4, Q&A (F2) at 201 (2014) ("All firearms acquired after obtaining a firearms license must be recorded as an acquisition in the acquisition and disposition record as business inventory."); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Feb. 2011), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-2011/download ("There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity."); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Mar. 2006), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2006/download ("[E]ven if a dealer acquires a firearm from a licensee by completing an ATF Form 4473, the firearm must be entered in the transferee dealer's records as an acquisition.").

[92] *See* ATF, *May a Licensee Store Personal Firearms at the Business Premises?*, https://www.atf.gov/firearms/qa/may-licensee-store-personal-firearms-business-premises (last reviewed July 15, 2020); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Feb. 2011), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-2011/download; ATF Industry Circular 72-30, *Identification of Personal Firearms on Licensed Premises Not Offered for Sale* (Oct. 10, 1972).

firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a.[93] These proposed parameters to define the term "personal collection" as applied to licensees reflect the statutory and regulatory requirements for personal collections in 18 U.S.C. 923(c) and 27 CFR 478.122(a), 478.123(a), 478.125(e), and 478.125a.[94] To implement these changes, the rule also proposed to make conforming changes by adding references in 27 CFR 478.125a to the provisions that relate to the acquisition and disposition recordkeeping requirements for importers and manufacturers.

F. Definition of "Responsible person"

The NPRM also proposed to add a regulatory definition of the term "responsible person" in 27 CFR 478.11, to mean "[a]ny individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a sole proprietorship, corporation, company, partnership, or association, insofar as they pertain to firearms." This definition comes from 18 U.S.C. 923(d)(1)(B) and has long been reflected on the application for license (Form 7) and other ATF publications since enactment of a similar definition in the Safe Explosives Act in 2002.[95] This definition would exclude, for example, store clerks or cashiers who cannot make management or policy decisions with respect to firearms (e.g., what company or store-wide policies and

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[93] *See* ATF, *May a Licensee Maintain a Personal Collection of Firearms? How Can They Do So?*, https://www.atf.gov/firearms/qa/may-licensee-maintain-personal-collection-firearms-how-can-they-do-so (last reviewed July 15, 2020).

[94] The existing regulations, 27 CFR 478.125(e) and 478.125a—which require licensees to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms—were upheld by the Fourth Circuit in *National Rifle Ass'n*, 914 F.2d at 482–83.

[95] *See* 18 U.S.C. 841(s); *Application for Federal Firearms License*, ATF Form 7, Definition 3 (5300.12) (Oct. 2020); *Gilbert v. ATF*, 306 F. Supp. 3d 776, 781 (D. Md. 2018); *Gossard v. Fronczak*, 206 F. Supp. 3d 1053, 1064–65 (D. Md. 2016), *aff'd*, 701 F. App'x 266 (4th Cir. 2017); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 6 (Sept. 2011), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-september-2011/download.

controls to adopt, which firearms are bought and sold by the business, and who is hired to buy and sell the firearms), even if their duties include buying or selling firearms for the business.

G. Definition of "Predominantly earn a profit"

The NPRM also explained that the BSCA broadened the definition of "engaged in the business" as a dealer by substituting "to predominantly earn a profit" for "with the principal objective of livelihood or profit." 18 U.S.C. 921(a)(21)(C). It also defined the term "to predominantly earn a profit." 18 U.S.C. 921(a)(22). The NPRM proposed to incorporate those statutory changes, as discussed above.

The NPRM proposed to further implement the BSCA's amendments by: (1) clarifying that the "proof of profit" proviso—*i.e.*, the BSCA's provision that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism"—also excludes intent to profit, thus making clear that it is not necessary for the Federal Government to prove that a person intended to make a profit if the person was dealing in firearms for criminal purposes or terrorism; (2) clarifying that a person may have the predominant intent to profit even if the person does not actually obtain pecuniary gain from selling or disposing of firearms; and (3) establishing a presumption in civil and administrative proceedings that certain conduct demonstrates the requisite intent to "predominantly earn a profit," absent reliable evidence to the contrary.

These proposed regulatory amendments are consistent with the plain language of the GCA. Neither the pre-BSCA definition of "with the principal objective of livelihood and profit" nor the post-BSCA definition of "to predominantly earn a profit" requires the

Government to prove that the defendant actually profited from firearms transactions. *See* 18 U.S.C. 921(a)(22), (a)(23) (referring to "the intent underlying the sale or disposition of firearms"); *Focia*, 869 F.3d at 1282 ("The exact percentage of income obtained through the sales is not the test; rather, . . . the statute focuses on the defendant's motivation in engaging in the sales.").[96]

ATF's experience also establishes that certain conduct related to the sale or disposition of firearms presumptively demonstrates a primary motivation to earn a profit. In addition to conducting criminal investigations of unlicensed firearms businesses under 18 U.S.C. 922(a)(1)(A), ATF has for many decades observed through qualification and compliance inspections how dealers who sell or dispose of firearms demonstrate a predominant intent to obtain pecuniary gain, as opposed to other intents, such as improving or liquidating a personal collection.

Based on this decades-long body of experience, the proposed rule provided that, absent reliable evidence to the contrary, a person would be presumed to have the intent to "predominantly earn a profit" when the person: (1) advertises, markets, or otherwise promotes a firearms business (e.g., advertises or posts firearms for sale, including on any website; establishes a website for selling or offering for sale their firearms; makes available business cards; or tags firearms with sales prices), regardless of whether the

[96] *See also Valdes*, 681 F. App'x at 877 (the government does not need to show that the defendant "necessarily made a profit from dealing" (quoting *Wilmoth*, 636 F.2d at 125)); *United States v. Mastro*, 570 F. Supp. 1388, 1391 (E.D. Pa. 1983) ("[T]he government need not show that defendant made or expected to make a profit." (citing cases)); *United States v. Shirling*, 572 F.2d 532, 534 (5th Cir. 1978) ("The statute is not aimed narrowly at those who profit from the sale of firearms, but rather broadly at those who hold themselves out as a source of firearms."); *cf. King*, 735 F.3d at 1107 n.8 (Section 922(a)(1)(A) does not require an actual sale of firearms).

person incurs expenses or only promotes the business informally;[97] (2) purchases, rents, or otherwise secures or sets aside permanent or temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case;[98] (3) makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales;[99] (4) purchases or otherwise secures merchant services as a business (e.g., credit card transaction services, digital wallet for business) through which the person makes or offers to make payments for firearms transactions;[100] (5) formally or informally purchases, hires, or otherwise secures business security services (e.g., a central station-monitored

[97] *See, e.g.*, *United States v. Caldwell*, 790 F. App'x 797, 799 (7th Cir. 2019) (defendant placed 192 advertisements on a website devoted to gun sales); *Valdes*, 681 F. App'x at 878 (defendant handed out business card); *United States v. Pegg*, 542 F. App'x 328 (5th Cir. 2013) (defendant sometimes advertised firearms for sale in the local newspaper); *United States v. Crudgington*, 469 F. App'x 823, 824 (11th Cir. 2012) (defendant advertised firearms for sale in local papers, and tagged them with prices); *United States v. Dettra*, No. 99-3667, 2000 WL 1872046, at *2 (6th Cir. Dec. 15, 2000) ("Dettra's use of printed business cards and his acceptance of credit payment provide further reason to infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby."); *United States v. Norman*, No. 4-10CR00059-JLH, 2011 WL 2678821, at *3 (E.D. Ark. 2011) (defendant placed advertisements in local newspaper and on a website).

[98] *See, e.g.*, *United States v. Wilkening*, 485 F.2d 234, 235 (8th Cir. 1973) (defendant set up a glass display case and displayed for sale numerous ordinary long guns and handguns that were not curios or relics); *United States v. Jackson*, 352 F. Supp. 672, 676 (S.D. Ohio 1972), *aff'd*, 480 F.2d 927 (6th Cir. 1973) (defendant set up glass display case, displaying numerous long guns and handguns for sale that were not curios or relics); Press Release, DOJ, *Asheville Man Sentenced for Dealing Firearms Without a License* (Jan. 20, 2017), https://www.justice.gov/usao-wdnc/pr/asheville-man-sentenced-dealing-firearms-without-license-0 (defendant sold firearms without a license from his military surplus store).

[99] *See, e.g.*, *United States v. White*, 175 F. App'x 941, 942 (9th Cir. 2006) ("Appellant also created a list of all the firearms he remembers selling and the person to whom he sold the firearm."); *Dettra*, 2000 WL 1872046, at *2 ("Dettra carefully recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner."); *United States v. Angelini*, 607 F.2d 1305, 1307 (9th Cir. 1979) (defendant kept sales slips or invoices).

[100] *See, e.g.*, *King*, 735 F.3d at 1106–07 (defendant "incorporated and funded a firearms business 'on behalf' of a friend whose American citizenship enabled business to obtain Federal firearms license" and then "misappropriated company's business account, using falsified documentation to set up credit accounts and order firearms from manufacturers and wholesalers"); *Dettra*, 2000 WL 1872046, at *2 ("Dettra's . . . acceptance of credit payment provide[s] further reason to infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby.").

security system registered to a business[101] or guards for security[102]) to protect business assets or transactions that include firearms; (6) formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions;[103] (7) secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or (8) purchases a business insurance policy, including any riders that cover firearms inventory.[104] Any of these firearms-business-related activities justifies a rebuttable presumption that the person has the requisite intent to predominantly earn a profit from reselling or disposing of firearms.

The NPRM noted that these rebuttable presumptions concerning an intent "to predominantly earn a profit" are independent of the set of presumptions described above regarding conduct that presumptively shows a person is "engaged in the business." This second set of presumptions that addresses only intent "to predominantly earn a profit" would be used to independently establish the requisite intent to profit in a particular

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[101] Numerous jurisdictions require all persons with alarms or security systems designed to seek a police response to be registered with or obtain a permit from local police and pay the requisite fee. *See, e.g.*, Albemarle County (Virginia) Code § 12-102(A); Arlington County (Virginia) Code § 33-10(A); Cincinnati (Ohio) City Ord. Ch. 807-1-A4 (2); City of Coronado (California) Code § 40.42.050; Irvine (California) Code § 4-19-105; Kansas City (Missouri) Code § 50-333(a); Larimer County (Colorado) Security Alarm Ord. 09142010O001 § 3(A); Lincoln (Nebraska) Mun. Code § 5.56.030(a); Los Angeles (California) Mun. Code § 103.206(b); Loudoun County (Virginia) Code § 655.03(a); Mobile (Alabama) Code § 39-62(g)(1); Montgomery County (Maryland) Code § 3A-3; Prince William County (Virginia) Code § 2.5.25(a); Rio Rancho (New Mexico) Mun. Code § 97.04(A); Scottsdale (Arizona) Code § 3-10(a); Tempe (Arizona) Code § 22-76(a); Washington County (Oregon) Code § 8.12.040; West Palm Beach (Florida) Code § 46-32(a); Wilmington (Delaware) Code § 10-38(c); Woburn (Massachusetts) Code § 8-31. Due to the value of the inventory and assets they protect, for-profit businesses are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property.

[102] *See, e.g.*, *United States v. De La Paz-Rentas*, 613 F.3d 18, 22–23 (1st Cir. 2010) (defendant was hired as bodyguard for protection in an unlawful firearms transaction).

[103] *See, e.g.*, *United States v. Gray*, 470 F. App'x at 469 (defendant sold firearms through his sporting goods store, advertised his business using signs and flyers, and displayed guns for sale, some with tags).

[104] *See, e.g.*, *United States v. Kish*, 424 F. App'x 398, 404 (6th Cir. 2011) (defendant could only have 200 firearms on display because of insurance policy limitations).

proceeding. As with the "engaged in the business" presumptions, the activities set forth in these intent presumptions would not be exhaustive of the conduct that may show that, or be considered in determining whether, a person actually has the requisite intent "to predominantly earn a profit." There are many other fact patterns that would not fall within the specific conduct that presumptively requires a license under this rule but that reveal one or more preparatory steps that presumptively demonstrate an intent to predominantly earn a profit from firearms transactions. Again, none of these presumptions would apply to criminal prosecutions, but could be useful to courts in criminal cases, for example, to inform appropriate jury instructions regarding permissible inferences. These presumptions would be supported by the Department's investigative and regulatory efforts and experience as well as conduct that the courts have relied upon in determining whether a person was required to be licensed as a dealer in firearms even before the BSCA expanded the definition.

H. Disposition of Business Inventory after Termination of License

The NPRM next explained that one public safety issue that ATF has encountered over the years relates to former licensees who have liquidated their business inventory of firearms without performing background checks or maintaining required records after their license was revoked, denied renewal, or otherwise terminated (e.g., license expiration or surrender of license). Some former licensees have transferred their business inventory of firearms to a "personal collection" and then sold them without performing background checks or recordkeeping.[105] Sometimes former licensees even continue to

[105] *See, e.g.*, Annie Linskey, *Closed Store Is a Source of Guns*, Baltimore Sun (Apr. 15, 2008), https://www.baltimoresun.com/news/bs-xpm-2008-04-15-0804150118-story.html (after revocation of license, a dealer transferred around 700 guns to his "personal collection" and continued to sell them without

acquire more firearms for resale ("restocking") after license termination. These activities have resulted in numerous firearms being sold without background checks by former licensees (including those whose licenses have been revoked or denied due to willful violations of the GCA) to potentially prohibited persons without any ability to trace those firearms if later used in crime.[106]

The NPRM proposed to revise the regulation's sections on discontinuing business, 27 CFR 478.57 and 478.78, to clarify how the prohibitions on engaging in the business of dealing in firearms without a license in 18 U.S.C 922(a)(1)(A) and 923(a) apply with respect to the sale of firearms that remain in the possession of a former licensee (or a responsible person of the former licensee) as business inventory at the time the license is terminated. Firearms that were in the business inventory of a former licensee at the time the license was terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license) and that remain in the possession of the licensee (or a responsible person acting on behalf of the former licensee) are not part of a "personal collection." While 18 U.S.C. 921(a)(21)(C) allows an unlicensed person

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recordkeeping). The problem of licensees liquidating their business inventory of firearms as firearms from their "personal collections" without background checks or recordkeeping has been referred to by some advocacy groups and Members of Congress as the "fire-sale loophole." *See* Dan McCue, *Booker Bill Takes Aim at Gun Fire Sale Loophole*, The Well News (Sept. 9, 2022), https://www.thewellnews.com/guns/booker-bill-takes-aim-at-gun-fire-sale-loophole/; Shira Toeplitz, *Ackerman Proposes Gun-Control Bill to Close 'Firesale Loophole'*, Politico: On Congress Blog (Jan. 12, 2011), https://www.politico.com/blogs/on-congress/2011/01/ackerman-proposes-gun-control-bill-to-close-firesale-loophole-032289.

[106] *See, e.g.*, *Dettra*, 2000 WL 1872046, at *2 (defendant continued to deal in firearms after license revocation); Press Release, DOJ, *Gunsmoke Gun Shop Owner and Former Discovery Channel Star Indicted and Arrested for Conspiracy, Dealing in Firearms without a License and Tax Related Charges* (Feb. 11, 2016), https://www.justice.gov/opa/pr/gunsmoke-gun-shop-owner-and-former-discovery-channel-star-indicted-and-arrested-conspiracy (defendant continued to deal in firearms at a different address after he surrendered his FFL due to his violations of the federal firearms laws and regulations); *Kish*, 424 F. App'x at 405 (defendant continued to sell firearms after revocation of license); *Gilbert v. Bangs*, 813 F. Supp. 2d 669, 672 (D. Md. 2011), *aff'd* 481 F. App'x 52 (4th Cir. 2012) (license denied to applicant who willfully engaged in the business after license revocation); ATF Letter to AUSA (Mar. 13, 1998) (advising that seized firearms offered for sale were not deemed to be part of a "personal collection" after surrender of license).

to "sell all or part of his personal collection" without being considered "engaged in the business," in this context, these firearms were purchased by the former licensee as business inventory and were not accumulated by that person for study, comparison, exhibition, or for a hobby. Accordingly, a former licensee who sells business inventory after their license is terminated could be unlawfully engaging in the business of dealing in firearms without a license.

Under the proposals to revise 27 CFR 478.57 (discontinuance of business) and 27 CFR 478.78 (operations by licensee after notice), once a license has been terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee would have 30 days, or such additional period designated by the Director for good cause, to either: (1) liquidate any remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with part 478 of the regulations;[107] or (2) transfer the remaining business inventory to the "personal inventory of the former licensee" (or a responsible person of the former licensee) provided the recipient is not prohibited by law from receiving or possessing firearms. The term "personal inventory of the former licensee" was proposed to clarify that such firearms are not part of a "personal collection" within the meaning of 18 U.S.C. 921(a)(21)(C). Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee (or responsible person of such

[107] Consistent with its dictionary definition, the term "liquidate" in this context means to sell or otherwise dispose of a firearms inventory without acquiring additional firearms for the inventory (*i.e.*, "restocking"). *See Liquidate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/liquidate (last visited Mar. 4, 2024) (defining "liquidate" as "to convert (assets) into cash"); *see also, e.g.*, *Brenner*, 481 F. App'x at 127 (defendant former licensee was not liquidating a personal collection where all of the indictment-charged firearms were acquired after his license had not been renewed).

licensee) who resells any such inventory, including business inventory transferred to "personal inventory," would be subject to the same presumptions in 27 CFR 478.11 (definition of "engaged in the business" as a dealer other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale.

The 30-day period from license termination for a former licensee to transfer the firearms either to another licensee or to a personal collection parallels the period of time for record disposition after license termination in the GCA, 18 U.S.C. 923(g)(4), and is a reasonable period for that person to wind down operations after discontinuance of business without acquiring new firearms.[108] That period of liquidation was proposed to be extendable by the Director for good cause, such as to allow pawn redemptions if required by State, local, or Tribal law.

Also, the NPRM proposed to make clear in the definition of "personal collection" in 27 CFR 478.11 that firearms transferred by a former licensee to a personal collection prior to the license termination would not be considered part of a personal collection unless one year had passed from the date the firearm was transferred into the personal collection before the license was terminated. This proposal would give effect to 18 U.S.C. 923(c), which requires that all firearms acquired by a licensee be maintained as part of a personal collection for a period of at least one year before they lose their status as business inventory. Former licensees (or responsible persons) who sell business inventory within one year after transfer to a personal collection would be presumed to be

[108] *See also* 27 CFR 478.57 (requiring the owner of a discontinued or succeeded business to notify ATF of such discontinuance or succession within 30 days); 27 CFR 478.127 (requiring discontinued businesses to turn in records within 30 days).

engaging in the business of dealing in those firearms because the firearms are not yet considered part of a "personal collection." *See* 478.13(b)(5).

Moreover, under the proposed rule, a former licensee would not be permitted to continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, "restocking") without a license. Therefore, a former licensee (or responsible person) would be subject to the same presumptions in 27 CFR 478.11 (definition of "engaged in the business" as a dealer other than a gunsmith or pawnbroker) that apply to persons who sell firearms that were repetitively purchased with the predominant intent to earn a profit and any sales by such a person will be closely scrutinized by the Department on a case-by-case basis.

I. Transfer of Firearms between FFLs and Form 4473

Finally, to ensure the traceability of all firearms acquired by licensees from other licensees, the NPRM proposed to make clear that licensees cannot satisfy their obligations under 18 U.S.C. 923(g)(1)(A) by completing a Form 4473 when selling or otherwise disposing of firearms to another licensed importer, licensed manufacturer, or licensed dealer, or disposing of a curio or relic to a licensed collector, including a sole proprietor licensee who transfers the firearm to their personal collection or otherwise as a personal firearm in accordance with 27 CFR 478.125a.[109] Form 4473 was not intended

[109] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Mar. 2006), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2006/download ("A dealer who purchases a firearm from another licensee should advise the transferor licensee of his or her licensed status so the transferor licensee's records may accurately reflect that this is a transaction between licensees. An ATF Form 4473 should not be completed for such a transaction, because this form is used only for a disposition to a nonlicensee.").

for use by licensees when transferring firearms to other licensees or by a sole proprietor transferring to their personal collection or otherwise as a personal firearm.

Pursuant to 18 U.S.C. 926(a)(1) and 27 CFR 478.94, 478.122(b), 478.123(b), and 478.125(e), when a licensee transfers a firearm to another licensee, the transferor must first verify the recipient's identity and license status by examining a certified copy of the recipient's license and recording the transfer as a disposition to that licensee in the bound book record. In turn, the recipient licensee would record the receipt as an acquisition in their bound book record. *See* 27 CFR part 478, subpart H. The NPRM explained that if a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record, asserting it is a "personal firearm," then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime.

However, this clarification that FFLs may not satisfy their obligations by completing a Form 4473 to transfer firearms between themselves would not include dispositions by a licensed legal entity such as a corporation, company (to include a limited liability company), or partnership, to the personal collection of a responsible person of such an entity. This is because, when a responsible person acquires a firearm for their personal collection from the business entity holding the license, they are not acting on behalf of the licensee, even if the entity in which they are employed holds a Federal firearms license.[110] Such an entity, including a corporation, company, or partnership, would therefore have to use a Form 4473, NICS check, and disposition

[110] *See* ATF Ruling 2010-1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee* (May 20, 2010), https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download (permanently assigning a firearm to a specific employee for personal use is considered a "transfer" that would trigger the recordkeeping and NICS background check requirements).

record entry when transferring a firearm to one of its individual officers (or partners, in the case of a partnership, or members, in the case of a limited liability company) for their personal use.[111]

IV. Analysis of Comments and Department Responses

Subsections in Section IV

A. Issues Raised in Support of the Rule

B. Issues Raised in Opposition to the Rule

C. Concerns with Specific Proposed Provisions

D. Concerns with the Economic Analysis

In response to the NPRM, ATF received nearly 388,000 comments. Of these, there were nearly 258,000 comments that expressed support for the proposed rule, or approximately two thirds of the total number of comments. Of these, over 252,000 (or approximately 98 percent) were submitted by individuals as form letters, *i.e.*, identical text that is often supplied by organizations or found online and recommended to be submitted to the agency as a comment.[112] There were nearly 99,000 comments opposed to the rule, or approximately 26 percent of the total number of comments, of which over

[111] *See* ATF, *Does an Officer or Employee of an Entity That Holds a Federal Firearms License, Such as a Corporation, Have to Undergo a NICS Check When Acquiring a Firearm for Their Own Personal Collection?*, https://www.atf.gov/firearms/qa/does-officer-or-employee-entity-holds-federal-firearms-license-such-corporation-have (last reviewed May 22, 2020); ATF, 2 *FFL Newsletter: Federal Firearms Licensee Information Service* 4 (Sept. 2013), https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-september-2013-volume-2/download.

[112] There were four form letter campaigns in support of the rule and five form letter campaigns in opposition to the rule. Altogether, form letters totaled 332,000 comments, or about 86 percent. The vast majority of these form letter submissions included the name and city/state of the commenter. However, thousands also included personal stories, information, and concerns in addition to the form letter text. For example, at least one of these form letters had more than 1,000 variations (identified by a text analytics program and subsequent manual review) due to commenter additions and changes.

80,000 (or approximately 81 percent) were submitted as form letters.[113] The commenters' grounds for support and opposition, along with specific concerns and suggestions, are discussed below.

ATF also received some comments and recommendations on issues that are outside the scope of this rulemaking, such as comments asking ATF to implement provisions of the BSCA other than the definition of "engaged in the business,"[114] and comments not addressing issues presented in the proposed rule. Comments and recommendations that were outside the scope of this rulemaking, or received after the comment period deadline, are not addressed in this final rule.[115]

A. Issues Raised in Support of the Rule

As noted, nearly 258,000 commenters expressed support for the NPRM, including through form letters submitted as part of mass mail campaigns. The majority provided specific reasons why they supported the proposed rule. ATF received supporting comments from a wide variety of individuals and organizations, such as multiple city and State officials, including almost half of the States' attorneys general; Members of Congress;[116] teachers and teacher organizations; doctors, national medical organizations,

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[113] In addition to the number of comments in support or in opposition to the rule, for about 1,000 comments, the commenters' positions could not be determined. Another nearly 30,000 comments were identified by a text analytics program as duplicate submissions, some in support and some in opposition to the rulemaking.

[114] The Department is incorporating other firearm provisions of the BSCA into ATF regulations through a separate rulemaking, a direct final rule entitled "Bipartisan Safer Communities Act Conforming Regulations."

[115] *See Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) ("[The Administrative Procedure Act] has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial."); *cf. Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) ("[O]nly comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency.").

[116] ATF received two letters from Members of the United States House of Representatives in support of the rule, one dated December 1, 2023, with 149 signatories, and another dated December 7, 2023, with seven

and hospitals; victim advocate organizations; clergy and religious organizations; firearm owners; student and parent organizations; military veterans and active duty members; persons with law enforcement backgrounds; and various firearm control advocacy organizations, among many others. As discussed below, numerous commenters raised particular reasons they consider the rule necessary, as well as suggestions regarding the Department's proposed amendments to ATF regulations.

1. General Support for the Rule

Comments Received

Commenters supported the rule for a wide variety of reasons. The vast majority of supportive commenters expressed overall relief that this rule was forthcoming, were in support of the provisions as at least a beginning toward needed increases in public safety, and indicated that the rule was well designed. For example, one commenter stated, "I wholeheartedly support the proposed amendments," while another added, "I am thrilled that the ATF is taking action to tighten background checks." Another commenter said, "[w]ow. What a well thought out and thorough set of rules . . . . I support the rules set out as written." A fourth commenter, an organization, said, "[i]t is important to note that the various parts of the Proposed Rule are carefully integrated and work together to bring clarity, balance, and enforceability to the GCA's implementing regulations after BSCA amended the GCA—and we urge ATF to preserve each and every provision through to final publication."

Those who commented about their public safety concerns added that this rule would help reduce gun violence, prevent prohibited persons from obtaining firearms,

signatories. ATF received one letter in support from Members of the United States Senate, dated November 30, 2023, with 17 signatories.

make communities safer, and save lives of both private citizens and police personnel, all of which they considered essential. The overall sentiment, as succinctly summed up in one of the form letters submitted by many thousands in support of the regulation, was, "we must do what we can to stop gun violence." One commenter stated that moving beyond guidance to rulemaking is "absolutely essential" to ensure those selling firearms for profit are conducting background checks that are essential for public safety. One veteran and gun owner stated, "I have great respect for the challenging but important role the [ATF] plays to ensure firearms are properly sold to and remain in the hands of owners who can both ***legally and safely*** own a firearm. Public Safety is paramount for me and will always supersede any perceived infringement on my Second Amendment Rights." Another commenter stated that numerous avenues must be taken to help protect Americans and emphasized that the number of mass shootings, suicides by gun, domestic violence deaths by firearms, and all the other shooting deaths "are out of control, and appalling." Many other commenters also expressed their concern for public safety, for keeping prohibited persons from having firearms, and the resulting need for this rule, stating for example, "[a]lthough no single action will eliminate gun violence, this rule, which will have an especial impact on reducing gun access to those who are most interested in using it for ill, is essential to saving lives in our country."

Many of the commenters believed that the proposed rule would increase public safety. One commenter stated, for example, that "broadening the language [as Congress did in the statute] and strengthening this particular regulation will help to serve as a strong foundation for potential reforms in the future." Numerous other commenters stated that they considered the rule's provisions to be necessary, but only modest or

starting steps toward much-needed public safety measures. For example, one commenter stated, "[t]he standards in the proposed [rule] are such a modest beginning to the action needed to eliminate gun violence in our society." A further commenter added, "if [the rule] could save even one life, wouldn't that be worth it? Please do not let another opportunity pass to do something to make our country safer!"

Military veteran groups in support of gun safety stressed that veterans' unique and valuable understanding of guns comes from the three basic pillars of military gun culture: (1) training, (2) safety, and (3) accountability—concepts they said are often lacking in civilian gun culture and laws. They added that this rule will keep guns out of the hands of dangerous individuals by ensuring that those prohibited by Federal law from purchasing firearms cannot use gun shows or Internet sites to avoid our nation's background check laws—people who could be a danger not just to others, but to themselves. Additionally, these veteran groups pointed out that veterans are 2.3 times more likely to die by suicide, and 71 percent of veteran suicides are by gun (compared to about half of nonveteran suicides). Furthermore, they said, guns are 90 percent effective in causing a death by suicide, while all other lethal means combined are less than 5 percent effective. They concluded, "[t]his rule will save veterans lives; but it must be done now."

Healthcare and physicians' organizations called gun violence a public health epidemic and urged that ATF issue the rule because it would reduce or prevent firearm-related injuries and death. Several teacher organizations and religious organizations of different denominations expressed similar views, as did multiple parent and student-led organizations. One commenter stated, "Gun violence is among our nation's most

significant public health problems. Indeed, gun violence is the leading cause of death of children and teens. The impact of gun violence is not only death and injury, but also the long-term psychological toll that gun-related incidents inflict on those who survive shootings, as well as on the friends and family members of the injured, killed or impacted." They added that the proposed rule is vital and must be finalized. One commenter summarized, "[t]his ruling can help to address the horrific epidemic of gun violence in this country." Another commenter agreed, observing that "[g]un violence needs to be treated as the public health issue that it is. We owe our children a safe environment in schools as well as places of worship, stores and other public spaces."

Department Response

The Department acknowledges the commenters' support and agrees that the final rule will increase public safety, as further explained below. *See* Section IV.A.6 and Department Response in Section IV.B.2 of this preamble.

2. Changes are Consistent with Law

Comments Received

A number of commenters believed the proposed rule's approach was fair and consistent with current law. For example, one commenter stated that the "proposed rule balances regulatory oversight and individual rights" and "ensures that responsible gun enthusiasts can engage in legal sales without unnecessary burdens while addressing concerns related to unlicensed firearms dealing." Several other commenters stated that promulgating this rule would not be forcing new law onto people and that the rule falls in line with the new gun laws that have already been established. As another commenter added, under the proposed rule, gun sellers will be no more exposed to criminal liability

than they are currently for engaging in unlicensed business dealings; "they will just have a much clearer sense of what conduct does and does not fall within that prohibition."

Some commenters said the current process for acquiring firearms from licensed dealers is working, is not burdensome, and should be applied more broadly. For example, one gun owner commented that she could "attest to how fast a background check can take after completing an online sale and then going to pick up the gun through a local dealer" and that "[n]o one is being inconvenienced by doing a [background] check." A sport trap shooter agreed, commenting that, "I don't understand why there is something wrong with [this] process in the eyes of the [National Rifle Association] and others." Another commenter added that this rule still easily allows law-abiding people to obtain a gun if they go through the appropriate process. Some State attorneys general agreed, specifically mentioning that ATF's "predominantly earn a profit" presumptions are consistent with commercial, for-profit enterprises and are inconsistent with "other intents, such as improving or liquidating a personal firearms collection," that Congress intended to exempt.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule is fully consistent with the GCA. The presumptions in the rule are based on the text and structure of the GCA as well as decades of post-FOPA case law interpreting the GCA. Additionally, the presumptions in the rule are consistent with the purpose of the GCA, as amended by the BSCA.

3. Changes are Consistent with Statutory Authority

Comments Received

Other comments in support of the proposed rule emphasized that the proposed rule, which clarifies who must be licensed as a dealer and perform background checks, is fully within the Department's and ATF's statutory authority. Two sets of congressional commenters from both the House and Senate explained that ATF has interpreted the BSCA amendments to the GCA "pursuant to the authority that Congress has long and consistently delegated to the Department of Justice and ATF to enforce our federal firearms laws— including the Gun Control Act of 1968 and now BSCA." The commenters added, "[t]he proposed rule is appropriately based on investigative efforts and regulatory action that ATF has undertaken for decades and Congress' recognition that ATF can, and must, address the modern firearms marketplace, including the conditions under which guns are bought and sold. Claims that ATF has overstepped or even usurped Congress' legislative powers are inapposite. ATF has, time and again, implemented the laws that Congress has passed, including those related to licensing requirements and procedures, as well as background checks. ATF's proposed rule is no different."

Another set of commenters (some State attorneys general) added, "[t]he proposed rule is an exercise of ATF's inherent authority to amend its own regulations to implement the broadened definition of 'engaged in the business' promulgated by Congress in the BSCA. It is a function explicitly authorized by 18 U.S.C. 926(a), as clarifying a definition within the rule is a 'rule[] [or] regulation necessary to carry out the provisions' of the [GCA]. ATF's regulatory authority under the GCA plays a critical role in protecting the public from gun violence and has been repeatedly reaffirmed by federal

courts in the decades since the GCA's passage." In support, the commenters cited cases in which courts have recognized ATF's expertise and authority to promulgate regulations.

Additional commenters noted that the proposed regulatory changes are fully within ATF's lawful authority and that the proposed rule is, as stated by one commenter, "in fact necessary for ATF to be able to implement and enforce the new law that Congress has put on the books." Citing multiple ATF firearms regulations, this commenter also pointed out that ATF has for decades exercised its authority to promulgate and revise regulations implementing and enforcing the GCA, including by issuing and updating detailed regulatory definitions.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule is fully consistent with the Department's and ATF's statutory authority.

4. Enhances Public Safety by Expanding Background Checks

Comments Received

Many commenters opined that the proposed rule would improve public safety by expanding background checks for firearms purchasers. One commenter declared that, "[a]s a US citizen, I would like to feel safer knowing at least the steps of background checks through the FBI database were done before a person could obtain a weapon." Another commented that the danger from unlicensed dealers is great because, according to several recent studies cited by the commenter: (1) over one million ads for firearms are posted each year that would not legally require the seller to conduct a background check for the purchase to be completed; (2) 80 percent of firearms purchased for criminal

purposes come from sellers without a license; (3) firearms sold at gun shows are used disproportionately to commit crimes; and (4) 96 percent of inmates convicted of gun offenses were prohibited from having a firearm when they acquired one from an unlicensed seller. Another commenter summed up the current societal situation in their comment using information from a Centers for Disease Control and Prevention database: "[e]very day, an average of around 120 people in the United States are killed by gunfire and more than 200 are shot and wounded. Firearms are now the leading cause of death for American children and teens."

Most supporters thought that the rule provided a fair approach that would increase safety. One commenter declared that the proposal "is the very minimum our federal government can do to not only protect innocent victims from gun violence but also to protect law abiding gun owners from being tarred with the same brush as irresponsible gun owners." A self-described firearm owner commented, "I whole heartedly support the rule to expand background checks" because "this will make our communities that much safer."

Other commenters believed that the proposed rule was a step in the right direction. One commenter stated, "[m]others everywhere are begging you to support background checks." They added that background checks certainly will not be the only solution to the multifaceted problem of gun violence, but said they are a step in ensuring people have the right accountability to keep guns away from those who mean to do harm. Another commenter said there is no downside to background checks that help prevent troubled and misguided persons from acquiring over-powered guns.

Many commenters expressed frustration with the current state of affairs and expressed support for expanding background checks and compliance with the law. One commenter stated that it should not be easier to buy a high-speed rifle than get a driver's license. Another commenter explained, "I manage volunteer programs and people have to complete a background check before they can help a child learn to read or assist an older adult. We should require this same level of scrutiny for anyone looking to purchase a weapon." Another commenter stated, "[g]uns are too serious to be privy to simple loopholes . . . . we can't just turn a blind eye to gaps in our legal system." Several other commenters expressed that there was never a valid policy reason for what the commenters called "the gun-show loopholes." The commenters used this term to refer to a pre-BSCA interpretation of the definition of "engaged in the business" that many unlicensed dealers believe allows them to make unlicensed sales online and at gun shows. (See the Department Response at Section IV.C.16 of this preamble for explanation of the GCA provisions on this subject). The commenters stated that these "loopholes" are shameful, there is no downside to strict background checks, and people should do the right thing by requiring more background checks. Another commenter emphasized, "[i]t really is beyond time that we consider the rights of non gun-toting citizens, too." Another commenter said that the regulation goes directly to the "loopholes" people have been trying to close for years, referring to guns offered for sale online or at gun shows. Similarly, a commenter said that, while background checks might be imperfect, they are certainly safer than not performing them. One commenter simply stated that background checks are excellent and that, "[a]nyone who doesn't want one, should likely not be car[ry]ing a gun." Another commenter highlighted the public's opinion on the issue and

referred to a recent Fox News poll showing that 87 percent of Americans support requiring criminal background checks on all gun buyers. A health research organization commented on the danger from not doing background checks, saying that experts estimate that nearly one in nine people who seek out firearms online would not pass a background check.

Most commenters cited safety concerns as a basis for their support of the BSCA's changes narrowing the background check gap, as implemented through the rule. One professional physicians' organization commented that private firearm sales conducted at gun shows or over the Internet should be subject to the same background check requirements as firearm sales by federally licensed firearms dealers. They added that this would make children, their families, and their communities safer. Another commenter stated that reducing impulsive purchases and requiring time necessary to conduct background checks can save lives and spare family members grief.

One commenter provided a real-world example of what is currently happening without background checks for sales at gun shows, describing an experience they had at a recent gun show: "[a]s he was filling out the paperwork someone approached him and told him [they] had the same gun [for sale] and a background check would not be required [to buy it] – he could walk out with it that day." Another commenter stated, "[h]onest, law abiding, gun owners are NOT afraid of accountability and pro-active requirements."

Department Response

The Department acknowledges the commenters' support for the proposed rule. The GCA and these implementing regulations are designed to improve public safety by

helping to prevent persons who are prohibited from possessing firearms under Federal law from acquiring firearms and allowing law enforcement officers to trace firearms involved in crime. By clarifying the circumstances in which persons are engaged in the business of dealing in firearms under the GCA and required to become a Federal firearms licensee, this regulation will result in more NICS background checks being run on prospective firearms purchasers. Not only will fewer prohibited persons obtain firearms from FFLs, but notifications that NICS denied a firearm transfer will be made by NICS to State, local, and Tribal law enforcement agencies within 24 hours to help them prevent gun crime.[117] In sum, the rule will help implement the provisions and goals of the GCA, as amended by the BSCA. At the same time, as explained more below, the rule does not require or implement universal background checks for private firearm sales between individuals. The rule affects only persons engaged in the business of dealing in firearms, including manufacturers and importers who deal in the firearms they manufacture or import.

5. Creates Universal Background Checks

Comments Received

Many commenters indicated a belief that the proposed rule created a universal background check requirement or expressed support for such a development. For example, one commenter stated, "[b]ackground checks have been shown to stop some who should not have firearms from acquiring them," adding that, in "order to make [background checks] more effective, they must be systematically and carefully applied nationwide." Likewise, another commenter said that instituting universal background

[117] 18 U.S.C. 925B.

checks "is a no-brainer" and should have been done long ago. Similarly, commenters said the current situation "is madness" and "[u]niversal backgrounds checks are the very least and most obvious of interventions." Several other commenters stated that they fully support making background checks mandatory for gun buyers, that they support not just expanded background firearms checks, but indeed universal background checks, and that background checks should be required for all gun purchasers, every time, and similar variations. Many commenters expressed support for requiring background checks for all sales/transfers of firearms, including sales between private citizens.

Some commenters wanted to see a stronger, quicker approach to resolving the issue. One commenter said, "[g]un laws as they stand are incredibly too relaxed and need to be amended," and "I strongly feel that universal background checks are critical and need to be done now." Other commenters agreed that it is long overdue to pass universal background checks for gun ownership and they should be instituted now as the least that we should be doing. Likewise, a commenter requested that, hopefully, Congress would eventually move to a universal background check on all gun sales in the near future. Another commenter added that, since gun sales by legal dealers have required background checks for decades, these same requirements should apply to all gun sales.

A few commenters thought that implementing universal background checks was a minimally intrusive method of implementing change. For example, one commenter stated, "[u]niversal background checks make sense. It doesn't take away a responsible gun owner's right but it provides a means to track those that should not own guns."

A few commenters suggested additional actions that could be implemented. For example, one suggested regular checks at multi-year intervals in addition to universal

background checks for all purchasers. Another commenter suggested adding mandatory waiting periods for every gun sale. And another suggested universal background checks for ammunition sales, as well.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the BSCA expands the definition of "engaged in the business." As a result, the rule's implementation of that expansion will increase the number of background checks to prevent prohibited persons from obtaining firearms under the provisions of the GCA, as amended by the BSCA. However, the Department disagrees with commenters who believe this rule will result in "universal background checks." The concept of "universal background checks" is not defined in Federal law, but is commonly understood to require persons to run background checks whenever a private, unlicensed person transfers a firearm to another, and some States have imposed this requirement.[118] Congress has not passed a law to require universal background checks, and this rule does not require unlicensed individuals who are not engaged in the business of manufacturing, importing, or dealing in firearms to run background checks for private firearm sales between individuals. Congress decided that only persons engaged in the business of manufacturing, importing, or dealing in firearms must obtain a license and run NICS background checks on firearm transferees. Nonetheless, by clarifying the meaning of "engaged in the business," the rule will make clear that licensees must run NICS background checks when they transfer firearms at gun shows, over the Internet, and by other means.

[118] Michael Martinez, *'Universal Background Check:' What Does It Mean?*, CNN (Jan. 28, 2013), https://www.cnn.com/2013/01/14/us/universal-background-checks/index.html.

6. Enhances Public Safety by Allowing More Crime Guns to be Traced

Comments Received

Several commenters believed that the current state of affairs, in which unlicensed dealers are selling firearms without making records, has a negative impact on crime gun tracing. One commenter opined that the rule can provide law enforcement with better tools to track and trace firearms used in crimes, aiding in their efforts to protect our communities. A law enforcement organization commented that the proposed rule would "enable law enforcement to investigate guns recovered at crime scenes. With more gun sellers required to become licensed dealers, more information will be available to law enforcement aiding in completing the investigations. Law enforcement will be better equipped to identify and follow leads in criminal investigations and solve more crimes." Another commenter said, "the absence of background checks means no sales records, hampering crime gun tracing." Finally, one group commented that aggregate firearm trace data can help identify patterns and trends that are valuable for understanding and combatting the trafficking of firearms into criminal hands, and more comprehensive transaction recordkeeping, like the rule will require, would help increase the aggregate amount of information available for tracing.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule will help Federal, State, local, and Tribal law enforcement solve crimes involving firearms through crime gun tracing. Under the GCA, "dealers must store, and law enforcement officers may obtain, information about a gun buyer's identity. That information helps to fight serious crime. When police officers retrieve a gun at a

crime scene, they can trace it to the buyer and consider him as a suspect." *Abramski*, 573 U.S. at 182 (internal citations omitted). As more persons become licensed, the transaction records maintained by those dealers will allow law enforcement to trace more firearms involved in crime[119] and to apprehend more violent offenders who misuse firearms.

7. Prevents Unlicensed Dealers from Exploiting Loopholes

Comments Received

Thousands of commenters in support of the rule expressed their desire to close gaps in the clarity of "engaged in the business" that, in their view, had been enabling people to deal in firearms without a license or prohibited persons to acquire firearms from unlicensed dealers. One set of commenters said that the rule "will help close loopholes in our background check system that have, for decades, been exploited by bad actors like gun traffickers, straw purchasers, and other prohibited persons, including domestic abusers and convicted felons." Another commenter said, "I can't think of any reasonable argument for continuing to allow loopholes that allow individuals to acquire guns outside the well-established, affordable, and reasonable process that applies to all other purchases." One of the form letters submitted by many commenters stated that, "[a]nyone offering guns for sale online or at a gun show is presumed to be trying to make a profit and should therefore be licensed and run a background check on their customers." Other commenters simply stated that we need to be closing the loopholes in the system and do so once and for all.

[119] *See Definition of "Frame or Receiver" and Identification of Firearms*, 87 FR 24652, 24659 (Apr. 26, 2022).

Another commenter shared this example: "[i]t was as easy as going to a flea market or pawn shop. Fifteen minutes or less and he had another gun for his collection." A third commenter observed that "[g]uns sold without background checks in all cases are like the old days of the Wild West" and that gun shows "are a huge source for gun traffickers and people looking to avoid scrutiny."

Some commenters were concerned that the current state of affairs is unjust. One commenter stated that they believe the proposed rule is necessary in fairness to the brick-and-mortar businesses and the up-front online retailers. Similarly, another commenter said that "[c]losing loopholes so that commercial transactions that have previously evaded background checks [can no longer do so] is simply consistency; this is a very good idea, and I wholeheartedly support it." Additionally, a commenter thought that "[t]here shouldn't be venues where background checks can be skirted. If a firearm changes hands, it benefits society to ensure that the hands accepting that firearm are going to handle it safely."

Several commenters highlighted the fact that dealing as a licensee had integral advantages. For example, one commenter said the proposed rule expands the range of people required to have a license to sell a firearm, which makes neighborhoods safer because citizens know the firearms are being sold by a trusted merchant. Another commenter expressed that people should be happier to see firearms coming from a reputable source, rather than some "flipper" who might not have safety-checked the item. A dealer will stand behind an item and can be held accountable if there is an issue, they added.

Some commenters appreciated the Department's balanced approach. One commenter stated, "[o]f course anyone selling firearms should be licensed & appropriately conducting background checks! Most responsible gun-owners agree on this point. Thank you for seeking to make our communities safer!" One group commented that, by clarifying who is not considered to be "engaged in the business," ATF has protected the ability of genuine hobbyists and collectors to transact firearms without fear of breaking the law. Another commenter added, "I support this idea because this does not infringe on any rights, in my opinion, but rather stops back yard or home-based individuals from buying firearms then selling these items for a profit within a quick time frame."

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will result in more persons who are engaged in the business of dealing in firearms, regardless of location, becoming licensed as required under the GCA, as amended by the BSCA. Once licensed, those persons will be required to abide by the recordkeeping and background check requirements of the GCA. The Department also agrees that promoting compliance with the licensing requirements of the GCA, as passed by Congress, is another benefit of the rule. As more persons dealing in firearms become licensed under this rule, there will be more fairness in the firearms marketplace. Licensed dealers are at a competitive disadvantage when, for example, similar firearms are being sold at a nearby table at a gun show by a seller who is engaged in the business of dealing in firearms but is not following the requirements that licensed dealers must follow. However, the Department disagrees with the comment that offering guns for sale

online or at a gun show necessarily means the person must be licensed. This rule also recognizes that persons may, for example, occasionally offer firearms for sale to enhance or liquidate their personal collections even if a profit is sought from those sales.

8. Closes the Gun Show/Online Loophole

Comments Received

Several commenters voiced support for closing what they referred to as the "gun show loophole," by which commenters meant a situation in which many sellers dealing in firearms offer them for sale at gun shows without becoming licensed or subjecting purchasers to background checks. For example, one commenter simply requested that the government please stop criminals from easily buying guns at gun shows without a background check. Another commenter expressed that Americans cannot allow individuals with violent histories to purchase a gun at a gun show or online without their background being investigated. A mother and gun owner added that she is relieved to hear that ATF is moving forward on closing the gun show loopholes. As a final example, one commenter stated that the "only reason this loophole exists is to create a method for criminals & people with histories of violence to procure guns, there are no other reasons."

Many supporters of the rule believed that it would resolve a long-standing inequity. As one commenter stated, "[f]or decades, gun sellers have exploited loopholes in federal law that let them sell guns online and at gun shows without conducting background checks. It's a recipe for disaster that worsens our country's gun violence crisis." Another commenter made the following comparison: "[a]llowing unlicensed sellers to operate alongside licensed dealers at gun shows is akin to allowing some airline passengers to board without going through security – it's inconsistent and unsafe."

Another commenter said that it shouldn't be as easy to purchase a gun online or at a gun show as it is to purchase a pair of shoes. Other commenters stated that our current reality is one in which firearms can be too easily acquired without background checks, notably through online platforms and at gun shows, and that the loophole that allows legal purchase of firearms at gun shows is a tragedy. A licensee commented with the following example from his 20 years of selling firearms: "[t]here are 100s of guns sold at every gun show with no background check whatsoever. I see the same dealers at every show with tables full of guns selling to anyone with cash. I have had people who were denied in the NICS background check [I had conducted,] only to see them walk out with a gun. I beg of you to change the law to where EVERYONE at gun shows has to do background checks."

Some commenters believed the rule presented a balanced approach. One commenter stated that closing the gun show loophole is a "common-sense measure" and doesn't infringe on the rights of responsible gun owners; rather, it ensures that background checks are conducted for all firearm purchases, regardless of where they take place. Additionally, a commenter said that the "proposal laid out does not appear overly cumbersome for currently licensed dealers or citizens looking to liquidate guns from their personal collection" and that "[c]losing the 'gun show loophole' and requiring a record of firearms sold limits the possibility of nefarious characters obtaining weapons while increasing and promoting responsible gun ownership." Another commenter agreed, describing the rule as a modest, common-sense measure to close some of the huge loopholes that buyers and sellers use to get around our necessary and otherwise effective system of background checks.

Another commenter, while supporting this aspect of the rule, also recommended that ATF provide popular online marketplaces, such as Armslist and GunBroker, with materials and guidance once the rule is finalized to ensure their users understand their obligations to obtain federal firearms licenses and conduct background checks before dealing in firearms.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that, as a result of this rule, there will be greater compliance with the law and more individuals who engage in the business of dealing in firearms at gun shows and online will become licensed under the GCA and therefore run background checks. ATF has updated its guidance in light of the BSCA and intends to further update the guidance to ensure that persons who operate at gun shows and online understand the relevant licensing obligations. *See* Section II.C of this preamble. The Department also notes that the term "gun show loophole" is a misnomer in that there is no statutory exemption under the GCA for unlicensed persons to engage in the business of dealing in firearms at a gun show, or at any other venue. As this rule clarifies, all persons who engage in the business of dealing in firearms must be licensed (and, once licensed, conduct background checks), regardless of location.

9. Reduces Firearms Trafficking

Comments Received

Some commenters thought the proposed rule could have a positive impact on reducing illegal firearms trafficking. One commenter said that firearm transfers must be regulated to prevent criminals from obtaining weapons and unscrupulous arms dealers

from trafficking weapons that fuel violence here and in Mexico. Another commenter thought the rule would cause a reduction in trafficking because gun traffickers are "masquerading as hobbyists or collectors." Other commenters stated that firearm rules or legislation may be very different between neighboring States, thus enabling trafficking. For example, one commenter, relying on a news story, stated that, "[b]ecause Massachusetts has universal background checks and Maine does not, Maine is a top 'source state' for crime guns in Massachusetts" and that "[c]riminals come to Maine to get the guns in private sales that they cannot get in Massachusetts or in other states with universal background checks." Another commenter stated that creating additional regulations on how firearms are sold will reduce the number of firearms that are trafficked and that the rule will decrease the number of guns trafficked between State lines. Commenters who participated in one of the form letter campaigns stated that guns purchased in unlicensed sales often end up trafficked across State lines, recovered at crime scenes in major cities, and used against police officers, which contributes to the gun violence epidemic plaguing our country. Such commenters also added that guns sold without background checks—both online and at gun shows—are a huge source for gun traffickers and people trying to avoid such checks.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will help reduce firearms trafficking. Many ATF criminal gun trafficking investigations reveal that guns used in crimes involve close-to-retail diversions of guns from legal firearms commerce into the hands of criminals, including straw purchases from FFLs, trafficking by FFLs, and illegal transfers by unlicensed

sellers.[120] As more persons become licensed as a result of the BSCA's amendments to the meaning of "engaged in the business," the multiple sales forms, out-of-business records, demand letter records, theft and loss reports, and trace responses provided to ATF by those dealers during criminal investigations will provide law enforcement with additional crucial crime gun intelligence. Law enforcement can use this information to better target limited resources to pursue illicit firearms traffickers nationally and internationally.[121]

10. Closes Liquidation Loophole for Former Licensees

Comments Received

Some commenters supported the proposed rule's clarification as to how the GCA applies to firearm sales and former dealers. For example, one commenter stated that dealers who have lost their licenses should never be allowed to sell guns again. Similarly, another commenter said that they support the rule because it "goes a step beyond [previous liquidation provisions] and does not allow any dealers who had their licenses revoked to sell, trade, or distribute firearms to the public."

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will reduce the number of firearms in the business inventory of a former licensee that are sold improperly, *i.e.*, without background checks and associated recordkeeping. However, the Department is not adopting the suggestion to bar former

[120] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 41 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

[121] *See* 18 U.S.C. 923(g)(3)–(7); ATF Form 3310.4 (Dec. 2021) (multiple handgun sales); ATF Form 3310.11 (Oct. 2020) (theft-loss report); ATF Form 3310.12 (Feb. 2024) (multiple sales of certain rifles).

dealers from ever selling guns again. Rather, former dealers are prohibited from engaging in the business of dealing in firearms, unless they once again become licensed.

11. Establishes Better Standards for Who Should Become Licensed

Comments Received

Several commenters appreciated the transparency established by the proposed rule. For example, one commenter stated, "I strongly support this proposed regulation because it sets a clear, common-sense standard for when gun sellers must become licensed dealers and run background checks" and builds on the BSCA passed by Congress. Multiple commenters and those associated with certain form letters said that they believe that anyone offering guns for sale online or at a gun show is trying to make a profit and should therefore be licensed, adding that they supported the rule's clarifying provisions. One group of parents whose children were victims of a mass shooting stated that they recognized that "the intent of the proposed rule is not to be punitive." They added, "[w]e support ATF maintaining an evaluation of the totality of the circumstances when determining if one is 'engaged in the business' rather than establishing a minimum standard of how many firearms bought or sold constitutes a licensure." Other commenters supported the clarifying provisions because they do more to ensure that sellers engaged in the business are treated alike. For example, one commenter stated that it "simply makes no sense for some gun dealers/sellers to be exempt from the same standards that apply to licensed dealers."

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule will provide needed clarity to persons who are unsure whether they

must become licensed under the GCA based on their firearms purchase and resale activities. Although this rule does not set forth a presumption that any person offering guns for sale online or at a gun show is engaged in the business, it does set forth several actions that give rise to a presumption that persons engaging in those activities, including online or at gun shows, are engaged in the business.

12. Consistent with Second Amendment Rights

Comments Received

Many supporters recognized that the proposal did not conflict with an individual's Second Amendment rights. One commenter stated that the rule is an important clarification in how gun laws are enforced in the United States, and it does not infringe upon the rights of citizens to "keep and bear arms" because "[a]nyone wanting to transfer a firearm can still do so under this rule by using an existing federally-licensed firearms dealer." In another commenter's opinion, the "right to bear arms is still alive and well even with reasonable rules set in place." Another commenter stated that gun advocates will argue that taking away these loopholes endangers their Second Amendment rights and that this is a false argument. This commenter added that, "[a]ny American citizen who wants to purchase a firearm online for self-protection or hunting and who has a clean mental health and criminal record has nothing to fear from common sense restrictions to online gun sales." Other commenters stated that this rule will make all citizens of the United States safer without disrupting or infringing upon Second Amendment rights.

Many commenters thought that firearm ownership comes with certain responsibilities and that this rule helps ensure that those who are not able to be responsible are less able to get firearms. Several commenters stated that the rule would

not limit Second Amendment rights but would increase safety. For example, one commenter stated that the proposed rule "in no way infringes on our rights for gun ownership but instead makes it safer for all of us to own and purchase guns responsibly." Another commenter stated, "[g]un ownership is a protected right but it is also a privilege reserved for those who can handle the responsibility." Other firearm owners commented that they are firm believers in their Second Amendment rights and feel strongly that those rights were conferred on individuals with responsible gun ownership in mind, and that they grew up being taught respect for guns.

Department Response

The Department agrees that this rule is fully consistent with the Second Amendment. This rule implements the provisions of the GCA, as amended by the BSCA, that require persons who are engaged in the business of dealing in firearms to be licensed. The Supreme Court has emphasized that its recent Second Amendment opinions "should not be taken to cast doubt on laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008); *see also Bruen v. N.Y. State Rifle & Pistol Ass'n*, 597 U.S. 1, 80–81 (2022) (Kavanaugh, J., concurring, joined by Roberts, C.J.) (same). *See* Section IV.B.8.c of this preamble for more discussion on this topic.

B. Issues Raised in Opposition to the Rule

As noted, nearly 99,000 commenters expressed opposition to the NPRM, including through form letters submitted as part of mass mail campaigns. ATF received comments from a variety of interested parties, including FFL retailers and manufacturers; legal organizations that represent licensees; firearm sporting organizations; gun owner

and gun collector organizations; more than half of States' attorneys general; Members of Congress;[122] firearm owners; active-duty military members and veterans; various firearm advocacy organizations; gun enthusiasts; and people with law enforcement backgrounds. As discussed below, numerous commenters raised various concerns about the Department's proposed amendments to ATF regulations. The topics included constitutional and statutory authority concerns, issues with the clarity and effect of the proposed definitions, presumptions, changes to procedures upon discontinuation of business, and concerns about the public safety goals of the Department in promulgating this rule.

1. Lack of Clarity

Comments Received

Many commenters opposed the rule on the grounds that it was vague or lacked clarity. Most of these commenters made statements to that effect without providing an explanation or examples. Some explained that they found the entire rule to be confusing, stating, "[t]he language and grammar of the entire preamble is intentionally misleading and confusing unless the reader is an attorney," "the regulations are exceedingly confusing to me, and I consider myself to be a learned man," and "this rule is so vague that people trying to be right will never know exactly what would make them need to be a dealer."

[122] ATF received two letters from Members of the United States House of Representatives in opposition to the rule, one dated October 12, 2023, with four signatories, and another received on December 7, 2023, with nine signatories. ATF received two letters in opposition from Members of the United States Senate, one dated September 21, 2023, with seven signatories, and one received December 7, 2023, with two signatories.

Some commenters, however, were more specific. Some of these commenters gave examples of particular parts of the rule they found vague, for example: "the proposed definitions are replete with the use of the term 'may' with respect to being engaged in the business as a dealer in firearms"; the rule "leaves the interpretation of 'occasional' subjective in nature"; the word "repetitively" used in the fourth EIB presumption is ambiguous and could be interpreted as "selling any number of firearms that is more than one"; "it states 'even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license.' No examples are provided"; the rule "creates confusion by attempting to clarify the term 'dealer' and how it applies to auctioneers"; and the presumption that a person is a dealer when that person "'sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrate a willingness and ability to purchase and sell additional firearms' is vague and would likely include even harmless banter between buyer and seller of a single firearm regarding additional purchases these individuals with to make some time in the future." One commenter argued that, "[t]he apparent fines and jail time are draconian relative to the vagueness of the application of the proposed rule." At least one commenter asked that the Department qualify "repetitively" with a time limit so that a firearms owner who is likely to sell a firearm more than once in their lifetime or even over a five-year period would not be inadvertently captured under the presumptions. And, at least one commenter took the position that "of course, repetition means more than once."

Some other commenters focused on the impacts of the provisions they stated were vague. One commenter said it appears that the "intent of this law is to force all sales

through an FFL as you otherwise are never sure the sale is lawful." A couple of commenters mentioned that "four times in the proposed rule the ATF provide[d] a list of 'rebuttable presumption[s]' or other factors and then conclude[d] by noting that the list is 'not exhaustive'" and that the proposed rule is "unlikely" to cover selling one's gun to an immediate family member—but leaves open the possibility that ATF could change its mind. "This makes compliance both difficult and inconsistent," one of these commenters added. "When definitions are vague in this manner, it leaves far too much opportunity for unlawful or unjust 'interpretation' or inconsistent implementation and enforcement," they concluded. The commenter further explained that the proposed rule's lack of clarity "places citizens who wish to abide by laws . . . in the unreasonable position of having their lawfulness in a gray area. In this way, an unelected official of ATF seems to have discretion to arrest persons, seize property, or take other 'enforcement actions' somewhat arbitrarily. Additionally, even if courts later overturn that ATF officer's decision, the hardship faced by the law[-]abiding citizens due to those circumstances (lost wages, attorney fees, reputational damage, emotional stress and trauma, etc.) are unreasonable."

Other commenters were concerned about what they described as the ambiguity of the statutory definitions, which ATF proposed to include verbatim in the regulation. One commenter stated, "[t]he new definitions, such as 'predominantly earn a profit' and 'terrorism,' may lead to differing interpretations and legal challenges." Another stated, "[t]he proposed rule is riddled with ambiguous and imprecise terms such as 'predominantly earn a profit' and 'principal objective of livelihood and profit.' This lack of clarity is unacceptable and can lead to arbitrary enforcement and interpretation, jeopardizing the rights of law-abiding citizens."

One commenter suggested that additional education will be necessary because the rule is hard to understand. "While I appreciate the intention to assist individuals in understanding when they are required to have a license to deal in firearms, the proposed changes, as they currently stand, create more questions than answers. The need for comprehensive education and outreach efforts to inform the public about these changes is evident."

Department Response

The Department disagrees that the rule is vague or lacks clarity. The rule implements the BSCA by setting forth specific conduct that is presumed to be "engag[ing] in the business" of dealing in firearms or acting with a predominant intent to earn a profit under the GCA. This rule provides persons who may be unclear how the statute applies to them with greater clarity as to what conduct implicates the statute, even though the rule does not purport to include every possible scenario. Many thousands of commenters stated that they believe this rulemaking provides much needed clarity to help ensure that persons who are prohibited from receiving or possessing firearms do not receive them.

The Department acknowledges commenters' concerns that the presumptions are not exhaustive of all of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms or has a predominant intent to earn a profit. However, there are numerous and various fact patterns that could fall within the statutory definition of being "engaged in the business" of dealing in firearms under 18 U.S.C. 921(a)(21)(C). This rule cannot possibly describe every potential scenario. It is important to note the presumptions are designed to improve

clarity and consistency, though, as presumptions, they are not conclusive findings and may be rebutted. The conduct that presumptively falls within the definition of "engaged in the business" represents common fact patterns that the Department has seen during numerous criminal investigations, regulatory enforcement actions, and criminal prosecutions, and which the Federal courts have recognized as strong indicators of engaging in the business of dealing in firearms even prior to the BSCA's expanded definition. In other words, these presumptions represent situations that have been observed and tested repeatedly over decades as conduct that is indicative of whether a person is engaged in the business or has a predominant intent to earn pecuniary gain from the sale or disposition of firearms. The Department therefore disagrees that the rule, which provides additional clarification about what the statute requires, is vague or will result in inconsistent or unfair implementation and enforcement.

The Department also disagrees that the rule is confusing or overly complex. The Department acknowledges that the preamble to the proposed rule was long and included significant discussions and legal case citations in support of the Department's proposed regulatory changes. However, the rule changes the regulatory definition of what it means to be "engaged in the business" as a dealer in firearms to match the statutory definition as amended by the BSCA and provides additional detail to aid persons in understanding what conduct is likely to meet that definition. This includes addressing particular contexts, such as auctioneers, and licensees who cease to be licensed. The rule does this by defining certain terms and describing specific, identifiable conduct in specific rebuttable presumptions. These definitions are based on statutory language, standard dictionary definitions, and Federal court opinions.

Based on concerns identified in the public comments, this final rule has further refined some definitions and presumptions to help collectors and hobbyists better understand when they are enhancing or liquidating a personal collection without the need for a license. For example, in response to one of the specific comments on the first EIB presumption, the Department has added a parenthetical after "represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms" to explain that it means "(*i.e.*, to be a source of additional firearms for resale)." This presumption, like the others, is based on ATF's criminal and regulatory enforcement experience and the case law cited in both the proposed rule and this final rule.

The Department does not agree with commenters that the rule's use of the term "may" in the regulatory definition of "engaged in the business" does not provide firearms sellers with sufficient clarity as to who is required to be licensed. While the presumptions in the rule are intended to provide clarity to persons who resell firearms, the Department cannot establish bright-line rules that address every conceivable scenario. For example, while the regulatory text states that "[s]elling large numbers of firearms . . . may be highly indicative of business activity," that will not always be the case, depending on the circumstances. This is why the regulatory text uses the word "may" at times and expressly states that activities set forth in the rebuttable presumptions are not exhaustive of the evidence or conduct that may be considered in determining whether a person is engaged in the business of dealing in firearms or in determining the more limited question of whether a person has the intent to predominantly earn a profit through the repetitive purchase and resale of firearms.

The Department does not agree with commenters that the undefined terms in the rule are vague. In the absence of specific definitions, readers should use the ordinary meaning of these statutory terms and other words in the regulatory text. This includes the definition of the term "occasional," which means "infrequent," or "of irregular occurrence,"[123] and the term "repetitively" as it applies to a person engaged in the business as a dealer, which means that a person intends to or actually does purchase and resell firearms again. With regard to the comment that the term "repetitive" should be limited to a period of time, again, this term, like the term "occasional," should be read consistently with its ordinary meaning.[124] Consistent with that ordinary meaning, a person is less likely to be understood as "repetitively" selling firearms if they do so twice over five years than if they do so several times over a short period. With regard to statutory terms, such as "to predominantly earn a profit" and "terrorism," those definitions were added to the GCA by the BSCA. The Department is now adding them into ATF regulations so that the regulatory text conforms to the statute.

The Department disagrees that no examples were provided in the proposed rule to explain the statement, "even a single firearm transaction or offer to engage in a transaction, when combined with other evidence, (*e.g.*, where a person represents to others a willingness to acquire more firearms for resale or offers more firearms for sale) may require a license." 88 FR at 62021. That regulatory text itself included an example: "(*e.g.*, where a person represents to others a willingness to acquire more firearms for

[123] *See Occasional*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/occasional (last visited Feb. 29, 2024) (defining "occasional" in "American English").
[124] *See, e.g.*, *Repetitive*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repetitive (last visited Apr. 1, 2024) ("containing repetition"); *Repetition*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repetition (last visited Apr. 1, 2024) ("the act or instance of repeating or being repeated").

resale or offers more firearms for sale)." *Id.* This distinguishes a person engaged in the business of dealing in firearms from a person who makes only a single isolated firearm transaction without such other evidence, and who would not ordinarily require a license, as the case law demonstrates.[125] To further clarify this example, the Department has added the following clause to the regulatory text, "whereas, a single isolated firearm transaction without such evidence would not require a license." § 478.13(b).

The Department disagrees that ATF's enforcement of the rule would be arbitrary. The rule clarifies the meaning of statutory terms and identifies common scenarios under which persons are presumptively engaged in the business, allowing for uniform application and understanding.

The Department also disagrees that the rule creates confusion as to how the term "dealer" applies to auctioneers. As described in Section III.C of this preamble, the proposed and final regulatory text explains that firearms dealing may occur anywhere, including by online auction, and establishes by regulation ATF's longstanding interpretations that distinguish between estate-type and consignment-type auctions.

The Department agrees with commenters that undertaking additional outreach efforts would be beneficial to further explain the amendments made to the GCA by the BSCA and how this rule implements those changes. The Department plans to do so. As one example, in response to the BSCA, ATF already updated its guidance entitled, "*Do I*

[125] *See* footnote 72; *cf.* S. Rep. No. 98–583, at 8 (1984) (The statute does "not require that the sale or disposition of firearms be or be intended as, a principal source of income or a principal business activity. Nor does it apply to isolated sales, unless of course, such sales are part of a regular course of business with the principal objective of livelihood and profit.").

Need a License to Buy and Sell Firearms?"[126] and intends to further update the guidance to include additional details that conform with this final rule.

2. Does not Enhance Public Safety

Comments Received

Other commenters opposed the rule on the grounds that it will not enhance public safety. The majority of comments on this topic argued that criminals are the people putting public safety at risk, and that they are not going to abide by the BSCA and the proposed regulation or purchase firearms through FFLs. As a result, they stated, the proposed rule will do nothing to affect public safety, while imposing a burden on law-abiding citizens. One commenter stated, "[p]rivate firearm sales and transfers happen among law-abiding people and are not in any way part of the unreasonable public safety risk that gun prohibition advocates claim. Therefore, this rule does nothing to address the unlawful acts of the criminals that pose a true and actual threat to public safety." Another stated, "there is very little public safety i[f] this rule is enacted. The criminal element in society simply will ignore it, and the lawful gun owners will be greatly affected with the burden of complying with the rule. Time and effort[] and money will have to be expended by gun owners for no appreciable benefit." A third commenter stated there is no evidence to support a correlation with public safety, asserting, "[t]he proposed rule change lacks empirical evidence to substantiate its assumed benefit of improved public safety. Numerous studies, including those published in peer-reviewed journals [citing a journal article], have found that the correlation between gun control measures and reduction in gun violence is negligible. This suggests that the rule change is a reactive

[126] ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms*? (Aug. 2023), https://www.atf.gov/file/100871/download.

measure rather than a well-considered evidence-based policy." Another commenter said that, if ATF wants to do something to promote gun safety, it should be actively involved with industry experts to develop standards in education and safe ownership instead of issuing the rule.

Other commenters suggested that issuing the regulation will "only serve to create a black market in firearms sales, while doing nothing to actually stop crime," asked "how this helps with cartels and organized crime, when most of those people are already under a class that shouldn't have guns anyway (i.e. illegal)," and argued that the rule "will create criminals out of lawful gun owners, while dangerous criminals like drug dealers and gang members could not care less." They added that the rule will make the public less safe because law-abiding gun owners will face more hurdles while criminals will keep doing what they are doing. Another commenter stated that, "[o]n the whole[,] gun owners are more law abiding[,] not less. We purposely avoid breaking any law that may affect our ability to own firearms, even laws we may not agree with. So this affects a population that is less likely to be a problem and does nothing to discourage the criminal population."

Several commenters stated that criminals receive their firearms from sources other than FFLs. For example, one commenter said: "Federal studies have repeatedly found that persons imprisoned for firearm crimes get their firearms mostly through theft, the black market, or family members or friends." They stated, "less than one percent get guns at gun shows [citing a report]." Another commenter said that a study conducted by ATF, which reportedly concludes that less than 1 percent of guns used in crimes were acquired by other means (*i.e.*, through private sales), indicates that this rule would not be

effective in preventing criminals from obtaining firearms. And a couple of commenters stated that the source of danger comes from outside the country, asserting, for example, "This rule will not make anyone safer. America has enemies across the globe. Who will do everything they can to attack us. When [our] border is wide open, America is significantly less safe because our border is open. Guns that will come from across the border will not be known to the ATF. Close the border to truly secure our nation." Another commenter said the rule will only encourage more back-alley deals and the proliferation of unsafe, hand-made, and 3D-printed firearms to evade the regulatory provisions.

Department Response

The Department disagrees that this rule will not enhance public safety or lacks empirical evidence to support it. In enacting the BSCA, Congress determined that there were persons who were engaged in the business of dealing in firearms at wholesale or retail who should have been licensed under existing law.[127] Congress therefore amended the GCA to clarify that those persons must be licensed. This rule implements that amendment to the GCA. The result will be that more persons who are engaged in the business of dealing in firearms will become licensed, run NICS background checks, and maintain transaction records through which firearms involved in crime can be traced. *See* Section VI.A.2 of this preamble. One empirical indication of support for this anticipated increase is that after the original publication of the guidance, *Do I Need a License to Buy and Sell Firearms?*, ATF Publication 5310.2, in January 2016, there was a modest increase of approximately 567 license applications (based on Federal Firearms Licensing

[127] *See* footnotes 30 and 31, *supra*.

Center ("FFLC") records). In addition, around 242,000 commenters stated that they believe this rulemaking will increase public safety and provided data on that point. Additional empirical evidence that public safety will be enhanced includes the following:

More Background Checks: As explained previously, the amended regulations will increase the number of background checks performed because more dealers will become licensed and run background checks on their customers. With additional background checks being run by licensed dealers, more prohibited persons will be denied firearms, consistent with the plain language and intent of the GCA, as amended by the Brady Act and the BSCA. Since the inception of NICS in 1998, the FBI has denied at least 2,172,372 transfers due to background checks, and in 2022 alone, it denied 131,865.[128] From among the transfers denied in 2022, 60,470 potential transferees were convicted of a crime punishable by imprisonment for a term exceeding one year;[129] 12,867 were under indictment or information for such a crime; 8,851 were fugitives from justice; and 10,756 had been convicted of a misdemeanor crime of domestic violence.[130] These NICS denials prevented the receipt and possible misuse of a firearm by a prohibited person. Additionally, since the passage of the BSCA's provision on enhanced background checks for juveniles, 18 U.S.C. 922(t)(1)(C)(iii), the FBI has conducted more than 200,000 enhanced checks, resulting in at least 527 potentially dangerous juveniles being denied firearms as of the first week of January 2024.[131] And, as a result of the

[128] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 14, https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.
[129] *See* 18 U.S.C. 921(a)(20) (defining "crime punishable by imprisonment for a term exceeding one year").
[130] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 32, https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.
[131] Press Release, DOJ, *Justice Department Marks More Than 500 Illegal Firearm Purchases Stopped by New Enhanced Background Checks* (Jan. 5, 2024), https://www.justice.gov/opa/pr/justice-department-marks-more-500-illegal-firearm-purchases-stopped-new-enhanced-background.

NICS Denial Notification Act, codified at 18 U.S.C. 925B, these denials will be reported within 24 hours directly to State, local, and Tribal law enforcement authorities, which can then take appropriate action. Because more persons will become licensed under the BSCA and this rule, more enhanced juvenile checks will be conducted and more denials will be reported to State, local, and Tribal law enforcement, resulting in fewer firearms being transferred to prohibited persons and faster investigation of denials and recovery of transferred firearms as appropriate.

More Crime Gun Traces: With more licensed dealers, law enforcement will have increased ability to trace firearms involved in crime through required records, including out-of-business records. Between 2017 and 2021, law enforcement agencies nationally and internationally submitted a total of 1,922,577 crime guns to ATF for tracing, with 460,024 submitted in 2021. During that period, the number of traces increased each year, resulting in a 36 percent rise over the five years from 2017 to 2021.[132] ATF was able to determine the first retail purchaser in 77 percent of those requests, providing law enforcement with crucial leads and an increasing capability to solve gun crimes in their respective jurisdictions throughout the United States and abroad.[133]

In response to the comment alleging that few criminals (1 percent) acquire firearms at gun shows, the most recent ATF report on firearms commerce—the National Firearms Commerce and Trafficking Assessment, Volume Two, Part III—reveals that, between 2017 and 2021, 41,810 crime guns were traced to licensees at gun shows,

[132] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 1 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.
[133] *Id.* at 2.

reflecting a 19 percent increase during that time.[134] While the figure from 2021 represents only 3 percent of the total number of crime guns traced, "this figure does not represent the total percentage of recovered crime guns that were sold at a gun show during the study period as private citizens and unlicensed dealers sell firearms at gun show venues." ATF has no ability to trace crime guns to the numerous unlicensed dealers at gun shows, and therefore, "[n]ational data . . . [is] not available on unregulated firearms transfers at gun shows."[135] The low figure, therefore, does not suggest that few crime guns are sold at gun shows—to the contrary, it demonstrates law enforcement agencies' limited ability to trace crime guns that are purchased at those venues. As more unlicensed gun show dealers become licensed, law enforcement will be able to trace more firearms subsequently involved in crime that were sold at gun shows to help solve those crimes.

Better Crime Gun Intelligence: All licensed dealers are required to report multiple sales of handguns occurring within five consecutive business days, report thefts or losses of firearms from their inventory or collection, and respond to trace requests.[136] Certain dealers are required to report multiple sales of certain rifles to ATF occurring within five consecutive business days, and respond to demand letters with records that report transactions where there is a short "time-to-crime."[137] From this information, ATF

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[134] *Id.* at 14.
[135] *Id.*
[136] 18 U.S.C. 923(g)(3), (6), (7).
[137] 18 U.S.C. 923(g)(3)(a); ATF, *National Tracing Center: Demand Letter Program*, https://www.atf.gov/firearms/national-tracing-center (last reviewed Feb. 26, 2024) ("Demand Letter 2 is issued to FFLs who had 25 or more firearms traced to them the previous calendar year with a 'time-to-crime' of three years or less."); Report of Multiple Sale or Other Disposition of Certain Rifles, ATF Form 3310.12 (Feb. 2024), https://www.atf.gov/firearms/docs/form/report-multiple-sale-or-other-disposition-certain-rifles-atf-form-331012/download; Demand Letter 2 Program: Report of Firearms Transactions, ATF Form 5300.5 (Dec. 2021), https://www.atf.gov/firearms/docs/form/report-firearms-transactions-atf-form-53005/download.

is able to provide law enforcement agencies throughout the United States with key crime gun intelligence showing firearm trafficking patterns.[138] In addition to crucial intelligence provided directly to law enforcement in their respective jurisdictions, comprehensive data gathered from licensee sources was used to compile the *National Firearms Commerce and Trafficking Assessment*, *Volume II*, regarding the criminal use of firearms that have been diverted from lawful commerce. This assessment allows law enforcement to better focus their limited resources on dangerous criminals and enhances policymakers' ability to create strategies to better stem the flow of crime guns to their jurisdictions.[139] For example, stolen firearms play an indirect role in trafficking and diversion to the underground firearm markets used by prohibited persons, juveniles, and other individuals seeking to buy firearms without going through a background check. From 2017 to 2021, licensees reported being the victims of 3,103 larcenies, 2,154 burglaries, and 138 robberies.[140] This data was further broken down over time by license type, business premises type, State, quantity of firearms stolen, weapon type, caliber, time-to-crime, time-to-recovery, recovery location, and age and gender of ultimate possessor.[141] This information will help reduce thefts from licensees and, therefore,

[138] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part II: National Tracing Center Overview* 8–10 (Jan. 11, 2023), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-ii-ntc-overview/download.
[139] Press Release, DOJ, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment: Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), https://www.atf.gov/news/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and ("The comprehensive—and unprecedented—compilation of data in this report is intended to provide strategic insight to law enforcement, policymakers, and researchers as they work to reduce and prevent gun violence.").
[140] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part V: Firearm Thefts* 2 (Jan. 11, 2023), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download.
[141] *Id.* at 5–12.

reduce firearms trafficking.[142] ATF does not receive the same detailed information about thefts from non-licensee dealers who do not submit FFL Theft/Loss Reports (ATF Form 3310.11) to ATF, but ATF is aware that thefts from non-licensees constitute a significantly higher number of thefts and thus are a larger contributor to firearms trafficking.[143] Increasing the number of dealers who are licensed will help reduce firearms trafficking by providing more of this kind of detailed information as well.

The Department acknowledges that there are criminals who are currently engaged in the business of trafficking in firearms for profit who will not become licensed, notwithstanding the requirements in the GCA (as amended by the BSCA) and this rule. But the fact that some persons purposely violate Federal law is appropriately addressed through enforcement, and it is not a reason to refrain from providing further clarity to increase compliance among those dealing in firearms. The penalties for engaging in the business of dealing in firearms without a license have long been set forth in the GCA, and this rulemaking does not purport to change them. The illicit market in firearms already exists, and nothing in this rule furthers that market. By providing further clarity about who is required to become licensed, this rule will help law-abiding persons comply with

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[142] Press Release, DOJ, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment: Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), https://www.atf.gov/news/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and ("The Department of Justice is committed to using cutting-edge crime gun intelligence to reduce violent crime, and this first of its kind data set on emerging threats, specifically the epidemic of stolen firearms and the proliferation of machinegun conversion devices, will have real-world impact in safeguarding our communities.").

[143] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part V: Firearm Thefts* 2 (Jan. 11, 2023), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download ("[F]irearm thefts from private citizens greatly outnumber firearms stolen from FFLs. As reflected in Figure BRL-01, firearms stolen from private citizens accounted for most stolen crime guns known to LEAs. From 2017 to 2021, there were 1,074,022 firearms reported stolen. About 3% (34,339) were stolen in FFL thefts, 1% (13,145) were stolen in interstate shipments, and almost 96% (1,026,538) were stolen in thefts from private citizens.").

the law and will also help ATF in its ability to enforce the law. It will reduce the number of persons who are currently engaged in certain purchases and sales of firearms without a license so that their activities do not perpetuate firearms trafficking.

Moreover, as noted previously, prohibited persons continue to seek to purchase firearms through licensed dealers—there were over 130,000 attempts in 2022 alone. By helping sellers better understand when they must be licensed pursuant to the BSCA, and thus increasing the number of licensees, this rule will result in more prohibited persons being denied firearms at the point of sale before they can be used in a violent crime. And, to the extent criminals purchase firearms through licensed dealers, the firearms they use will be able to be traced through the dealers' transaction records when they are later found at a crime scene or otherwise linked to a violent crime. Unlicensed sellers are not required to run background checks or maintain transaction records through which crime guns can be traced. As to the proliferation of more hand-made and 3D-printed firearms, other rules address the licensing requirements for persons engaged in the business of manufacturing firearms.[144] Nonetheless, when dealers who become licensed under this rule accept hand-made, 3D-printed, and privately made firearms into inventory, they are already required to serialize and record such firearms for crime gun tracing purposes and run background checks on subsequent purchasers.[145]

3. Punishes Law-Abiding Citizens

Comments Received

[144] For more information on who must be licensed as a manufacturer, *see Definition of "Frame or Receiver" and Identification of Firearms*, 87 FR 24652 (Apr. 26, 2022).
[145] *See* 27 CFR 478.92(a)(2); 478.125(i).

Thousands of commenters stated that the proposed rule is an attack on the entire population of law-abiding firearm owners through unlawful infringement of their rights. To that end, many commenters claimed they will lose the ability to protect themselves and their families because they believe the proposed rule was designed to make it difficult for law-abiding Americans to acquire firearms.

Many commenters opined that they would be prevented—potentially criminally—from passing firearms to family, friends, or others when trading up, retiring from their gun collecting hobby, or otherwise wishing to purge firearms from their collections. Many commenters believed that a certain number of firearms sold, such as more than three per year, would make them a felon. One commenter was concerned with how the rule affects him as a WWII re-enactor when members seek to sell firearms to new members and stated that it would be difficult for this group to continue their hobby under the proposed rule without going through an FFL.

In that vein, many commenters stated that the proposed rule is threatening, puts law-abiding citizens in a burdensome defensive position of proving to an "over-zealous" Government that they are not required to be licensed as a firearms dealer, and could entrap them. Some opined that the goal of the proposed rule is to use complex and confusing language to criminalize the activities of countless average individuals who wish to sell or otherwise liquidate their firearms as they naturally gain in value over time, especially during periods of inflation. One commenter stated that "[t]his proposal is a transparent attempt to strong-arm Internet service providers, gun shows, technology platforms, and other facilitators to abandon any involvement in private gun sales with vague threats of 'administrative action' for non-compliance." Another commenter

suggested that the proposed rule was intended to "make every American gun owner live in fear of buying or selling a gun at any point in their lives."

A few commenters raised concerns that, if they inadvertently deal in firearms without a license, and are therefore determined to be in violation of the rule by ATF, they would not be able to then become a legal dealer. "One footnote in this proposed rule suggests the ATF might prevent a person from obtaining a license to even engage in future firearm transactions because they were presumed to have 'willfully engaged in the business of dealing in firearms without a license,'" a commenter said. "Therefore, the agency might warn that individual of their purportedly unlawful behavior," the commenter continued, and "[s]uch an individual, wishing to complete a future firearm transaction without ATF harassment, might submit an application to obtain a license to deal in firearms. But ATF's footnote suggests the law-abiding individual might be denied the license simply because their previous conduct was presumptively unlawful," they concluded.

Department Response

The Department disagrees with the assertions that this rule is intended to or will make felons of law-abiding citizens when they wish to pass firearms to family or friends, or to sell all or a part of a personal collection of firearms. This rule effectuates the BSCA and helps protect innocent and law-abiding citizens from violent crime. This rule does not place additional restrictions on law-abiding citizens who occasionally acquire or sell personal firearms to enhance a personal collection or for a hobby. Instead, the rule provides clarity to persons on when they are engaged in the business as a dealer in firearms with the predominant intent to profit. It articulates what it means to be engaged

in the business, as well as other relevant statutory terms, to identify those persons whose conduct requires that they obtain a license—as distinguished from persons who make occasional purchases and sales in private transactions not motivated predominantly by profit.

This rule does not prevent law-abiding persons from purchasing or possessing firearms, from selling inherited firearms, or from using their personal firearms for lawful purposes such as self-defense, historical re-enactments, or hunting. The rule includes a non-exhaustive list of conduct that does not support a presumption that a person is engaging in the business and that may also be used to rebut the presumptions. Additionally, this rule does not impose any new restrictions in the application process to become an FFL. Further, nothing in this rule imposes licensing requirements on Internet service providers, gun show promotors, or technology platforms that are operating in conformity with applicable legal requirements. And finally, this rule does not inhibit law-abiding citizens from acquiring firearms. In fact, this rule will likely increase the number of licensed dealers available to sell firearms to consumers. Nonetheless, a small percentage of unlicensed persons who are engaged in the business under the BSCA amendments, and therefore must become licensed to continue dealing in firearms, might choose to leave the firearm sales market rather than become licensed, for a variety of reasons. *See* Sections IV.D.5 and VI.A of this preamble for further discussion of this potential outcome.

In this rule, despite several commenters advocating for a strict numerical threshold, the Department did not establish a numerical threshold for what would constitute being "engaged in the business." Any number would be both overinclusive

and underinclusive. It would be overinclusive in that a collector who does not sell firearms to predominantly earn a profit might sell a significant number of firearms to liquidate a personal collection (and thus cross the numerical threshold), even though the GCA provides that sales to liquidate a personal collection are not made to predominantly earn a profit. *See* 18 U.S.C. 921(a)(22). And it would be underinclusive in that someone might devote time, attention, and labor to dealing in firearms with the intent to profit (and would thus qualify as being engaged in the business under the statute), but might not meet some hypothetical number of sales and thus elect not to get, or purposefully evade getting, a license. As stated above, the courts have indicated that a license may be required even when there is a single firearms transaction or offer to engage in a transaction where persons also hold themselves out as sources of additional weapons. *See* Section III.D of this preamble. At the same time, however, Congress specifically exempted from the definition of "engaged in the business" as a dealer in firearms "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms," 18 U.S.C. 921(a)(21)(C), so a person who makes multiple sales will not always be engaged in the business.

The Department disagrees with the commenters who said that persons who inadvertently deal without a license in violation of the rule would be "caught in a trap" of not being able to become a licensed dealer. Even if a person is presumed to be engaged in the business of dealing in firearms under one of the EIB presumptions in the rule, ATF would need to have evidence that the person "willfully" engaged in that business without a license to deny the application for license. *See* 18 U.S.C. 923(d)(1)(C). Consistent

with the way the courts have long interpreted this term in this administrative firearms licensing context, the term "willfully" means that the license applicant "knew of his legal obligation [to become licensed] and purposefully disregarded or was plainly indifferent to" that requirement. *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 497 (7th Cir. 2006) (quoting *Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980)).[146] So, only an applicant who purposefully disregarded or was plainly indifferent to the licensing requirement would be denied a license on those grounds.

The Department disagrees that WWII re-enactors will be unable to sell firearms to fellow hobbyists under this rule without going through a licensed dealer. While Federal law already generally prevents persons from selling firearms to a person in another State without going through a licensed dealer,[147] neither existing law nor this rule prevents persons residing in the same State from occasionally purchasing and reselling firearms to enhance their personal collections or for a hobby without going through a licensee. Nonetheless, to further address these concerns, the Department has amended the definition of "personal collection" in this rule to include, as an example, personal firearms that a person accumulates for "historical re-enactment."

4. Adverse Impact on Underserved and Minority Communities

Comments Received

Certain commenters opined that the proposed rule could somehow have an adverse effect on persons with limited economic means who would be forced to "choose

[146] *See also CEW Properties, Inc. v. ATF*, 979 F.3d 1271, 1273 (10th Cir. 2020); *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1077–78 (7th Cir. 2011) (quoting *Gonzales*, 441 F.3d at 497); *Armalite, Inc. v. Lambert*, 544 F.3d 644, 647–49 (6th Cir. 2008); *On Target Sporting Goods, Inc. v. Attorney General of U.S.*, 472 F.3d 572, 575 (8th Cir. 2007); *RSM, Inc. v. Herbert*, 466 F.3d 316, 321–22 (4th Cir. 2006); *Willingham Sports, Inc. v. ATF*, 415 F.3d 1274, 1277 (11th Cir. 2005); *Perri v. ATF*, 637 F.2d 1332, 1336 (9th Cir. 1981).

[147] *See* 18 U.S.C. 922(a)(5).

between living expenses and protecting themselves and love[d] ones." Comments included scenarios such as economically disadvantaged persons being unable to sell a personally owned firearm to make ends meet because of, for example, prohibitive costs and hurdles to becoming licensed; families needing to liquidate assets, including personally owned firearms, to care for loved ones, pay for food, rent, or other obligations; disadvantaged persons having to choose between selling a firearm at a loss or being prosecuted as an "illegal gun dealer"; and low-income individuals being financially unable to acquire a firearm to provide protection for themselves or families as a result of the rule. One commenter stated that the requirement for individuals to rebut presumptions in administrative or civil proceedings poses a considerable financial burden, particularly for those with lower incomes, and specifically persons of color.

Several commenters expressed concern that the proposed rule would unfairly target minority communities. Some commenters opined that the proposed rule is classist and racist: "only rich [White] people" can afford to legally obtain guns because licensed firearms dealers are disproportionately distributed in white neighborhoods; minority populations experience disproportionately higher rates of arrest versus non-minority populations; and minority communities will have the greatest struggle to obtain a firearm for protection where self-defense needs may be most acute. Another commenter opined that Black and brown communities, LGBTQI+ people, and transgender people will be disproportionately affected by the final rule. Others suggested that the FFL licensing costs should be reduced by this rule, suggesting a $10 limited FFL license for a personal collector.

Department Response

The Department disagrees that this rule will prevent persons with limited income from lawfully acquiring or liquidating firearms. Specifically, under this rule, a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms occasionally as bona fide gifts, to obtain more valuable, desirable, or useful firearms for the person's personal collection; occasionally to a licensee or to a family member for lawful purposes; to liquidate all or part of a personal collection; to liquidate firearms they have inherited; or to liquidate firearms pursuant to a court order. *See* 27 C.F.R. 478.13(e). With respect to the cost of a dealer license and the comment suggesting that ATF reduce the FFL licensing cost, this rule must effectuate the laws of Congress and that amount is set by 18 U.S.C. 923(a)(3)(B) ($200 for three years, and $90 renewal for three years). With respect to commenters' asserted limited access to licensed dealers in minority communities, neither the GCA nor this rule distinguishes between communities. All persons who engage in the business of dealing in firearms must be licensed at fixed business premises within a State, *see* 18 U.S.C. 923(d)(1)(E), and this rule implements the licensing requirements wherever that dealing may occur.

The Department further disagrees that this rule will disproportionately affect lower-income individuals or certain minority groups. This final rule implements the GCA, as amended by the BSCA, which regulates commerce in firearms. The GCA requires that all persons who meet the definition of engaged in the business of dealing in firearms must become licensed without regard to their socioeconomic status, where they live, or to which identity groups they belong. The GCA does not distinguish between minority groups and other groups, and its licensing provisions are not targeted at reducing

the number of locations where lower income residents can lawfully purchase firearms. And, according to several commenters, including a civil rights organization, minority communities are disproportionately hurt by gun violence, including hate crimes (often by prohibited persons who would not pass a background check), and this rule will help minority communities by reducing gun violence.

Under the GCA and this rule, a person who "makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of the person's personal collection of firearms" is not "engaged in the business" of dealing firearms. § 478.13(a). In addition, nothing in the GCA or this rule precludes a person from lawfully purchasing firearms for self-protection or other lawful personal use, or making isolated sales of such firearms without devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. A single or isolated sale of a firearm that generates pecuniary gain to help make ends meet, care for loved ones, or pay for food, rent or other obligations would not alone be sufficient to qualify as being engaged in the business; instead, there would need to be additional conduct indicative of firearms dealing within the meaning of the GCA. Similarly, persons who liquidate (without restocking) all or part of their personal collection are not considered to be engaged in the business and may use the proceeds for lawful purposes, including those mentioned above. However, a person could still be engaged in the business even when they are using proceeds to make ends meet, care for loved ones, or pay for food, rent, or other obligations if they were to engage in additional conduct that is indicative of firearms dealing within the meaning of the GCA.

5. More Important Priorities and Efficiencies

Comments Received

Many of the commenters opined that there are more important ways that ATF should address firearm violence and crime instead of promulgating the rule. Thousands of commenters suggested considering alternative solutions that address the root causes of gun violence, such as community-based violence prevention programs, mental health reform, or improved access to mental health services, including allocating money for such services. Others suggested implementing weapon safety courses in schools. Specifically, a commenter said, "[a]ccording to the government's own statistics [citing to the CDC website], the majority of gun deaths are due to suicides. And the next highest category of deaths by firearms is inner city peer on peer murders of young men[.]" If the Government wants to try to fix these sources of firearm-related deaths, the commenter added, it should look at the evidence and address the root causes.

Many commenters suggested increasing support for law enforcement agencies, such as funding and equipment, while many more suggested enforcing current laws, such as targeting stolen firearms or felons possessing firearms, instead of creating new laws and regulations. Others suggested targeting straw purchases, criminals who sell firearms to minors, unlawful Internet sales such as Glock switches, and individuals who lie on the ATF Form 4473.

Some suggested focusing enforcement efforts based on geography, such as focusing on the southern border to address firearm, drug, and human trafficking whereas others suggested focusing on gangs or criminals known to operate in certain cities or other areas and creating gang task forces. Along those lines, some suggested enforcing existing Federal law against prohibited persons possessing firearms in communities

where local officials downplay Federal prohibitions for political reasons. In addition to enforcing current laws, some suggested other measures, such as harsher prison sentences for violent criminals, eliminating "no bail" policies, constructing more prisons, and ending a "revolving door" justice system that they said fails to hold violent felons accountable.

Other commenters expressed concern about the firearm background check system. Some commenters suggested improving firearm background check response times for currently licensed FFLs before implementing a rule that would increase the number of licensees. Some suggested focusing on comprehensive background checks and closing legal loopholes that allow firearms to fall into the wrong hands.

Department Response

The Department acknowledges comments about treating mental health and drug addiction, securing schools and workplaces, improving records available to the NICS, properly funding law enforcement, and various other national policy issues, such as the root causes of gun violence, border control, gangs, drug and human trafficking, penal facilities and laws, and how State and local officials implement laws. The Department agrees that these are important issues; however, they are not addressed in the GCA or the BSCA's provisions relating to persons engaged in the business of dealing in firearms, and therefore are outside the scope of this rule.

To the extent that commenters raised issues within ATF's jurisdiction—such as by suggesting that ATF focus on firearms trafficking, felons possessing firearms, stolen firearms, targeting straw purchases, criminals who sell firearms to minors, unlawful Internet sales of weapons such as Glock switches, and individuals who lie on ATF Form

4473—the Department agrees that these are, and should be, among the Department's most important concerns. At their core, they are all related to keeping firearms out of the hands of prohibited persons and others who may commit crimes with firearms. In addition to ATF's other enforcement efforts, the Department considers this rulemaking necessary to implement the GCA and address those concerns.[148] Clarifying who qualifies as a dealer in firearms and must be licensed will not only increase the number of FFLs, but also provide ATF with a better ability to: (1) curb prohibited sales to minors, felons, and others; (2) better identify and target those engaging in straw purchases and firearms trafficking (which can indirectly aid in capturing people who engage in drug and human trafficking); and (3) identify unlawful Internet sales and false statements on ATF Forms 4473, among other benefits. These issues are precisely what this rule targets.

6. Concerns with Effect on ATF

Comments Received

A number of commenters expressed views that the proposed rule would cause such an increase in the number of dealer applicants and licensees that ATF would not have the resources to handle the corresponding increased workload. One commenter stated, "Legal sales of firearms by individuals take place every day over trading websites and gun shows, creating thousands of transactions; estimates in the proposed rule indicate as many as 300,000 individuals would need to obtain an FFL which would overburden the ATF and result in long delays and high expense for the government, likely much greater than the estimates." Another stated, "[t]he true cost is likely to be far greater

[148] Although these other matters may fall within the scope of ATF's authority, "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007).

when factoring in the ATF's expanded responsibilities, increased workload, and the potential need for additional personnel and resources to manage the influx of license applications and compliance checks. This could result in unforeseen financial and logistical challenges for both the ATF and the individuals seeking licenses." Another commenter stated that the NPRM would increase the number of inspections ATF would have to conduct, including just for one or two firearms sold.

In addition to costs to ATF and potential licensees, another commenter suggested that the proposed rule raises concerns relating to the NICS. By exponentially increasing the number of transactions requiring background checks, the proposal risks overburdening the NICS, leading to delays or even erroneous outcomes, they said, adding, "This rule would exacerbate existing problems, thereby undermining its effectiveness as a tool for ensuring public safety."

Other commenters suggested that all this extra cost and work would provide little benefit because nearly all of these current exchange activities are innocent and legal, having no criminal intent, the "mountains of applications [would be] for what will be temporary FFL licenses," and the increase would, ironically, "hinder" ATF's ability to solve crime. As one commenter stated, "After all, licensed dealers can directly order firearms from distributors or manufacturers, and the more licensed dealers, the harder it is to ensure all those dealers are complying with all applicable laws and regulations (fixed number of agents available for compliance inspections, more license holders, lower rate of inspections per license holder)." Although acknowledging that the licensing fee is set by statute, several of these commenters nonetheless suggested an increase in the fees to help ATF. The application fee for dealers in firearms is currently set by the GCA at $200

for the first three-year period, stated one of these commenters. They continued by comparing this to the amount people spend in State fees for hunting licenses, as well as the scope of ATF's work: "In the area of firearms alone ATF not only assists thousands of law enforcement agencies nationally and internationally in firearm tracing but also further contributes to public safety through permitting and monitoring with follow up compliance checks of 11 different types of [FFLs]. Your agency needs additional staff and funding support. I recommend increasing the FFL application fee to $600 to help facilitate carrying out your public safety mission. If an out of state person went on an elk hunting trip to Oregon, Wyoming, Montana, or Colorado they would be paying over $700 just for the license/tags!" (emphasis removed)

Department Response

In response to comments saying that ATF does not have resources necessary to process additional licenses and increasing workload, the Department acknowledges that the BSCA amended the GCA to broaden the scope of persons who are required to be licensed as dealers under the GCA. The Department anticipates that, soon after this final rule is published, there will be an initial influx of applicants, which will then level off as licenses are processed and issued. The Department will reallocate resources as necessary to handle the estimated initial increase in the number of license applicants and anticipates being able to do so without taking away from other enforcement priorities.

The Department acknowledges commenters' desire to increase dealer license fees; however, those fees are set by statute, not by regulation. *See* 18 U.S.C. 923(a)(3). As such, those comments are beyond the scope of this rule.

7. Concerns with the Comment Process

Comments Received

One commenter stated that ATF required all commenters to include their name and address to comment and added that this requirement violates the First Amendment, adding that courts have consistently held that restrictions on anonymous speech are subject to "exacting scrutiny." They also stated that asking for commenter identity "severely limit[s] both the degree and amount of public participation." The commenter further stated that this "is predictably likely to chill the gun owning public from weighing in and exercising their right to participate." Finally, the commenter pointed out that many government agencies accept anonymous comments in identical circumstances and that the Administrative Procedure Act ("APA") does not require agencies to authenticate comments. As a result, the commenter requested that ATF re-open the comment period. At least one commenter who submitted a comment later in the comment period expressed skepticism about the large number of comments already posted in favor of the rule and thought they could have been produced by automated bots. Further, at least two commenters were under the impression that ATF refused to accept boxes of petitions submitted by a firearms advocacy organization.

Department Response

The Department disagrees that ATF's request for self-identification in its instructions "severely limit[ed] the degree and amount of public participation," or discouraged the public from commenting, as evidenced by the thousands of electronic comments that ATF received that were either submitted anonymously or under an obvious pseudonym. Moreover, among the tens of thousands of submitted comments opposing the rule were many comments in which commenters expressly declared that

they would not comply with any regulation or simply made disparaging or profane statements about the proposed rule, DOJ, or ATF, which undermines the comment's suggestion that commenters who have a negative view of ATF were deterred from submitting comments. ATF accepted, posted, and considered the anonymous and pseudonymous comments and those with negative views.

The commenter's statement that restrictions on anonymous speech are subject to "exacting scrutiny" under the First Amendment is irrelevant here because ATF did not restrict anonymous speech. Rather, ATF required commenters to include their first and last name and contact information when submitting comments, and noted that "ATF may not consider, or respond to, comments that do not meet these requirements." 88 FR at 62019. Thus, individuals could submit anonymous comments at will, but ATF indicated that it might not respond. ATF is not constitutionally required to respond to all comments, as "[n]othing in the First Amendment or in [the Supreme Court's] case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984). Nonetheless, ATF did consider the submitted comments, anonymous or not, and is responding in this preamble to the issues raised, even though not to every individual comment.

The NPRM instructions under "Public Participation," requiring that commenters include their first and last name and contact information (88 FR at 62019), were for mail-in comments. ATF generally requires that persons provide such information on mailed comments in case of illegible handwriting in the comment or in case the agency would like to follow up on a comment to gain further information or perspective from the

commenter. In addition, ATF also generally requests such information on any comment submitted by electronic means or mail for the latter reason. Commenters are encouraged to include such information when submitting an electronic comment; however, the NPRM made clear that if commenters were submitting via the Federal eRulemaking portal, they should follow instructions on the portal. 88 FR at 61993, 62019. On the Federal eRulemaking portal, the Department permits individuals to submit comments anonymously or even use aliases to mask their identity.

The significant majority of comments were submitted through the eRulemaking portal and were not required to include identifying information. As discussed above, thousands of commenters submitted electronic form letters opposing the rule, and those commenters, though they could have submitted anonymously, typically provided a name as part of those mass-mail campaigns. Accordingly, the Department disagrees that commenters opposing the rule were discouraged from participating and also disagrees with the suggestion that ATF should re-open the comment period.

Additionally, the developers of the Federal eRulemaking portal have in place measures to prevent comments from automated bots[149] and did not inform ATF that there were any system irregularities during the comment period.

And finally, the commenters who believed that ATF denied acceptance of boxes of petitions were mistaken. ATF received, accepted, scanned, posted, and considered the petitions from the firearms advocacy organization on behalf of their constituency, which were timely mailed before the close of the comment period in accordance with the NPRM

[149] According to regulations.gov, the system employs reCAPTCHA "to support the integrity of the rulemaking process and manage the role of software-generated comments." *See Frequently Asked Questions*, Regulations.gov, https://www.regulations.gov/faq (last visited Mar. 7, 2024).

instructions. Those petitions, which expressed objections to the proposed rule, totaled over 17,000 comments and were processed and considered.

8. Constitutional Concerns

a. Violates the Ex Post Facto Clause

Comments Received

A few commenters stated that the NPRM directly violates clause 3 of Article I, Section 9, of the United States Constitution, which prohibits ex post facto laws. These commenters' opposition comes from their belief that, once the final rule goes into effect, sales of firearms that are currently lawful will no longer be legal, and that the new prohibition would constitute an ex post facto law. The commenters who provided reasons for their assertion that this rule constitutes an ex post facto law primarily focused on their belief that the rule would be an "infringement on firearms ownership and property rights" and would create a backdoor firearms registry, that the rule is "criminalizing and restricting transactions and expanding the scope of scrutiny" of the "engaged in the business" as a dealer definition to "those who the original law had not intended," and that the rule is an attempt to tax and punish Americans that have not committed a crime. One commenter stated that the EIB presumption that applies when a person repetitively sells firearms of the same or similar kind or type "reads like a trap ready to spring on an unsuspecting collector who[se conduct] would previously be perfectly legal" if, for example, they had exchanged a bolt-action Mosin-Nagant rifle in 7.62x54r for a Star Model B pistol in 0x18. According to the commenter, "the concern here is taking an activity which was entirely acceptable prior to this rule, then moving the goalposts to make it illegal. It is concerning that this would appear to be an ex-post facto

change." Another commenter asked whether it was legal "to pass a law in 2022, then redefine what that law says?"

Department Response

The Department disagrees that the proposed rule violates the Ex Post Facto Clause. As an initial matter, the rule does not itself impose any new liability. Rather, the rule implements the BSCA, which amended the GCA, a statute passed by Congress. A law "violates the Ex Post Facto Clause if it applies to events occurring before its enactment and alters the definition of criminal conduct or increases the punishment for a crime." *United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004) (citing *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). But a law does not violate the Ex Post Facto Clause just because it applies to conduct that "began prior to, but continued after" its effective date. *United States v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994) (internal quotation marks omitted). For example, in the context of firearm possession, courts have consistently recognized that regulating the continued or future possession of a firearm that was acquired before the regulation took effect does not implicate the Ex Post Facto Clause because such a regulation does not criminalize past conduct. *See, e.g.*, *United States v. Pfeifer*, 371 F.3d 430, 436–37 (8th Cir. 2004); *United States v. Mitchell,* 209 F.3d 319, 322–23 (4th Cir. 2000); *United States v. Brady*, 26 F.3d 282, 290–91 (2d Cir. 1994); *United States v. Gillies*, 851 F.2d 492, 495–96 (1st Cir. 1988); *United States v. D'Angelo*, 819 F.2d 1062, 1065–66 (11th Cir. 1987); *cf. Samuels v. McCurdy*, 267 U.S. 188, 193 (1925) (rejecting Ex Post Facto Clause challenge to statute that prohibited the post-enactment possession of intoxicating liquor, even when the liquor was lawfully acquired before the statute's enactment).

Here, the rule does not impose any civil or criminal penalties and nothing in this rule requires that the statute be applied in a manner that violates the Ex Post Facto Clause. Nor does this rule regulate "firearm ownership" in a vacuum—it addresses dealing in firearms. This rule describes the proper application of the terms Congress used in various provisions of the GCA, as modified by the BSCA, to define what constitutes being engaged in the business as a dealer—and, thus, when persons must obtain a dealer's license before selling firearms. As stated above, this rule does not impose liability independent of the pre-existing requirements of those statutes.

The Department disagrees that this rule "redefine[s] what that law says." It simply explains and further clarifies the terms of the BSCA. The Department further disagrees that substantive rules that interpret an earlier statute—such as the 2022 changes the BSCA made to the GCA—through a congressional grant of legislative rulemaking authority are ex post facto laws merely because they interpret or clarify those laws. The proposed rule is exclusively prospective and does not penalize prior conduct; it is not an ex post facto law. *See Lynce,* 519 U.S. at 441. For these reasons, the Department disagrees with commenters' assertions that the rule violates the Ex Post Facto Clause.

b. Violates the First Amendment

Comments Received

A few commenters raised concerns that the proposed definitions violate the First Amendment. These commenters stated that, "One is not required by the Constitution to be vetted and permitted in order to claim protection under the First Amendment Right to Free Speech," which the commenters stated includes the right to "procure and sell firearms as a citizen." In addition, at least one commenter stated that the "promotion"

presumption under the definition of "predominantly earn a profit" violates the First Amendment by infringing on a private citizen's ability to promote their brand by conflating intent to sell with promotion of a brand. Another commenter stated that, when an agency can charge a crime against a person solely because they utter an offer to sell a firearm, ATF is enforcing thought crimes. The commenter added that this goes beyond existing law structures and does not meet the standard of calling "Fire!" in a theater.

Some commenters expressed First Amendment concerns specifically regarding the definition of terrorism included in the regulation. While some commenters voiced approval of including the definition of terrorism because they believe it allows the Government address potential threats effectively, other commenters objected, with some stating it is unnecessary and possibly infringes on freedom of speech and expression because the Government might inadvertently stifle protected political activism or dissent. They urged that the definition needs to be more precise to avoid unintended consequences and to ensure that legitimate firearms activities are not penalized.

Department Response

The Department disagrees with the commenters' First Amendment objections. As an initial matter, this rule does not regulate speech at all, nor is the right to "procure and sell firearms as a citizen" protected speech under the First Amendment. Although the Supreme Court has held that the First Amendment protects "expressive conduct," it is not implicated by the enforcement of a regulation of general application not targeted at expressive activity. *Arcara v. Cloud Books, Inc*., 478 U.S. 697, 702, 706–07 (1986). (First Amendment scrutiny "has no relevance to a statute directed at . . . non-expressive activity," but applies "where it was conduct with a significant expressive element that

drew the legal remedy in the first place."); *see also Wright v. City of St. Petersburg*, 833 F.3d 1291, 1298 (11th Cir. 2016) ("First Amendment scrutiny 'ha[d] no relevance to [a trespass ordinance] directed at imposing sanctions on nonexpressive activity'"); *cf. Talk of the Town v. Dep't of Fin. & Bus. Servs. ex rel. Las Vegas*, 343 F.3d 1063, 1069 (9th Cir. 2003) (section of Las Vegas Code barring consumption of alcohol in places that lack valid liquor licenses "in no way can be said to regulate conduct containing an element of protected expression"). Conduct may be expressive where "[a]n intent to convey a particularized message [is] present, and . . . the likelihood [is] great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). This final rule does not regulate expressive conduct of any kind, and the commenters have not offered any valid reason to believe that selling firearms constitutes expressive conduct. As such, the First Amendment is not implicated by this rule.

Even if certain aspects of procuring and selling a firearm could be considered expressive conduct, "a sufficiently important governmental interest in regulating the nonspeech element" of conduct that also includes an expressive element "can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Under an *O'Brien* analysis—

> a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Addressing these elements, first, "the Government may constitutionally regulate the sale and possession of firearms." *Wilson v. Lynch*, 835 F.3d 1083, 1096 (9th Cir. 2016). Second, courts have repeatedly held that public safety and preventing crime are not only substantial, but compelling, governmental interests. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020); *Worman v. Healey*, 922 F.3d 26, 39 (1st Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015); *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015). Third, "the Government's efforts to reduce gun violence" are not directed at any hypothetical expressive conduct and cannot be construed to be related to the suppression of free expression in any way. *Wilson*, 835 F.3d at 1096–97. Fourth, the regulation's definitions and rebuttable presumptions do not ban ownership, purchase, or sale of firearms, nor do they restrict purchases and sales for enhancement of personal firearms collections. The regulation merely clarifies that recurring sales or purchases for resale, with the predominant intent to earn a profit, constitute being engaged in the business as a dealer. It does not ban these sales; it just requires that dealers comply with existing statutory licensing requirements. Therefore, any burden is "incidental" and "minimal." *Id.* Because the regulation "satisfies each of the *O'Brien* conditions," it would "survive[] intermediate scrutiny." *Id.* at 1097 (finding ATF's Open Letter to Federal Firearms Licensees, informing them that they would have cause to deny a firearm sale as violating 18 U.S.C. 922(d)(3) if a purported purchaser presented their medical marijuana registry card, did not violate the First Amendment even if having the card was considered

expression). Thus, even if the *O'Brien* standard applies, the regulation does not violate the First Amendment.

Moreover, this rule does not establish that an individual will be charged with a crime "solely" because they "utter" an offer to sell a firearm. As noted above, the presumptions set forth in this rule do not apply to criminal proceedings. Further, the application of a rebuttable presumption based on a seller's speech does not restrict speech in any way—it means only that, in a proceeding to determine whether a seller of firearms is "engaged in the business" of dealing in firearms, the Department may be able to make an initial evidentiary showing based on the seller's speech, and the evidentiary burden then shifts to the seller. The Supreme Court has held that the First Amendment "does not prohibit the evidentiary use of speech to establish" a claim "or to prove motive or intent." *Wisconsin v. Mitchell,* 508 U.S. 476, 489 (1993). Consistent with this principle, courts have rejected First Amendment challenges to rebuttable presumptions that are triggered by speech evidence. *See Cook v. Gates*, 528 F.3d 42, 63–64 (1st Cir. 2008); *cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495–96 (1982) (rejecting claim that a village had unlawfully restricted speech through a drug paraphernalia licensing ordinance just because guidelines for enforcing the ordinance "treat[ed] the proximity of drug-related literature as indicium that paraphernalia are 'marketed for use with illegal cannabis or drugs'"). Ultimately, the subject of this final rule is a seller's conduct and not his speech, and the rule does not impose any burdens on speech.

To the extent commenters are alleging this rule impermissibly inhibits commercial speech, it does no such thing. Repetitively or continuously advertising the

sale of firearms can result in a person being presumed to be engaging in the business, but a presumption may be rebutted. At any rate, even if unrebutted, the implication of the presumption is simply that the person must have a license to deal in firearms—that person is not precluded from advertising the sale of firearms. Assuming the presumption does burden commercial speech, courts have routinely recognized that "[t]he Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562–63 (1980) (internal quotation marks omitted). If the content of the commercial speech is not illegal or misleading, the Government must first "assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went For It, Inc*., 515 U.S. 618, 624 (1995). As stated above, "the Government may constitutionally regulate the sale and possession of firearms," *Wilson*, 835 F.3d at 1096, and public safety is a compelling governmental interest. Requiring those who are engaged in the business of dealing in firearms to be licensed—and thus to keep records and conduct background checks on potential purchasers to deny transfers to those who are prohibited from possessing firearms—materially advances public safety. Moreover, this requirement is narrowly drawn because it pertains to only those "who devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." It does not apply to every sale.

The Department also disagrees that the rule's definition of "terrorism" is unnecessary or infringes upon protected speech. The definition mirrors the statutory definition of "terrorism" that Congress enacted and codified in 18 U.S.C. 921(a)(22) and (a)(23), with only a minor addition at the beginning to state the definitions to which it applies. It is also necessary to explain the congressionally enacted proviso that proof of profit shall not be required when a person engages in the regular and repetitive purchase and disposition of firearms in support of terrorism. The definition does not constitute a governmental restriction on speech or expressive conduct, and so it does not violate the First Amendment.

Again, it bears emphasizing that this statutory definition of "terrorism" existed in the definition of "principal objective of livelihood and profit" before the BSCA was passed, and still remains there verbatim. The BSCA added that same definition to the new "predominantly earn a profit" definition. This rule merely moves that definition within the regulations to be a standalone definition so that it applies to both the term "predominantly earn a profit" and "principal objective of livelihood and profit" (in the sections governing importers, manufacturers, and gunsmiths)—consistent with the statute—without repeating it in two places, and makes a slight edit at the beginning to state that it applies to both definitions. This rule does not further interpret or define that term, and comments in that regard are beyond the scope of the rule.

c. Violates the Second Amendment

Comments Received

Of those who objected to the NPRM, a majority argued that any changes to the definitions, or creating new requirements and rebuttable presumptions, are inconsistent

with the Second Amendment and are therefore unconstitutional. Commenters stated that the right to have—and thus purchase and sell—firearms dates back to the Founding and that requiring licenses for any aspect of firearm sales is an unconstitutional infringement of Second Amendment rights. Many commenters stated that the rule is "reclassifying all sales (even private) to require a 'licensed dealer' (FFL) . . . thusly preventing law abiding United States citizens from obtaining firearms. If a citizen cannot obtain a firearm, a citizen cannot keep or bear a firearm violating the Second Amendment," and similar statements. Some of these commenters stated that the rule violates the Second Amendment by creating universal background checks, making it difficult and costly for citizens to sell personal firearms, and that it deprives people of the inherent right to dispose of, trade, or do what they wish with their own property.

Some stated they understand the importance of balancing public safety and regulation of illegal firearms activity with firearm ownership, but expressed concerns that the correct balance point has not been determined yet or that the proposed regulation might "inadvertently classify individuals who engage in the lawful and occasional transfer of personal firearms to friends or family members as arms dealers," raising concerns about overreach and undue burden.

Several commenters tied these concerns to *District of Columbia v. Heller*, 554 U.S. 570 (2008), stating that expanding the definition of who is engaged in the business of dealing in firearms may criminalize law-abiding citizens engaging in their Second Amendment rights, which the commenters stated were "unequivocally affirm[ed]" by *Heller*. One commenter stated that the *Heller* decision "emphasized that any restrictions placed on the Second Amendment must be closely tailored to avoid unnecessary

infringement on individual rights. The proposed rule, by including casual sellers under the umbrella of those 'engaged in the business,' stretches this definition beyond its historical and legal boundaries. This is not a close tailoring of restrictions but an undue burden on average citizens who may occasionally sell firearms without falling under any standard commercial definition of a firearms dealer."

Many other commenters stated that the regulation violates *New York State Rifle & Pistol Ass'n, v. Bruen*, 597 U.S. 1 (2022), because, the commenters argued, there is no analogous historical law from either the Founding era—when the Second Amendment was ratified—or the Reconstruction period—when the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment's protections and rendered them applicable to the States—that defined a "dealer" in firearms or required background checks, dealer licensing, recordkeeping, or gun registration. Others stated that the regulation violates *Bruen* because, they stated, *Bruen* precludes the Government from using means-end scrutiny to justify its firearms laws. Accordingly, the commenters argued, the proposed rule's use of public safety as a basis for purportedly banning firearms from average citizens renders it unconstitutional under *Bruen*. These commenters further argued the proposed rule is unconstitutional under *Bruen* because it serves no public interest.

A few other commenters directly stated that the BSCA, GCA, and NFA all violate the Second Amendment. Some added that the ATF regulation is misinterpreting the BSCA, which did not intend to change the definition of "engaged in the business" or any other definition, and the proposed rule is thus an effort to work around the Second Amendment.

Department Response

The Department disagrees with commenters that the GCA, the BSCA amendments, or this rule implementing these statutes violate the Second Amendment. Those statutes and this final rule are consistent with the Supreme Court's Second Amendment decisions. In *Heller*, the Court emphasized that "the right secured by the Second Amendment is not unlimited" and "nothing in our opinion should be taken to cast doubt" on certain laws, including those "imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. The Court repeated the same statement in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010), and Justice Kavanaugh, joined by the Chief Justice, reiterated the point in his concurring opinion in *Bruen*, 597 U.S. at 81 (Kavanaugh, J.).

Those precedents confirm that this rule raises no constitutional concern under the Second Amendment. The rule addresses the commercial sale of firearms. This rule does not prevent individuals who are permitted to possess firearms under Federal law from possessing or acquiring firearms; individuals remain free to purchase firearms from an FFL or in a private sale from a non-licensee who is not engaged in the business of dealing in firearms. Nor does this rule require a dealer's license for all sales. By its terms, this rule applies only to those who "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." 18 U.S.C. 921(a)(21)(C). And because this rule does not mandate a license for all sales, it does not mandate a background check for all sales. Likewise, this rule does not prevent those who own firearms from lawfully selling, acquiring, or keeping this property. This rule does not prevent law-abiding

citizens from making occasional sales or purchases of firearms for the enhancement of a personal collection or for a hobby—it concerns only those "engaged in the business" of firearms dealing. Firearm owners would only need a license in the event that they are devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.

At least one circuit court has rejected a facial Second Amendment challenge to the licensing requirement in 18 U.S.C. 923(a) on the ground that it "imposes a mere condition or qualification. Though framed as a prohibition against unlicensed firearm dealing, the law is in fact a requirement that those who engage in the [business of selling] firearms obtain a license." *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). The licensing requirement, which is implemented by this rule, is "a crucial part of the federal firearm regulatory scheme." *Id*. at 168; *see also Focia*, 869 F.3d at 1286 (prohibiting transfers between unlicensed individuals in different states "does not operate to completely prohibit [the defendant] or anyone else, for that matter, from selling or buying firearms"; instead, it "merely" imposes "conditions and qualifications on the commercial sale of arms" (internal quotation marks omitted)); *United States v. Nowka*, No. 11-CR-00474, 2012 WL 2862061, at *6 (N.D. Ala. May 10, 2012) ("[Plaintiff's] right to buy or sell a firearm is not abridged. It is regulated."). This rule implements a definitional change that Congress made in the BSCA, which will expand the number of firearms sellers affected by the licensing requirement in 18 U.S.C. 923(a).

Additionally, the final rule is consistent with the Supreme Court's more recent decision in *Bruen*. That case clarified the standard for resolving Second Amendment

claims "[i]n keeping with *Heller*," 597 U.S. at 17, and the Court did not draw into question *Heller*'s explanation that regulations of commercial sales of firearms are presumptively lawful. *See id.* at 81 (Kavanaugh, J., concurring); *see also id.* at 79 (noting that the Second Amendment does not prohibit the imposition of objective "licensing requirements" commonly associated with firearms ownership); *id.* at 72 (Alito, J., concurring) (noting that nothing in that opinion decided anything about "the requirements that must be met to buy a gun"). Under *Bruen*, to establish a Second Amendment violation, a challenger must first show that the final rule implicates "the Second Amendment's plain text." *Id*. at 17 (majority opinion). Only if that threshold requirement is met is the Government then required to "demonstrate that the [final rule] is consistent with this Nation's historical tradition of firearm regulation." *Id.* Here, the final rule does not implicate the Second Amendment's "plain text," which addresses the right to "keep and bear Arms" and is silent as to the commercial sale of firearms. U.S. Const. amend. II. Both before and after *Bruen*, courts have agreed that the Second Amendment does not "protect a proprietor's right to sell firearms." *Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017); *see also United States v. Kazmende*, No. 22-CR-236, 2023 WL 3872209, at *5 (N.D. Ga. May 17, 2023) (rejecting a Second Amendment challenge to 18 U.S.C. 922(a)(1)'s prohibition on willfully engaging in the business of dealing in firearms without a license on the ground that the "Second Amendment . . . simply does not cover the *commercial* dealing in firearms."), *report and recommendation adopted*, 2023 WL 3867792 (N.D. Ga. June 7, 2023); *United States v. Flores*, 652 F. Supp. 3d. 796, 799–802 (S.D. Tex. 2023) (holding that "commercial firearm dealing is not covered by the Second Amendment's plain text"); *United States v.*

King, 646 F. Supp. 3d. 603, 607 (E.D. Pa. 2022) (holding that "the Second Amendment does not protect the *commercial* dealing of firearms"); *United States v. Tilotta*, 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022) (concluding that the plain text of the Second Amendment does not cover the commercial sale and transfer of firearms).

Even if, contrary to law, the scope of the Second Amendment's protection extended to commercial dealing in firearms, there is a robust historical tradition supporting the Government's authority to require licenses and inspection of firearms sellers. Where a regulation implicates the Second Amendment, the Government may justify it "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation," including, for example, by pointing to "a well-established and representative historical *analogue*." *Id.* at 24, 30. To be analogous, historical and modern firearms regulations need only be "relevantly similar"; a "historical *twin*" is not required. *Id.* at 29–30. In fact, from colonial times, State and local governments have routinely exercised their authority to regulate the sale of firearms, through licensing, inspection, and similar requirements.

For instance, the third U.S. Congress made it unlawful for a limited period "to export from the United States any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenades, gunpowder, sulpher, or saltpetre," Act of May 22, 1794, 1 Stat. 369, ch. 33, sec. 1 ("An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same"), demonstrating a clear understanding that the Constitution permitted regulation of firearms sellers. Further, as the en banc Ninth Circuit recounted in detail, as early as the 1600s, "colonial governments substantially controlled the firearms trade," including through "restrictions

on the commercial sale of firearms." *Teixeira*, 873 F.3d at 685 (further explaining, as examples, that "Connecticut banned the sale of firearms by its residents outside the colony," and Virginia law made it unlawful for any individual to travel more than three miles from a plantation with "arms or ammunition above and beyond what he would need for personal use").

Measures regulating firearms sellers, similar to the inspection and licensing regime of today, have been commonplace throughout history. To take one example, in 1805, Massachusetts required that all musket and pistol barrels manufactured in the State and offered for sale be "proved" (inspected and marked by designated individuals) upon payment of a fee, to ensure their safe condition, and Maine enacted similar requirements in 1821.[150] Further, multiple States, such as Massachusetts (1651, 1809), Connecticut (1775), New Jersey (1776), and New Hampshire (1820), required licenses or inspection to export or sell gunpowder (akin to modern ammunition).[151] *See also United States v. El Libertad*, --- F. Supp. 3d ---, No. 22-CR-644, 2023 WL 4378863, at *7 (S.D.N.Y. July 7,

[150] *See* 3 Laws of the Commonwealth of Massachusetts, from November 28, 1780, to February 28, 1807, at 259–61 (1807); 1 Laws of the State of Maine 546 (1830).

[151] *See* Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 126, Powder (1890) (1651 statute requiring license to export gunpowder); 2 General Laws of Massachusetts from the Adoption of the Constitution to February, 1822, at 198–200, ch. 52, An Act Providing for the Appointment of Inspectors, and Regulating the Manufactory of Gun-Powder, secs. 1, 8 (1823) (1809 statute providing for the appointment of an "inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder," and imposing penalties for any sale or export of gunpowder "before the same has been inspected and marked"); 15 The Public Records of the Colony of Connecticut, from May, 1775, to June, 1776, Inclusive 191, An Act for Encouraging the Manufactures of Salt Petre and Gun Powder (1890) (1775 Connecticut law establishing, among other things, that no gunpowder manufactured in the colony "shall be exported out" of the colony "without [an applicable] licence"); Acts of the General Assembly of the State of New-Jersey, at a Session Begun at Princeton on the 27th Day of August 1776, and Continued by Adjournments 6, ch. 6, An Act for the Inspection of Gun-Powder, sec. 1 (1877) (No person shall offer any gunpowder for sale "without being previously inspected and marked as is herein after directed."); Laws of the State of New Hampshire; With the Constitutions of the United States and of the State Prefixed 276–78, An Act to Provide for the Appointment of Inspectors and Regulating the Manufactory of Gunpowder, secs. 1, 8 (1830) (authorizing "inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder in this state" and imposing penalties for any sale or disposition of gunpowder "before the same has been inspected and marked").

2023) (finding that historical laws showed "expansive authority exercised by colonial and early state legislatures as well as early congresses over the transfer of firearms between individuals and across borders," including through "licensing requirements [and] registration requirements"). Similar licensing and taxation requirements for the sale of gunpowder and certain arms were enacted through the antebellum and Reconstruction eras.[152]

That modern laws regarding the commercial sale of firearms may not be identical to laws from the Founding era is not dispositive. There are many reasons other than constitutional limitations that historical regulations are not a "dead ringer" for modern regulations. *Bruen,* 597 U.S. at 30. For example, during the Founding era, guns in America were "produced laboriously, one at a time," Pamela Haag, *The Gunning of America* 9 (2016), and communities were "close-knit," where "[e]veryone knew everyone else," *Range v. Att'y Gen.*, 69 F.4th 96, 117 (3d Cir. 2023) (en banc) (Krause, J., dissenting) (quoting Stephanos Bibas, *The Machinery of Criminal Justice* 2 (2012)). That is substantially different from today, where guns may be mass-produced quickly and are widely available for purchase at ubiquitous retailers through modern technology and more plentiful and far-reaching channels of national and international commerce, where sellers are unlikely to know their customers. But from the Founding and before, the

[152] The Revised Charter and Ordinances of the City of Chicago: To Which are Added the Constitutions of the United States and State of Illinois 123–24, ch. 16, Regulating the Keeping and Conveying Gun Powder and Gun Cotton, secs. 1, 6 (1851) (1851 city law barring the sale of gunpowder "in any quantity" without government permission, and barring "retailer[s] of intoxicating liquors" and "intemperate person[s]" from such permits); The Charter and Ordinances of the City of Saint Paul, to August 1st, 1863, Inclusive 166, Gunpowder, ch. 21, sec. 1 (1863) (similar 1858 city law requiring permission to sell gunpowder,); Acts of the General Assembly of Alabama: Passed at the Session of 1874–75, at 41, An Act to Establish Revenue Laws for the State of Alabama, Act No. 1, sec. 102(27) (1875) (imposed $25 license fee on dealers of pistols and certain knives); Acts of the General Assembly of Alabama, Passed at the Session of 1878–9, at 436–37, Act of Feb. 13, 1879, Act No. 314, sec. 14 (authorized town to "license dealers in pistols, bowie-knives and dirk-knives").

principle remains the same. The Government has been allowed to—and has enacted measures to—regulate the commercial sale of firearms to prevent their sale to persons the Government deemed dangerous. Thus, assuming for the sake of argument that the regulation implicates Second Amendment rights, it would pass muster under *Bruen*.

In response to commenters stating that the Department should not use the *Heller* two-step process, the Department acknowledges that *Bruen* abrogated the "two-step" framework of *Heller*, as "one step too many," and rejected the application of means-end scrutiny at the second step. *Bruen*, 597 U.S. at 19. Although the Department believes this rule does promote public safety, the Department is not relying on this benefit in conducting the historical analysis required by *Bruen* (assuming again for the sake of argument that it applies).

Therefore, to the extent that commenters argued the rule or the underlying statute violates the Second Amendment, the Department disagrees for all of the reasons stated above.

d. Violates the Fourth or Fifth Amendment Right to Privacy

Comments Received

Several commenters claimed the proposed rule violates their right to privacy under the Fourth Amendment and the Fifth Amendment's Due Process Clause. These commenters believe that the proposed rule creates a de facto firearms registry by requiring that people who engage in recurring purchases and sales with the predominant intent to earn a profit must obtain a dealer's license. Other commenters stated that enforcement of the proposed rule would lead to a violation of their constitutional right to privacy by requiring them to be registered dealers subject to privacy-invading and

warrantless inspections without breaking a law—even for a single firearms transaction. They raised particular concerns in this regard for those who operate from home. And other commenters asserted a Fourth Amendment violation in regard to their property if the Government knows what firearms or how many weapons each individual owns. One commenter focused on the rule's inclusion of electronic marketplaces as a violation of privacy, stating that including online brokers, auctions, text messaging services, and similar electronic means of transacting purchases and sales would cause people to "forfeit their privacy to the ATF in these matters."

Department Response

The Department disagrees that the rule violates the Fourth Amendment or any constitutional right to privacy. Under both the statute and the proposed and final rules, there are no recordkeeping or background check requirements for personal firearms that are occasionally bought and sold as part of enhancing a personal collection, such as for sporting purposes. As to the recordkeeping and background check requirements for the licensees engaged in the business of dealing in firearms, those records are not maintained in the custody of the government but are retained by the licensee until they discontinue their business. *See* 18 U.S.C. 923(g)(4); 27 CFR 478.129. Moreover, even when these records are in ATF's possession after the licensee discontinues their business, due to statutory and permanent appropriations restrictions, they are not searchable by a transferee's name or any personal identification code. *See* 18 U.S.C. 926(a)[153];

[153] "No such rule or regulation prescribed after the date of the enactment of the Firearm Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation."

Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112–55, 125 Stat. 552, 609–10 (2011) ("That, hereafter, no funds made available by this or any other Act may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code . . ."). This rule does not create or modify requirements with respect to retaining and searching records.

The Department also does not agree that this rule will violate a constitutional right to privacy with regard to commenters' property. This rule does not require individuals to provide any information with regard to their possession of firearms. It applies only to those engaged in the business of dealing in firearms. "Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. 'An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.'" *Minnesota v. Carter*, 525 U.S. 83, 90 (1998) (quoting *New York v. Burger,* 482 U.S. 691, 700 (1987)). Moreover, every applicant for a license is made aware of ATF's right of entry into their premises and examination of their records, *see* 27 CFR 478.23; thus there can be no reasonable expectation of privacy in the information contained in those records. *Cf. United States v. Marchant*, 55 F.3d 509, 516 (10th Cir. 1995) (finding no reasonable expectation of privacy in the information contained in ATF Form 4473 and further noting that "Form 4473 did not advise Defendant that the information elicited was private, or that it would remain confidential"). Additionally, while the proposed rule in no way establishes a registry of firearms, and Congress has specifically prohibited such a registry, it is worth noting that the nearly century-old requirement for the actual registration of privately held firearms has never once been found to violate a Fourth Amendment right to privacy.

Some courts have recognized a privacy interest in avoiding disclosure of certain personal matters under the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Doe No. 1 v. Putnam County*, 344 F. Supp. 3d 518, 540 (S.D.N.Y. 2018). Even under these court decisions, however, "not all disclosures of private information will trigger constitutional protection." *Id.* (internal quotation marks omitted). In at least one circuit, the right to privacy in one's personal information under the Due Process Clauses is "limited [to a] set of factual circumstances involving one's personal financial or medical information." *Id.* "[T]he question is not whether individuals regard [particular] information about themselves as private, for they surely do, but whether the Constitution protects such information." *DM v. Louisa County Dep't of Human Services*, 194 F. Supp. 3d 504, 508–09 (W.D. Va. 2016) (internal quotation marks omitted) (finding no right to privacy with respect to the nature and location of an individual's counseling sessions). Basic information regarding firearms ownership or possession is of neither the medical nor financial variety, and no court has found this information to be constitutionally protected. *See Doe 1*, 344 F. Supp. 3d at 541 ("Disclosure of one's name, address, and status as a firearms license [holder] is not one of the 'very limited circumstances' in which" a right to privacy exists).

e. Violates the Fifth Amendment—Unconstitutionally Vague

Comments Received

Some commenters objected to the rule on the ground that it is so vague that it violates the Due Process Clause of the Fifth Amendment. Most commenters merely stated that the rule violates the Fifth Amendment because it is unconstitutionally vague, without providing further details. Of those few commenters that elaborated their

vagueness concern, the primary concern was that the rule does not define a threshold number of firearms that must be sold to qualify a person as a dealer in firearms, and that they felt this is unconstitutionally vague. A couple of other commenters stated that the rule was unconstitutionally vague and arbitrary in setting some of the rebuttable presumptions, and focused particularly on the presumption that a resale within 30 days after purchase could qualify a person as a dealer in firearms. These commenters believed that the time period included in this provision was arbitrary and so vague that routine actions that commonly arise in personal firearms contexts could trigger the presumption without people realizing it, thus entrapping people or exposing law-abiding citizens to a criminal prosecution. One commenter stated that "[p]hrases like 'time, attention, and labor' or 'predominantly earn a profit' are nebulous and subject to interpretation," and stated that this vagueness conflicts with the principles established in *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

One commenter argued that the proposed rule is unconstitutional, relying on *Johnson v. United States*, 576 U.S. 591 (2015), for the proposition that a criminal statute is unconstitutionally vague in violation of due process for either of two reasons: first, if "it fails to give ordinary people fair notice" of what is proscribed; and, second, if it is "so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. The commenter added that "[o]ther case law expounding the 'void for vagueness' doctrine" includes *Grayned*. According to the commenter, "[u]nder *Grayned*, due process required that a law provide fair warning and provide 'persons of reasonable intelligence a reasonable opportunity to know what is prohibited so he may act accordingly.'" Another commenter cited to *Cargill v. Garland*, 57 F.4th 447, 469 (5th Cir.) (en banc), *cert.*

granted 144 S. Ct. 374 (2023) (mem.), and stated, "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" Relying on *Cargill*, the commenter said, "[a] statute is ambiguous if, after a court has 'availed [itself] of all traditional tools of statutory construction,' the court is left to 'guess at its definitive meaning' among several options. *Id*. (cleaned up)." This commenter continued, "In those circumstances involving ambiguous criminal statutes, the court is 'bound to apply the rule of lenity.' *Id*. at 471. So even if a court were to find that the statutory definition of 'engaged in the business' is ambiguous enough to allow for presumptions of guilt based on a single transaction, that is far from the most obvious reading of the statute, which interpretation would thus be resolved in favor of lenity." Some congressional commenters stated, "The proposed rule raises serious vagueness concerns in light of the severe penalties. Will someone face a civil investigation for handing out business cards to sell his personal collection? What about if someone decides to sell a firearm in its original packaging?"

Department Response

The Department disagrees with commenters that this regulation, terms within it, or the rebuttable presumptions established by it are unconstitutionally vague. To begin, many of the comments are critical of the specific language Congress included in the statute (which is being added to the regulation). The Department cannot change the terms in the statute or their effect on sellers' legal rights and obligations. However, these comments illustrate the benefits of a rule that provides additional clarification to the public. The rule explains the Department's understanding of the statutory terms at issue

and describes how those terms apply to particular circumstances, thus providing greater clarity to the public.

In any event, however, the terms employed in the statute and rule are not unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. A law is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages discriminatory enforcement." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) (internal quotation marks omitted). However, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned,* 408 U.S. at 110. The definitions in this rule use the terms with their ordinary meanings and in context, *see United States v. TRW Rifle*, 447 F.3d 686, 689, 690 (9th Cir. 2006), and are sufficiently clear to "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,'" *Village of Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned*, 408 U.S. at 108). Absolute certainty is not required. *See Hosford*, 843 F.3d at 171 (explaining that laws "necessarily have some ambiguity, as no standard can be distilled to a purely objective, completely predictable standard"); *Draper v. Healey*, 827 F.3d 1, 4 (1st Cir. 2016) ([I]f due process demanded [a] how-to guide, swaths of the United States Code, to say nothing of state statute books, would be vulnerable."); *United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004) ("The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague."); *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 800 (D. Md. 2014) (A "statute is not impermissibly vague simply because it does not spell out every possible factual scenario with celestial

precision." (internal quotation marks omitted)). The many objective examples and detailed explanations in the rule, all supported by a thorough administrative record, provide clarification and assist people in complying with the statute. This rule is therefore not unconstitutionally vague.

The Department further disagrees that this rule violates the rule of lenity. The rule of lenity does not apply whenever a law or rule may contain some ambiguity. "The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). To invoke the rule of lenity, a court "must conclude that there is a 'grievous ambiguity or uncertainty' in the statute." *Id.* at 138–39 (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994)). A grievous ambiguity or uncertainty is present "'only if, after seizing everything from which aid can be derived, [a] [c]ourt 'can make no more than a guess as to what Congress intended.'" *Ocasio v. United States*, 578 U.S. 282, 297 n.8 (2016) (quoting *Muscarello*, 524 U.S. at 138–39). This rule does not require "a guess" as to what conduct satisfies being "engaged in the business"; it adopts the plain, statutory or dictionary meaning of terms and provides rebuttable presumptions and examples for additional clarity.

The rule's rebuttable presumptions are also not unconstitutionally vague; indeed, such presumptions are common in the law. Courts frequently rely on them because they provide an approach that is particularized to certain circumstances. The presumptions in this rule are specific and tailored to particular situations. The fact that they may be overcome by rebuttal evidence does not render them vague. Although the presumptions do not address all circumstances in which a person might be engaged in the business, they

do take into account common fact patterns that have been found to be appropriate indicators.

While a bright line numerical approach might provide greater clarity, the Department has rejected such an approach for the reasons identified in Section IV.B.3 of this preamble, as well as in the NPRM. The Department has also chosen to use presumptions in this rule rather than another approach,[154] because these presumptions are consistent with the analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in firearms without a license even under the pre-BSCA definition.

f. Violates the Fifth Amendment—Unconstitutional Taking

Comments Received

A few commenters opposed the rule as an unconstitutional taking under the Fifth Amendment. The primary concerns raised by these commenters were that, by requiring people who currently sell firearms without a license to acquire a license, the rule creates a backdoor registry, enabling the Government to identify what weapons, and how many, each person has, so that the Government can then enter private property without a warrant and seize them. One commenter spelled out the concern more fully, stating, "Moreover, the rights to self-defense and to keep and bear arms are, in no small measure, property rights. The Fifth Amendment's Takings Clause provides additional protection to these rights. This clause ensures that private property cannot be taken for public use without just compensation. Arms, as personal property acquired lawfully, fall under this protection. Therefore, any regulation that effectively deprives an individual of their

[154] For the reasons why the Department did not adopt a factor-based approach, see Section IV.C.3.

arms, or the utility thereof, intersects with property rights and demands rigorous scrutiny under the Takings Clause."

Department Response

The Department disagrees that the proposed regulation constitutes a taking, and further disagrees that it results in a compensable taking. As an initial matter, no property is being taken. This rule does not require individuals who currently own firearms that they might sell or who might buy firearms in the future to surrender or destroy any personal property in order to engage in those activities. Further, even if they predominantly intend to earn a profit through repetitive purchases or resales, and thus must obtain a dealer license, they still do not have to surrender or destroy any personal property to comply with this rule.

Furthermore, even where the application of Federal firearms laws results in the forfeiture of firearms, that is not a compensable taking. The Federal Circuit has recognized that, under Supreme Court precedent, there are certain exercises "of the police power that ha[ve] repeatedly been treated as legitimate even in the absence of compensation to the owners of the . . . property." *Acadia Tech. Inc. v. United States*, 458 F.3d 1327, 1332–33 (Fed. Cir. 2006). As the Supreme Court articulated the doctrine, "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); *see Acadia Tech., Inc.*, 458 F.3d at 1333. The Federal Circuit and the Court of Federal Claims have also made clear that these principles apply with full force in analyzing the impact of firearms regulations. *See*

Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993); *Akins v. United States*, 82 Fed. Cl. 619 (2008).

Even if a takings analysis would be appropriate, a takings claim would likely be analyzed under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and the result would be the same. Under *Penn Central,* a court considers: (1) the character of the Government's actions, (2) the property holder's investment-backed expectations, and (3) the economic impact on the property holder. *Id*.

No taking exists under the *Penn Central* test. A restriction "directed at the protection of public health and safety . . . is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009). A plaintiff's "reasonable investment-backed expectations are greatly reduced in a highly regulated field," *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995), such as the firearms industry. And as the Supreme Court has made clear, an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless." *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1027–28 (1992). At the same time, with respect to economic impact, the Court has observed that even when a regulation "prevent[s] the most profitable use of [a person's] property," a "reduction in the value of property is not necessarily equated with a taking." *Andrus v. Allard*, 444 U.S. 51, 67 (1979); *see also Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 303 (1920) (upholding a Federal law banning nonintoxicating alcoholic beverages on the ground that "there was no appropriation of private property, but merely

a lessening of value due to a permissible restriction imposed upon its use"). Therefore, even under a takings analysis, this rule does not constitute a taking under the Fifth Amendment.

The Department disagrees that the proposed rule will enable ATF to create a national firearms registry that can be used to seize firearms. Since Fiscal Year 1979, Congress has prohibited ATF from using any Federal funds to create a national gun registry. Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. 95–429, 92 Stat. 1001, 1002 (1978). ATF complies with that statutory prohibition, and this proposed rule does not change either the prohibition or ATF's compliance. Nor does the rule permit ATF to create a backdoor national firearms registry, and it is not doing so. Any records that licensed dealers are legally required to keep remain with the dealer as long as the business continues, and information from those records is requested only if a particular firearm becomes part of a criminal investigation by a law enforcement entity. *See* 18 U.S.C. 923(g). ATF does not keep or receive records until the licensee ceases operations. And, although ATF may receive some records from discontinued businesses, they are not searchable by name or other personally identifiable information. This rule does not change that.

g. Violates the Fifth Amendment—Equal Protection Clause

Comments Received

A few commenters claimed that the proposed rule violates what they characterize as the Fifth Amendment's Equal Protection Clause by enabling uneven application of the law; uneven enforcement; seizing personal property; and creating a chilling effect on owners, buyers, and sellers of firearms.

Department Response

The Department disagrees that the proposed rule violates the equal protection component of the Fifth Amendment's Due Process Clause. Under certain circumstances, the equal protection component prohibits the Federal Government from treating similarly situated persons differently. *See Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954). However, like the Fourteenth Amendment Equal Protection Clause, the equal protection component of the Fifth Amendment "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If a "classification 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class,' [a court will] subject the classification to strict scrutiny. Otherwise, [courts] will uphold the classification if it is 'rationally related to a legitimate state interest.'" *Mance v. Sessions*, 896 F.3d 699, 711 (5th Cir. 2018) (footnote omitted) (quoting *Nat'l Rifle Ass'n v. ATF*, 700 F.3d 185, 211–12 (5th Cir. 2012)). There is no fundamental right to be engaged in the business of dealing in firearms or in selling firearms without a license. *See Kazmende*, 2023 WL 3872209, at *5. Nor are firearms dealers a "suspect class," meaning a class that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted).

Rational basis review thus applies here. Rational basis review requires a "rational relationship" between the classification and "some legitimate governmental purpose."

See Heller v. Doe, 509 U.S. 312, 320 (1993). Under rational basis review, a classification "is accorded a strong presumption of validity," *id.* at 319, and will be upheld if "there is some rational basis for the statutory distinctions made . . . or [those distinctions] have some relevance to the purpose for which the classification is made." *Lewis v. United States*, 445 U.S. 55, 65 (1980) (internal quotation marks omitted) (rejecting an equal protection challenge to a "firearm regulatory scheme" that prohibits a felon from possessing a firearm).

There is clearly a rational basis for requiring those engaged in the business of dealing in firearms to be licensed according to the classifications and other requirements set forth in this rule. The "principal purpose" of the GCA is "to curb crime by keeping firearms out of the hands of those not legally entitled to possess them." *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (internal quotation marks omitted). As a result, "[c]ommerce in firearms is channeled through federally licensed importers, manufacturers, and dealers in an attempt to halt mail-order and interstate consumer traffic in these weapons." *Id.*; *see also United States v. Biswell*, 406 U.S. 311, 315 (1972) ("[C]lose scrutiny" of "interstate traffic in firearms" is "undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); *id*. at 315–16 ("Federal regulation" of the traffic in firearms "assures that weapons are distributed through regular channels and in a traceable manner"); *United States v. Hosford*, 82 F. Supp. 3d 660, 667 (D. Md. 2015) (prohibiting engaging in the business of firearms without a license "ensures that significant commercial traffic in firearms will be conducted only by parties licensed by the federal government" (internal quotation marks omitted)); *id*. ("Nor is the licensing requirement

onerous.”). As discussed throughout this preamble, the regulatory changes in this final rule are essential to implementing Congress’s changes to the GCA and furthering the Government’s interest in having people who are engaged in the business of selling firearms be licensed as FFLs.

h. Violates the Fifth Amendment—Due Process Clause

Comments Received

A few commenters claimed that the proposed rule violates the Fifth Amendment’s Due Process Clause and the concept of “innocent until proven guilty” by creating rebuttable presumptions. The Due Process Clause states, “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V. Some of these commenters asserted that the presumptions reduce the scrutiny that would be required under the Due Process Clause before charging a person with a crime or removing their property, or cause a person to inadvertently commit a crime without knowing it would be seen that way under a presumption.

Others interpreted the presumptions as causing people to be presumed guilty, and then having to prove their innocence, thereby undermining the concept of “innocent until proven guilty.” Two U.S. senators stated, “If the proposed rule goes into effect, innocent people will have to prove to the ATF that they are not firearms dealers when they, for example, try to resell firearms that are in the original packaging or represent that they can sell additional firearms to their friends. These types of activities do not make someone a licensed firearms dealer. Nothing in current law, including as amended by the BSCA, empowers the ATF to shift the burden to an innocent person to prove that keeping a

firearm in its original packaging or discussing the sale of firearms to friends or family makes him a licensed firearms dealer."

Other commenters asserted that the statutory provision saying that it is not necessary for the Government to prove intent to profit if the person was dealing in firearms for criminal purposes or terrorism runs contrary to the axiom that one is innocent until proven guilty and raises due process concerns under the Fifth Amendment. Others were concerned that the process of defending oneself during administrative processes to rebut a presumption would require people to set themselves up for self-incrimination during a subsequent criminal process. One commenter explained that using rebuttable presumptions shifts the burden of proof from the Government to the subject of the investigation, and runs counter to the Fifth Amendment, which they explained precludes using "forced testimony" against a person in a criminal trial unless waived. The commenter argued that if an accusation that a person is engaged in the business of dealing in firearms without a license is based upon a rebuttable presumption, then the person is unfairly and unconstitutionally placed in legal jeopardy. The person will lose the civil or administrative action against them, the commenter said, if they do not present facts to rebut the presumption, but then the information shared with the Government will be available for use against them in a criminal case. (The commenter cited *Allen vs. Illinois*, 478 U.S. 364 (1986), *Minnesota v. Murphy*, 465 U.S. 420, 435 & n.7 (1984), and other cases.) In other words, the commenter added, the person is penalized for not responding to the inquiry or allegation based upon a presumption. (The commenter cited *Marchetti v. United States*, 390 U.S. 39 (1968).)

Department Response

The Department disagrees that the rebuttable presumptions in this rule violate the Due Process Clause of the Fifth Amendment. First, the rebuttable presumptions apply only to shift the burden of production, not the burden of persuasion. Although the presumptions expressly do not apply in criminal proceedings, even in that context, presumptions that shift only the burden of production do not violate due process. *See Ruan v. United States*, 597 U.S. 450, 463–64 (2022). Second, "[t]he law is well established" that presumptions shifting the burden of production "may be established by administrative agencies, as long as there is a rational nexus between the proven facts and the presumed facts." *Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 716 (D.C. Cir. 2011); *see also Cole v. U.S. Dep't of Agric.*, 33 F.3d 1263, 1267 (11th Cir. 1994); *Atchison, Topeka & Santa Fe R.R. v. Interstate Com. Comm'n*, 580 F.2d 623, 629 (D.C. Cir. 1978). The BSCA broadened the scope of persons who are required to be licensed under the GCA, and the implementing presumptions in this rule are necessary to provide persons with a greater understanding as to who is likely to be "engaged in the business" as a "dealer" under that new standard. The presumptions are narrowly tailored and based on specific firearms purchase and sale activities to effectuate that purpose. As a result, there is a rational connection between the facts to be proven—for example, frequent and multiple purchases and resales, accepting credit cards as a method of payment, advertising, etc.—and the presumed facts—being engaged in the business or having the requisite intent to profit. *See USX Corp. v. Barnhart*, 395 F.3d 161, 172 (3d Cir. 2004) (finding agency's "rebuttable presumption [was] entirely reasonable" and noting that the "presumption is rebuttable and therefore avoids problematic mechanical operation").

Contrary to commenters' assertions, the rebuttable presumptions in this rule, even when applied in a civil or administrative proceeding, do not alleviate the burden of persuasion on the Government to prove that a person is willfully engaged in the business without a license under the applicable evidentiary standard. They neither limit nor prescribe the manner in which a party can rebut such a presumption. Agencies may adopt evidentiary presumptions provided that the presumptions shift the burden of production, not the burden of persuasion (also sometimes referred to as the burden of proof). *Cablevision*, 649 F.3d at 716.[155] That is the case here. Because the rebuttable presumptions are merely evidentiary tools to assist the trier of fact in determining whether the Government has met its burden of production in a given proceeding and do not shift the burden of persuasion, this rule does not violate due process.[156] In the NPRM, the Department stated that a person "shall not be presumed to be engaged in the business of dealing in firearms" when the person engaged in certain types of conduct (e.g., clearly a person is not presumed to be engaged in the business when that person's conduct is limited to activity the statute specifically excludes). However, to alleviate commenter concerns, the regulatory text of this final rule now makes clear that evidence of such conduct may also be presented as rebuttal evidence (e.g., gifts, certain occasional sales, etc.), and further makes clear that additional types of reliable rebuttal evidence could be offered beyond those examples.

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[155] *See also Chem. Mfrs. Ass'n. v. Dep't of Transp.*, 105 F.3d 702, 706 (D.C. Cir. 2007); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1284 (11th Cir. 2007) (internal quotation marks omitted)).

[156] *See Ruan v. United States*, 597 U.S. 450, 463–64 (2022) (Statute providing "a presumptive device, akin to others we have recognized in a criminal context, which merely shift[s] the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution" did not violate due process); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1517 (11th Cir. 1984) (regulatory presumption under 20 CFR 727.203(a)(1) that miner is presumed to be disabled with an X-ray showing of pneumoconiosis did not violate due process).

The Department acknowledges the commenters' concerns about the possibility of self-incrimination if they provide rebuttal evidence in an administrative or civil proceeding that could be used against them in a criminal proceeding. The Fifth Amendment privilege against compulsory self-incrimination, however, can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," and it "protects against disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972). The Fifth Amendment's protection against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but it also affords protection against having compelled responses provided in civil or administrative proceedings used against him in a later criminal prosecution. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Moreover, it is not uncommon for individuals to have to balance the implications of providing testimony in a civil or administrative case against the potential that such testimony may be used in a future criminal proceeding. For instance, this circumstance can occur whenever a statute has criminal, civil, and administrative implications. *See, e.g.*, 15 U.S.C. 1825(a), (b) (civil and criminal penalties for violations relating to sales or exhibitions of horses that are sore); 18 U.S.C. 670(c), (d) (civil and criminal penalties for theft of medical products); 22 U.S.C. 2778(c), (e) (civil and criminal penalties for unlawful exportation of defense articles); 30 U.S.C. 820(a), (b), (d) (civil and criminal penalties for violations of mine health and safety standards); and 33 U.S.C. 533(a), (b) (civil and criminal penalties for failing to comply with lawful orders of the Coast Guard).

The statutory definition of "terrorism" existed in the GCA's definition of "principal objective of livelihood and profit" before the BSCA was passed, *see* 18 U.S.C. 921(a)(22) (2020), and remains there verbatim. The BSCA added that same definition to the new definition of "to predominantly earn a profit" in the GCA, as well. This rule merely: (1) moves that definition within the regulations to be a standalone definition so that it applies to both the term "predominantly earn a profit" and "principal objective of livelihood and profit" without repeating it in two places; and (2) makes a minor revision to identify the provisions to which the definition applies. This rule does not further interpret or define that term, and comments in that regard are beyond the scope of the rule.

i. Violates the Tenth Amendment

Comments Received

Some commenters opposed the proposed rule on the grounds that it violates the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Some of these commenters referred to the rule as a violation of the separation of powers or federalism. The majority of these commenters stated that the rule "will override the authority of the states with overburdensome federal regulations and strip state's rights." One commenter suggested that this rule will "intrud[e] [upon] states' responsibilities." Several commenters stated that the power to regulate commerce in firearms is not a power delegated to the Federal Government. Others stated that, although the Federal Government has the power to regulate interstate commerce in firearms, it has not been delegated authority to regulate

commerce between people within a given state, or in intrastate commerce. One commenter stated that, "as long as the transaction doesn't cross state lines, it cannot be regulated by the Federal government." A couple of commenters cited *McDonald v. City of Chicago*, 561 U.S. 742 (2010), for the proposition that each state has its own body of laws that reflect its unique needs, culture, and opinions of its residents, and has the autonomy to tailor public safety measures to these unique situations. These commenters stated that the proposed rule disregards this principle.

Department Response

The Department disagrees that the rule violates the Tenth Amendment. Commenters seemingly argued that the powers exercised by the Department in issuing the rule were "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. However, if Congress has acted within its power under the Commerce Clause, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *See New York v. United States,* 505 U.S. 144, 156 (1992). Simply put, a valid exercise of Congress' power is not a violation of the Tenth Amendment. Multiple courts have repeatedly and consistently upheld the GCA as a valid exercise of Congress' Commerce Clause power, *see, e.g.*, *United States v. Hosford*, 843 F.3d 161, 163 (4th Cir. 2016); *United States v. Rose*, 522 F.3d 710, 716–19 (6th Cir. 2008); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1054–1065 (D.C. Cir. 1999), and rejected challenges to the statute on Tenth Amendment grounds, *see, e.g.*, *Bezet v. United States*, 714 F. App'x 336, 342–43 (5th Cir. 2017) ("[E]ach provision [of the GCA] that Bezet has standing to challenge was validly enacted

under the commerce power or the taxing power. Therefore, the district court was correct to reject Bezet's claims under the Tenth Amendment.").

As for commenters who argued Congress does not have authority to regulate any intrastate firearms transactions, regardless of its connection to interstate commerce, Congress may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). *Raich* held that one situation in which "Congress can regulate purely intrastate activity" even if that activity is not itself commercial, is "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id*. at 18. When there is a "comprehensive framework for regulating the production, distribution, and possession" of a commodity, the fact that the regulatory scheme "ensnares some purely intrastate activity is of no moment." *Id*. at 22, 24. This analysis has been specifically applied to firearms. *See Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147, 2010 WL 3926029, at *17 (D. Mont. Aug. 31, 2010) ("As *Raich* instructs, the fact that Federal firearms laws 'ensnare some purely intrastate activity,' such as . . . manufacturing and sales activity . . ., 'is of no moment.' Under *Raich,* the National Firearms Act and Gun Control Act constitute a valid exercise of federal commerce power, even as applied to the purely intrastate manufacture and sale of firearms . . . .") (quoting *Raich*, 545 U.S. at 22), *aff'd*, 727 F.3d 975 (9th Cir. 2013); *see also United States v. Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2006); *Hollis v. Lynch*, 121 F. Supp. 3d 617, 640 (N.D. Tex. 2015) (citing *Raich*, 545 U.S. at 22), *aff'd*, 827 F.3d 436 (5th Cir. 2016); *Rose*, 522 F.3d at 717–18.

j. Violates other Constitutional Provisions

Comments Received

A small number of commenters stated that the NPRM violates the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments; the Ninth Amendment (which states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX); and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. These commenters did not explain how they thought the proposed rule violated these constitutional provisions. One commenter stated that the proposed rule constitutes restricted zoning that will deprive people of their rights and is therefore unconstitutional. Numerous other commenters stated that the NPRM is unconstitutional and deprives people of their rights, but did not provide detailed arguments, although some of these commenters based their statement on a belief that the rule requires anyone who sells a firearm to be licensed as a dealer or that it creates a universal background check. Several commenters stated that the Constitution does not grant the Federal Government, including Congress, the authority to regulate firearms or the trade in firearms, and any law or regulation that does so is unconstitutional. Some of these commenters specifically stated that the BSCA, and even the NFA and GCA, are unconstitutional laws.

Department Response

The Department disagrees that the proposed rule violates the Eighth Amendment's protection against excessive fines and cruel and unusual punishments. Criminal and civil penalties, including forfeiture, can be considered fines under the Eighth Amendment if they are punishments for an offense and, thus, must not be

excessive. *Austin v. United States*, 509 U.S. 602, 619 (1993); *Disc. Inn, Inc. v. City of Chicago*, 72 F. Supp. 3d 930, 934 (N.D. Ill. 2014), *aff'd,* 803 F.3d 317 (7th Cir. 2015). Under the Eighth Amendment, a "fine" is "excessive" if it is "grossly disproportional to the gravity of [the] offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Here, the penalties for dealing firearms without a license are up to five years' imprisonment, a $250,000 fine, or both. *See* 18 U.S.C. 922(a)(1)(A), 923(a), 924(a)(1)(D), 3571(b)(3). The GCA does not require a minimum penalty, and the penalty in any particular case will vary according to circumstances, so the Department disagrees that the penalties associated with unlawfully dealing in firearms (which could be very low or none) are facially "excessive." The Department may also seek forfeiture of the property involved in criminal activity. Courts have repeatedly found on a case-by-case basis that these are not excessive penalties, *see, e.g., United States v. Approximately 627 Firearms, More or Less,* 589 F. Supp. 2d 1129, 1135–37 (S.D. Iowa 2008), and the proposed rule does not increase the penalties for noncompliance with the GCA, which are set by statute.[157]

The Department also disagrees that the rule violates the commenters' rights under the Ninth Amendment. The BSCA amendments to the statutory definition of "engaged in the business" and this rule implementing those amendments constitute only a modest congressional expansion of the previous FFL licensing requirements, and do not infringe upon any constitutional rights. The commenters discussed an implied right to self-defense and a right to "transfer nonliving personal property without government

[157] To the extent commenters argue that the fees required to be a Federal firearms licensee violate the Eighth Amendment, they are (1) not a fine, and (2) not excessive.

hindrance or supervision." This rule does not prevent any individuals from exercising self-defense, and no court has ever recognized a categorical right to transfer personal property free of government regulation. The Ninth Amendment "does not confer substantive rights in addition to those conferred by other portions of our governing law." *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991).

It is unclear how the commenters believe that the rule would violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment. First, the Fourteenth Amendment applies to the States and State actors, not Federal agencies. *See Shell v. United States Dep't of Housing & Urban Dev.*, 355 Fed. App'x 300, 307 (11th Cir. 2009). Second, the rule, like the statute, applies to all persons and does not burden one suspect class or group of people more than others. Instead, the rule helps to identify persons who are engaged in the business of dealing in firearms or have the predominant intent to earn a profit through certain firearms purchase and resale activities. Nor is the Government engaging in intentional disparate treatment of a suspect class or group of people regarding a fundamental right. This final rule has also complied with the requirements of the APA, including public notice and comment, of which the commenters availed themselves during the proposed rule stage. *See* 5 U.S.C. 553. With respect to a rulemaking of general and prospective applicability, the Due Process Clause does not require additional procedural safeguards. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization,* 239 U.S. 441, 445 (1915); *see also General Category Scallop Fishermen v. Sec'y of U.S. Dept. of Commerce*, 720 F. Supp. 2d 564, 576 (D.N.J. 2010) (explaining that publication in the Federal Register satisfies notice requirements under the Due Process Clause).

The Department disagrees that this rule amounts to restricted zoning and is therefore unconstitutional. The commenter seems to suggest that because the BSCA and this rule will result in more firearms sellers being deemed to be "engaged in the business" within the meaning of 18 U.S.C. 921, those sellers will no longer be permitted to make firearms sales from their homes and will instead have to comply with State and local commercial zoning laws. However, State and local governments determine zoning classes and requirements pursuant to their police powers. *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985) ("It is the general rule that zoning ordinances are in derogation of common-law property rights and find their authority through the state police power."). Nothing in this rule purports to alter State and local zoning laws or dictate how those laws should treat firearms sellers who are "engaged in the business" of dealing in firearms under Federal law. Nor does the commenter point to any particular zoning restrictions that might apply to an individual firearms seller who would be "engaged in the business" of dealing in firearms under this rule. At bottom, this rule does not create additional zoning restrictions. Such restrictions, if they exist at all, are created and managed on the State, local, and Tribal levels.

9. Statutory Authority Concerns

a. Lack of Delegated Authority to Promulgate the Rule

Comments Received

A majority of the commenters opposed to the rule argued that ATF is exceeding its authority by promulgating the rule, and that it is the job of Congress to change the laws and the job of Federal agencies to enforce them. A majority of these commenters stated that they considered the proposed regulation to be a method of changing the law

without passing new legislation and stated that Congress has given ATF no additional authority to "re-define" "details" in the law. One commenter stated that "No federal agency has the right to interpret laws, amendments, or constitutions. That's what [C]ongress is for." A few others made similar statements. Other commenters stated that the NPRM is an executive order or a law itself, and ATF has no authority to change law via an executive order or by issuing new laws.

One commenter, instead of saying that ATF has no authority to promulgate regulations, stated that ATF has no authority to "devise its own definitions." They further argued that the only exception to this is the term "collector," because the statute specifically delegates authority to the Attorney General to further define that term. The commenter concluded that when Congress includes explicit authorization to define one term, it negates any implied regulatory power to expand definitions for other terms, quoting the *expressio unius est exclusio alterius* principle described in *Bittmer v. United States*, 598 U.S. 85, 94 (2023). A second commenter, in a similar but narrower vein, pointed to the "specific definitions provided by Congress for both 'engaged in the business' and 'predominantly earn a profit.'" These definitions, the commenter argued, "should entirely foreclose any attempt by ATF to redefine those terms." The commenter quoted *Royce v. Hahn*, 151 F.3d 116, 123 (3d Cir. 1998), for the proposition that "[s]uch an explicit reference to a statutory definition demonstrates a Congressional intent to forestall interpretation of the term by an administrative agency and acts as a limitation on the agency's authority."

Some commenters stated that the proposed definition of "engaged in the business" is contrary to or an overreach of the BSCA or the FOPA. One commenter asked

"[w]here in the text of the FOPA does the ATF believe Congress expressly grants it the authority to redefine 'engaged in the business' as Congress has clearly defined it through several amendments made to the FOPA by Congressional legislative action?" Another commenter, citing 18 U.S.C. 926(a) and section 106 of FOPA, 100 Stat. at 459, stated that the FOPA reduced ATF's regulatory authority under the GCA by changing the original phrase "'such rules and regulations as he deems reasonably necessary'" to "'only such rules and regulations as are necessary.'" The commenter asserted that this change means that ATF has the authority to enact only regulations that are "necessary [for enforcement of the Act] as a matter of fact, not merely reasonably necessary as a matter of judgment." Another commenter, characterizing the BSCA, stated that "[t]he essence of the change was simply that illegal firearm sales need not amount to a person's 'livelihood' for that activity to be criminally actionable. It was never intended to give the administration a blank check to comprehensively rewrite settled law or understandings about private firearms sales for lawful purposes or for the enhancement or liquidation of personal firearm collections." One commenter cited the legislative record for the GCA, contending that Congress declined to adopt a provision that would have made it a crime to violate any regulation promulgated pursuant to the GCA due to asserted concerns that the provision would delegate to ATF the authority to determine what constitutes a crime. The commenter concluded that the proposed rule "would do exactly what Congress rejected when it enacted the GCA in 1968. It would redefine and expand GCA definitions, with the consequence that unlawful acts would be expanded by regulation. ATF has no such authority."

A few commenters argued that the regulation exceeds ATF's authority because it criminalizes behavior or deprives people of something. As a result, these commenters assert that the alleged penal provisions must be clearly stated in the statute itself. One commenter stated that the regulation, "with a stroke of a pen creates violations that may lead to fines, confiscation of assets and possibly jail time." Another added that, because the proposed rule involves criminal penalties, it must "not criminalize any action that is either not clearly prohibited by the law or that is specifically prohibited by the law." "Removing rights," added another commenter, "should be a matter take[n] up before the full body of Congress and U.S. Citizens, not an un-elected group of individuals." An additional commenter couched the issue in terms of deference, citing cases like *United States v. Apel*, 571 U.S. 359, 369 (2014), for the proposition that because the GCA is a criminal statute, ATF's reading is not entitled to any deference.

Department Response

As an initial matter, the Department disagrees that this rule "comprehensively rewrite[s]" or otherwise alters "settled law" in a manner inconsistent with Congress's enactments. Most recently, Congress passed the BSCA in 2022, and this rule implements the GCA, as amended by the BSCA. The Department and ATF have the legal authority to promulgate regulations and rules that are necessary to implement, administer, and enforce the GCA, as amended by the FOPA and the BSCA, including its definition of "engaged in the business" as a dealer. *See* 18 U.S.C. 926(a); 28 U.S.C. 599A(b)(1), (c)(1); 28 CFR 0.130(a)(1)–(2); Treas. Order No. 221(1), (2)(d), 37 FR 11696–97 (June 10, 1972). This rule—which updates ATF's regulations in accordance with the BSCA's new statutory definition of when a person is considered to be "engaged in the business"

and makes other related changes—is a valid exercise of that statutory authority. *See Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 479 (4th Cir. 1990) ("Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.'")

The rule is also consistent with ATF's historical experience implementing the GCA. In the original GCA implementing regulations in 1968, ATF's predecessor agency provided regulatory definitions of terms that Congress did not define in the statute. 33 FR 18555 (Dec. 14, 1968). Since that time, ATF has promulgated additional regulatory definitions to implement amendments to the GCA, including FOPA and the Brady Act. *See*, *e.g.*, Commerce in Firearms and Ammunition, 53 FR 10480 (Mar. 31, 1988) (providing definitions for, among other terms, "dealer" and "engaged in the business"); Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 FR 34634 (June 27, 1997). Now that Congress has passed further legislation to amend the statutory definition of certain terms, it is logical and appropriate for ATF—consistent with its statutory authority and experience in administering the relevant statutory provisions—to review existing rules and promulgate new ones if necessary to properly implement that statutory change.

This rule is necessary to assist people, such as unlicensed persons seeking to comply with the law and fact finders in certain proceedings, to determine when firearms sellers are required to be licensed as wholesale or retail dealers under the expanded statutory definition of "engaged in the business," and for ATF to effectively regulate the firearms industry. Indeed, numerous commenters stated that because the BSCA

redefined "engaged in the business" to focus on a person's intent "to predominantly earn a profit," regulatory updates were necessary to clarify when a license was needed and how ATF would consider and enforce certain aspects of firearms and sales that are relevant to the intent-to-profit analysis in the current marketplace.[158]

The Department also disagrees with commenters that the rule or its presumptions are inconsistent with the text or legislative history of FOPA,[159] or with the structure of the GCA. The GCA includes delegations of rulemaking authority that are both general and specific,[160] and its express grants of statutory authority to define particular terms do not negate the broader authority that Congress has granted to the Department to issue regulations that define additional statutory terms as necessary to carry out the GCA. Indeed, as congressional commenters have noted, the GCA as amended by FOPA and the BSCA authorizes the Department to utilize its expertise gained from decades of

[158] *See, e.g.,* ATF-2023-0002-319816 (Dec. 7, 2023); ATF-2023-0002-362368 (Dec. 6, 2023); ATF-2023-0002-317174 (Dec. 5, 2023); ATF-2023-0002-281792 (Nov. 29, 2023); ATF-2023-0002-333284 (Nov. 26, 2023); ATF-2023-0002-262638 (Nov. 2, 2023); ATF-2023-0002-246750 (Oct. 25, 2023); ATF-2023-0002-171793 (Oct. 18, 2023); ATF-2023-0002-218598 (Oct. 17, 2023); ATF-2023-0002-84981 (Oct. 5, 2023); ATF-2023-0002-65889 (Sep. 19, 2023); ATF-2023-0002-43184 (Sep. 14, 2023); ATF-2023-0002-0538 (Sep. 10, 2023).

[159] The Fourth Circuit has explained that the FOPA amendments did not change ATF's authority to promulgate regulations necessary to implement the GCA. *See Nat'l Rifle Ass'n*, 914 F.2d at 478–79 (rejecting argument that FOPA requires courts to "strike down [ATF] regulations if we do not find them strictly necessary and the least restrictive means of accomplishing the purposes of the [GCA]").

[160] *Compare, e.g.*, 18 U.S.C. 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . ."); H.R. Rep. No. 90–1577, at 18 (1968) ("Section 926. Rules and regulations. This section grants rulemaking authority to the Secretary . . . ."); S. Rep. No. 90–1501, at 39 (1968) (similar), *with, e.g.*, 18 U.S.C. 921(a)(13) ("The term 'collector' means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define . . . ."); *id*. 923(g)(1)(A) ("Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, 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."); *id*. 923(g)(2) ("Each licensed collector shall maintain in a bound volume the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms."); *id*. 923(i) ("Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.").

enforcement experience to further define terms or to issue other rules that are necessary to implement the GCA. In light of that delegation, the fact that Congress generally defined the term "engaged in the business" does not mean that the Department lacks the authority to further define that term.[161] In enacting the BSCA, Congress found it necessary to broaden the term "engaged in the business," but did not provide guidance on how to apply that new definition to specific firearms transaction activities. This rule provides that necessary clarification in accordance with the Department's delegated authority.

The Department disagrees that the rule criminalizes behavior or imposes criminal penalties. Congress long ago both enacted the statutory requirement that persons who engage in the business of dealing in firearms must obtain a license and imposed criminal penalties for noncompliance with that statutory requirement. This rule, on the other hand, merely implements Congress's latest amendment to the definition of "engaged in the business." Nothing in the rule criminalizes behavior or prohibits persons from engaging in the business of dealing in firearms; it merely implements the statutory requirement, as amended by the BSCA, that requires persons to become licensed if they wish to engage in that business.

b. Lack of Authority to Promulgate Presumptions

Comments Received

In addition to the concerns raised under Section IV.B.8.g of this preamble about the efficacy of the rule given that the presumptions will not be required in any criminal

[161] *See, e.g., Guedes v. ATF*, 45 F.4th 306, 314–19 (D.C. Cir. 2022) (upholding ATF regulation interpreting the statutory term "machine gun"); *cf. Nat'l Rifle Ass'n*, 914 F.2d at 480–81 (ATF had the legal authority to define the statutory terms "business premises" and "gun show or event").

proceeding, several commenters argued that creating such presumptions is unlawful and problematic. Some commenters argued that nowhere in the rule did the Department cite any authority authorizing it to adopt or create presumptions applicable to statutory terms. Another commenter stated that "ATF's recently proposed rule now aims to create several presumptions when a person is 'engaged in the business,' despite the [BSCA] definition that contains no such presumptions. It is clearly not the intent of Congress to include those presumptions in this proposed rule." A third commenter objected on the grounds that "many of [the presumptions] concern common and entirely innocent conduct related to firearms transactions."

Additionally, at least one commenter stated that the legislative history of the GCA clearly demonstrates that ATF cannot make the violation of a regulation a crime. As originally proposed, the commenter stated, the bill that became the GCA provided, "[w]hoever violates any provision of this chapter *or any rule or regulation promulgated thereunder* . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." Prior to passage, however, Congress deleted the provision making it an offense to violate "any rule or regulation promulgated thereunder." 114 Cong. Rec. 14,792, 14,793 (1968). The commenter concluded that, with the redefined and expanded GCA definitions in the proposed rule, unlawful acts would be expanded by regulation, which is contrary to the fact that all GCA offenses are defined in terms of violations of "this chapter" of the statute.

Moreover, commenters asserted, as a practical matter, that even with the disclaimer that the presumptions are only required in administrative and civil proceedings, it does not change the fact that 18 U.S.C. 924(a)(1)(D), which makes it a

criminal act to engage in the business of dealing in firearms without a license, exists and carries prison time and high fines. One commenter questioned how ATF could say it would not use the presumptions in a criminal case if the agency intends for courts to be in a position to rely on the presumptions to create permissive inferences in jury instructions. Another commenter stated that the Department did not adequately explain how any presumption would be "useful" or in any way appropriate to a criminal proceeding, whether considered by the judge or jury, and that there is no explanation as to how these presumptions become permissive inferences.

At least one commenter pointed out that jury instructions are written based on statutory language and applicable judicial decisions that interpret the law. As the GCA is a criminal statute, the commenter stated, ATF cannot expand it, and because the GCA definitions are the same in criminal and civil contexts, ATF cannot have rebuttable presumptions regarding the definitions that are different in a civil or administrative context. According to another commenter, this would violate the "chameleon cannon" in which courts have said statutory terms "are not chameleons, acquiring different meanings when presented in different contexts." *Maryland v. EPA*, 958 F.3d 1185, 1202 (D.C. Cir. 2020); *see also Clark v Martinez*, 543 U.S. 371, 382 (2005) (similar). Other commenters similarly cited *Leocal v. Ashcroft*, 543 U.S. 1 (2004), for the proposition that ATF is legally prohibited from employing a rebuttable presumption of liability in noncriminal proceedings that does not apply in the criminal context. Commenters pointed out that in *Leocal*, the Supreme Court stated that a statute with "both criminal and noncriminal applications" must be interpreted "consistently, whether [courts] encounter its application in a criminal or noncriminal context." *Id*. at 11–12 n.8. Commenters also argued that an

agency involved in the prosecution of a case does not get to tell the judge how to draft the jury instructions.

Additionally, commenters argued that the Department's use of presumptions in the civil and administrative context, but not the criminal context, runs afoul of the rule of lenity and is contrary to existing case law, specifically the Supreme Court's holding in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992). In *Thompson/Center Arms*, commenters stated that the Court rejected ATF's interpretation of the application of a certain definition in the NFA. The Court concluded that "although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor." *Id*. at 517–18. Commenters therefore argued that the Department's claim that the rebuttable presumptions are applicable to civil and administrative proceedings, but not criminal ones, is also impermissible.

Commenters also disagreed with the Department's characterization of case law in which the Department described that courts have relied on ATF's regulatory definition to decide whether the defendant was an "unlawful user of or addicted to any controlled substance" under the GCA. Specifically, commenters stated that in the cases cited in footnote 60 of the NPRM, 88 FR at 62000, the courts relied on ATF's regulation because there was no applicable statutory definition, unlike the terms that are the subject of this rulemaking. Another commenter argued that none of the cases cited by the Department support the use of presumptions in an "engaged in the business" analysis in which a single data point would suffice to satisfy what is inherently a multifactor test. The

commenter argued that an appropriate and relevant jury instruction would be for the jury to consider all the facts. In this sense, the commenter added, at most the NPRM could have: "(i) provided a list (as numerous courts have provided in their opinions) of various types of factors that can legitimately play into an 'engaged in the business' determination; (ii) noted that such conduct involves a tremendous amount of gray area that cannot be resolved by unyielding regulation; and (iii) concluded that each case is to be decided on its own unique facts and circumstances." Lastly, at least one opposing commenter noted that the Department was also incorrect in referring to forfeitures as a civil or administrative proceeding for which the presumptions could be used because, the commenter said, forfeitures require a showing of intent by "clear and convincing evidence" under 18 U.S.C. 924(d)(1), not a presumed violation. Focusing on forfeiture, another commenter stated that "[f]orfeitures may occur in civil, administrative, or criminal proceedings. ATF's proposed 'rebuttable presumptions,' in addition to being unauthorized by law, are particularly negated by the . . . requirement of clear and convincing evidence in § 922(a)(1) cases involving forfeiture."

In contrast to the commenters opposed to the presumptions as a matter of law, one commenter in support of the rule suggested including the "predominantly earn a profit" presumptions under the EIB presumptions, rather than having them as separate sets of presumptions. The reason for this suggestion is that each of the proposed presumptions under "predominantly earn a profit" also demonstrates other elements of the statutory definition. For example, a person who purchases or secures physical space to display firearms not only demonstrates profit motive but also establishes that the seller "devotes time, attention, and labor to dealing with firearms," therefore satisfying all elements of

BSCA's revised statutory definition of "engaged in the business" as a dealer in firearms. Another commenter in support stated that in the final rule, "ATF should consider clarifying that the conduct described in the list of rebuttable presumptions, while not creating presumptions in criminal prosecutions, may nonetheless be relevant and important when ATF prioritizes what conduct it focuses on when conducting criminal investigations."

Department Response

The Department disagrees that it lacks the legal authority to promulgate rebuttable presumptions in ATF regulations. As discussed above, the Attorney General and ATF have the authority and responsibility to promulgate regulations necessary to enforce the provisions of the GCA, and a regulation that clarifies when a license is required is such a regulation. *See* 18 U.S.C. 926(a); *see also* H.R. Rep. No. 90–1577, at 18 (1968); S. Rep. No. 90–1501, at 39 (1968). Because the BSCA broadened the scope of persons who are required to be licensed under the GCA, this rule, including its presumptions, are necessary to implement the BSCA and provide persons with a greater understanding of who is likely to be "engaged in the business" as a "dealer" under that new standard. *See Nat'l Rifle Ass'n*, 914 F.2d at 479 ("Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.'").

Further, "[t]he law is well established that presumptions may be established by administrative agencies, as long as there is a rational nexus between the proven facts and

the presumed facts." *Cole*, 33 F.3d at 1267.[162] The presumptions that the Department has chosen to promulgate are derived from ATF's extensive regulatory, enforcement, and investigative experience, and they are based on common firearms purchase and sales activities by dealers engaged in the business. As the Department has explained, each of the presumptions describes conduct that, in its experience, indicates that an individual is likely to be engaged in the business of firearms dealing (or, as applicable, acting with a predominant intent to profit). For example, persons who engage in frequent and multiple purchases and resales, accept credit cards as a method of payment, advertise, etc. are likely to be engaged in the business or have the requisite intent to profit. *See also, e.g.*, 88 FR at 61999–62003 (NPRM setting forth the rationale underlying each presumption). Accordingly, there is a rational connection between the facts to be proven and the presumed facts. *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (noting that a court must "defer to the agency's judgment" and uphold an evidentiary presumption so long as "there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it" (citation omitted)). The Department's determination

[162] *See, e.g.,* 88 FR 31314, 31450 (May 16, 2023) (Department of Homeland Security ("DHS") rule establishing rebuttable presumption that certain noncitizens are ineligible for asylum); 87 FR 65904, 66069 (Nov. 1, 2022) (Department of Education rule establishing rebuttable presumption that when a higher education institution closes and causes detriment to student loan borrowers, student loan borrowers who suffered that detriment are entitled to relief from loan repayment); 81 FR 34243, 34258 (May 31, 2016) (Small Business Administration ("SBA") rule establishing rebuttable presumption of affiliation based on an identity of interest); 8 CFR 208.13(b) (DHS regulations creating rebuttable presumption that past persecution of refugee establishes well-founded fear of future persecution); 12 CFR 225.32 (Federal Reserve Board regulations creating rebuttable presumptions that determine when a company controls another company); 13 CFR 124.103(b) (SBA regulations creating rebuttable presumption that individuals who are members of certain groups are socially disadvantaged); 38 CFR 3.307 (Department of Veterans Affairs regulations creating rebuttable presumptions relating to exposure by veterans to certain chemicals or diseases).

that presumptions are necessary to carry out the GCA here is also informed by its experience in other regulatory contexts where the agency has incorporated presumptions and found them to promote a common understanding of, and consistent compliance with, the laws it implements.[163]

The Department acknowledges, as commenters noted, that failure to comply with the licensing requirement can have criminal implications. It is unlawful under 18 U.S.C. 922(a)(1)(A), 923(a), and 924(a)(1)(D) for any person to willfully engage in the business of dealing in firearms without a license. However, the Department disagrees with commenters' assertions about how the rule would apply in a criminal context. First, the presumptions in the regulatory text do not apply to criminal proceedings. Instead, persons seeking to comply with the licensing requirement should take them into account in determining whether they must obtain a license, and they apply in civil and administrative proceedings. This includes license denial or revocation proceedings for willful violations "of this chapter or regulations issued thereunder," *see* 18 U.S.C. 923(d)(1)(C), 923(e), and civil/administrative asset forfeiture proceedings based on "willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder," *see id.* 924(d)(1).

The Department also disagrees with the commenters' assertion that the rebuttable presumptions are contrary to the clear and convincing evidence standard for forfeiture in

[163] *See, e.g.*, 27 CFR 478.12(d) ("The modular subpart(s) identified in accordance with § 478.92 with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be part of the frame or receiver of a weapon or device."); *id*. 478.12(f)(1) ("Any such part [previously classified by the Director] that is identified with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be the frame or receiver of the weapon."); *id*. 478.92(a)(1)(vi) ("[F]irearms awaiting materials, parts, or equipment repair to be completed are presumed, absent reliable evidence to the contrary, to be in the manufacturing process").

"intended to be used" violations of 18 U.S.C. 922(a)(1). Section 924(d)(1) provides for seizure and forfeiture of firearms and ammunition involved in the commission of several specified crimes. The statute also authorizes the forfeiture of any firearm and ammunition intended to be used in the commission of offenses set forth in 18 U.S.C. 924(d)(3)—which includes the prohibition against unlicensed dealing in 18 U.S.C. 922(a)(1). When a civil forfeiture action is based on the offenses in 18 U.S.C. 924(d)(3)(C), the Government is required to establish by a preponderance of the evidence (as required by 18 U.S.C. 983(c)(1)) the underlying violation that supports forfeiture (including inchoate offenses) and also, by clear and convincing evidence (as required by 18 U.S.C. 924(d)(1) and (d)(3)(C)) that the firearms and ammunition for which forfeiture is sought were intended to be used in that crime. When a criminal forfeiture action is based on the offenses in 18 U.S.C. 924(d)(3)(C), the Government, having already proven the underlying violation beyond a reasonable doubt, is required to establish by clear and convincing evidence (as required by 18 U.S.C. 924(d)(1) and (d)(3)(C)) that the firearms for which forfeiture is sought were intended to be used in that crime. Thus, the presumptions (or permissive inferences) would apply only to the Government's evidence to prove an individual is "engaged in the business" for purposes of the underlying section 922(a)(1) violation, not to the Government's burden of proving that a particular firearm was intended to be used in the section 922(a)(1) violation.

Moreover, the presumptions do not change the burden of proof applicable to forfeitures; they simply shift the burden of producing evidence in the underlying determination of whether a section 922(a)(1) violation occurred. If the Government seeks to seize a firearm on the basis that it was intended to be used in an unlicensed

dealing offense by a person presumed to be "engaged in the business" under this rule, the Government would still have the burden of proving that intent by clear and convincing evidence (and the underlying offense by a preponderance of the evidence). And in civil forfeiture cases where the firearms to be forfeited were actually offered for sale by a person presumed to be engaged in the business under this rule, rather than simply intended to be used in such violation, the "preponderance of the evidence" burden of proof applicable to all civil forfeitures under 18 U.S.C. 983(c)(1) would apply to that forfeiture proceeding. *See* 18 U.S.C. 924(d)(1) (providing for the forfeiture of "[a]ny firearm or ammunition involved in or used in any . . . willful violation of any other provision of this chapter [including section 922(a)(1)(A)]").[164]

The rule recognizes the unique constitutional context in which criminal proceedings take place, where defendants are entitled to heightened procedural protections and the Government bears the burden of persuasion beyond a reasonable doubt, and makes clear that its presumptions do not apply in criminal cases. But that does not mean, as some commenters have suggested, that the Department has given the statute a different meaning in the civil and criminal contexts. In any proceeding that requires proof that an individual was "engaged in the business"—whether criminal, civil, or administrative—the Government has the burden to prove conduct that meets the definition in 18 U.S.C. 921(a)(21)(C), *i.e.*, that the person devoted time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn

[164] *See, e.g.*, *United States v. 133 Firearms With 36 Rounds* of Ammunition, No. 08-cv-1084, 2012 WL 511287, at *3 (S.D. Ohio 2012) ("Where it is alleged that the firearm was 'involved or used in' any of the offenses listed in 18 U.S.C. § 924(d)(3), the government's burden of proof is by a preponderance of the evidence."); *United States v. Four Hundred Seventy Seven Firearms*, 698 F. Supp. 2d 890, 893 (E.D. Mich. 2010) ("[T]he statute's requirement of a heightened burden of clear and convincing evidence to prove intent does not apply to a forfeiture action premised on a firearm being actually *involved in or used in* a willful violation of 922(a)(1)(A).").

a profit through the repetitive purchase and resale of firearms. This rule further defines that term and sets forth certain activities that are indicative of being engaged in the business to provide clarification and guidance to persons who are potentially subject to the licensing requirement. These activities are indicative of being engaged in the business regardless of the type of proceeding in which the activities may ultimately be offered as proof. But the rule's delineation of evidentiary presumptions for use only in civil and administrative proceedings does not require courts to "giv[e] the same [statutory] provision a different meaning." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). As the proposed rule explained, in criminal cases, courts may decide to use the presumptions as permissive inferences, such as when drafting jury instructions, and nothing prevents the Department from requesting that criminal courts consider, or prevents such courts on their own from considering, the conduct underlying the rule's presumptions to determine whether an individual was "engaged in the business" (such as when instructing juries regarding permissive inferences).[165]

For example, the Department has concluded that a person who repetitively resells firearms within 30 days from purchase is likely to be "engaged in the business" requiring a license. A person potentially subject to the licensing requirement should take that

[165] *See, e.g.*, *United States v. Zareck*, Criminal No. 09-168, 2021 WL 4391393, at *68–69 (W.D. Pa. Sept. 24, 2021) (rejecting challenge to jury instructions that included an inference of current drug use based on the regulatory definition of "unlawful user of a controlled substance" in 27 CFR 478.11); *United States v. South*, No. 19cr43, 2020 WL 3489341 (N.D.W.V. June 26, 2020) (similar); Eighth Circuit Committee on Model Jury Instructions, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 266–68 (incorporating inference of current drug use in 27 CFR 478.11); *United States v. Perez*, 5 F.4th 390, 400 (3d Cir. 2021) (finding that application note to federal sentencing guidelines allowed courts to draw a rebuttable presumption that a firearm is used in connection with a drug-trafficking offense where it is found in close proximity to drugs or drug paraphernalia); *United States v. Freeman*, 402 F. Supp. 1080, 1082 (E.D. Wis. 1975) (interpreting Selective Service regulations to create a rebuttable presumption that shifted to the defendant the burden of putting forward evidence showing he did not receive the order requiring him to report for service).

interpretation into account in assessing their need for a license and, in a civil or administrative proceeding, the Government and court will apply that interpretation through rebuttable presumptions. Those presumptions do not apply in criminal proceedings, but that does not change the Department's interpretation that a person who repetitively resells firearms within 30 days from purchase is likely to be "engaged in the business" requiring a license, nor does it prevent a court presiding over a criminal proceeding from adopting the Department's interpretation and applying it in a manner consistent with the Constitution and criminal law. In a criminal proceeding, a court may, at its discretion, elect to instruct the jury that it may draw an inference that a person is "engaged in the business," or has the "predominant intent to earn a profit," based on evidence that the person repetitively resold firearms within 30 days from purchase, or engaged in any of the other activities set forth in the rule's presumptions. If the court decided to instruct the jury regarding such a permissive inference, that instruction would be consistent with the Department's interpretation of the statute contained in this rule.

The Department disagrees with commenters who imply that it is improper or unusual for a party, including the Government, to submit or advocate for proposed jury instructions in a case. Under the Federal Rules of Criminal Procedure, any party may request in writing that the court instruct the jury on the law as specified in the request, and any party may object to any portion of the instructions. *See* Fed. R. Crim. P. 30(a), (d). Independent bodies, including those that are private, quasi-judicial, and academic, also prepare form or pattern instructions. While criminal courts are under no obligation to adopt the Department's interpretation of "engaged in the business," and a court's ultimate treatment of the Department's evidence might differ across criminal and civil

proceedings, the Department's interpretation of the statutory term is the same across "both criminal and noncriminal applications." *Leocal*, 543 U.S. at 11 n.8.

For similar reasons, the commenters' reference to the Supreme Court's decision in *Thompson/Center Arms* is inapposite. There, the Supreme Court applied the rule of lenity to resolve an ambiguous statutory term, even though it was construing that term in a "civil setting," due to the statute's potential criminal applications. *See Thompson/Center Arms Co.*, 504 U.S. at 517–18. As discussed above, the Department's rule offers one definition of the statutory term "engaged in the business," and its use of presumptions does not require that courts apply the term differently in criminal and noncriminal settings. Further, *Thompson/Center Arms* does not speak to the burden of proof or attendant evidentiary presumptions, and its invocation of the rule of lenity to resolve an ambiguous statutory term imposes no barrier to the Department establishing prospectively by regulation presumptions for persons potentially subject to the licensing requirement to consider and for use in civil and administrative proceedings.

As noted above, it is well established that administrative agencies can create rebuttable presumptions. This is the case even when the statute at issue has both civil and criminal components.[166] In *Chemical Manufacturers Association v. Department of Transportation*, for example, the D.C. Circuit did not invoke the rule of lenity or suggest that the Department of Transportation's presumptions would result in inconsistent interpretations, but rather upheld the presumption at issue because the agency

[166] *See* footnotes 162 and 163*, supra*; *see also, e.g.*, 17 CFR 255.1, 255.3(b)(4) (Securities and Exchange Commission ("SEC") regulations implementing the Bank Holding Company Act of 1956, which provides for both criminal and civil penalties, *see* 12 U.S.C. 1847, and creating a presumption that the purchase or sale of a financial instrument by a banking entity is not for the trading account of the entity if it is held for 60 days or longer); *id*. 255.20(g) (SEC regulation from same part establishing rebuttable presumption that a banking entity with limited assets and liabilities is in compliance with regulatory obligations).

"adequately articulated a reasonable evidentiary basis for [it]." 105 F.3d 702, 707 (D.C. Cir. 1997). As addressed in Section IV.B.8.g of this preamble, the presumptions in this rule are rationally based on ATF's regulatory, investigative, and law enforcement experience, supported by subject matter expertise and decades of applicable case law applying various presumptions in civil and administrative proceedings.[167]

The Department disagrees with the commenters' recommendation to include the set of PEP presumptions under the EIB presumptions. While the Department agrees that the conduct underlying the PEP presumptions may often be found and proven in cases that depend on establishing that an individual "engaged in the business," the EIB presumptions stand on their own because, once proven, they demonstrate a likelihood of devoting time, attention, and labor to dealing in firearms as a regular course of business in addition to the person's intent to predominantly earn a profit through the repetitive purchase and resale of firearms. In contrast, the PEP presumptions, once proven, demonstrate only a likelihood of a predominant intent to earn a profit through the repetitive purchase and resale of firearms, not that the person is presumed to be engaged

[167] *See, e.g.*, *Big Branch Res. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013) (in disability benefits proceeding, claimant's proof of disability shifted the burden to employer's insurer to demonstrate otherwise); *Medina v. Cram*, 252 F.3d 1124, 1129 (10th Cir. 2001) (rebuttable presumption of qualified immunity in civil proceeding "necessarily shifts the burden from the party favored by the presumption to the party rebutting it."); *Scales v. I.N.S.*, 232 F.3d 1159, 1163 (9th Cir. 2000) (in deportation proceedings, evidence of foreign birth shifts burden to the petitioner to prove citizenship); *Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999) ("[O]nce the FAA shows that a pilot failed to follow a clear ATC instruction, the burden of production shifts to the pilot to offer an exculpatory explanation.); *Spilman v. Mosby-Yearbook, Inc.*, 115 F. Supp. 2d 148, 154 (D. Mass. 2000) (in copyright dispute proceeding, registration of the copyright created a rebuttable presumption of validity and shifted the burden to the respondent to prove invalidity of the copyright); *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1087–98 (D. Idaho 2000) (upholding environmental regulations adopting a rebuttable presumption in favor of fishable/swimmable use designations); *In re The Medicine Shoppe*, 210 B.R. 310, 312 (N.D. Ill. 1997) (in bankruptcy proceeding, a properly filed claim creates a rebuttable presumption of validity and shifts the burden to the objector to produce evidence to overcome the presumption); *Sinatra v. Heckler*, 566 F. Supp. 1354, 1358–59 (E.D.N.Y. 1983) (in Social Security benefits proceeding, regulatory presumption served to shift the burden of going forward with evidence of receipt of notice of adverse determination).

in the business as a result of their actual repetitive purchasing or reselling of firearms. That the Government is able to produce evidence of intent sufficient to satisfy a PEP presumption does not necessarily mean that the evidence put forward is always sufficient to prove the other EIB statutory elements in a civil or administrative proceeding.

For example, if a person repetitively rents tables at gun shows over the course of several months to display firearms for resale, that conduct would demonstrate a predominant intent to profit from repetitive resales and, therefore, the second PEP presumption (repetitively renting physical space to display firearms for resale). Indeed, a person would not likely continue to rent or continuously purchase space at a cost if the person did not intend to profit from selling at gun shows, even if no firearms were actually sold. The seller is presumed to have a predominant intent to earn a profit through repetitive firearms purchases and resales even though there may not have been any actual purchases or resales that would rise to an EIB presumption. Repetitively renting tables at gun shows over the course of several months is certainly indicative of being engaged in the business; however, by itself, it does not yet demonstrate the other elements of being engaged in the business—devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. Those elements would still have to be proven even if there was evidence sufficient to demonstrate the seller's predominant intent to support a PEP presumption. In contrast, if the seller repetitively rents tables at gun shows over the course of several months to display firearms for sale, and repetitively resells firearms within 30 days after purchasing them, the person's conduct meets both the PEP and EIB presumptions. In addition to the second PEP presumption, the first EIB presumption (offering to sell firearms and demonstrating a willingness and ability to

purchase and resell additional firearms) would be met because this conduct demonstrates not only a predominant intent to profit, but also the devotion of time, attention, and labor to dealing in firearms as a regular course of trade or business by actually transacting firearms.

c. Arbitrary or Capricious

Comments Received

Some commenters objected to the NPRM on grounds that it is arbitrary and capricious because, they said, it is nothing more than a politically motivated rulemaking designed to stop all private sales, create universal background checks, or establish a national firearms registry in furtherance of political agendas, rather than developing clear standards that apply over time. Others more specifically argued that the entire rule is arbitrary and capricious under 5 U.S.C. 706(2)(A) of the APA. Some of these commenters argued that the agency relied on factors that Congress did not intend for it to consider when enacting the BSCA. A few contended that the changes being made to the definition of "engaged in the business" were unnecessary because the definition as it was pre-BSCA has been in effect and working fine for a long time. Others said that changing the definition oversteps the authority allowed by the BSCA, which did not grant "additional authority" to "re-define" dealer, or asserted that the Department's definition does not simply clarify the law, which cannot be expanded without a solid basis.

Other commenters stated that the rule is arbitrary because it causes the proposed definition of a dealer "engaged in the business" to be less clear and makes it almost impossible to determine when one is in compliance. One of these commenters elaborated that "[t]he proposed rule outlines a set of extremely complex, subjective, and arbitrary

guidelines on how [ATF] will determine if an individual is engaged in the business of 2nd Amendment protected sales." Another commenter asserted that the rule was unfair because it changed the definition overnight without notice that most people would be aware of. A third stated the rule "fails to provide any bright-line rules for individuals to ascertain whether they are actually 'engaged in the business' and instead claims that ATF will conduct a 'fact-specific inquiry' under which 'even a single firearm transaction' may suffice. . . . This is not a rule, nor is it knowable to the average, reasonable person. And yet, this Proposed Rule suggests alterations to Federal regulation that will bear the full force of criminal law. More, the Proposed Rule leaves complete and total discretion in the hands of ATF."

Several commenters focused on the lack of a threshold number of firearms as an indicator of the arbitrary nature of the rule. One of these commenters explained that "[t]he rule does not provide any rationale for why selling more than one firearm per calendar year should be considered engaging in the business of dealing in firearms. There is no evidence that this is a meaningful threshold, and there is no reason to believe that it will be effective in preventing straw purchases." Related to frequency, another commenter stated that "the proposed rule negatively affects the public by providing the ATF exceptionally capricious leeway in its definition of 'repetitive'; since no clear definition is given, it is reasonable to assume that the ATF considers offering any of the listed firearms for sale more than once in the citizen's lifetime as repetitive."

Other commenters stated that the rebuttable presumptions as a whole are "a compilation of totally arbitrary criteria that just makes it hard for normal citizens to sell weapons to each other under non-business transactions." Others focused on specific

presumptions as arbitrary or capricious. For example, a couple of commenters asserted that the firearm's condition is an unsupported and arbitrary basis for a rebuttable presumption that one is engaged in the business. One of these commenters elaborated that new buyers may need the manufacturer instructions on care and handling of the firearms, among other information contained on original packaging, as well as special tools, locks, and cases that come with the original packaging. As a result, selling a firearm with original packaging may indicate nothing more than passing it on to a new owner. As another example, a commenter raised concerns about the resale of a firearm within 30 days after purchase, stating that "an arbitrary 30 day rule to define those individuals engaged in firearms sales cannot possibly be based on any data and facts . . . . If it were based on actual data, the days would be 28, or 34, or 67, for example. My point is that 30 days is an arbitrary amount based on nothing other than making it an easy number to remember for policy and enforcement purposes."

Some other commenters found the concept of "profit" to be arbitrary. One commenter stated that "[s]elling at a profit does not equate to engaging in the business. That is totally absurd. Prices of firearms appreciate, as do any other valuable object." Another stated that "'the statutory definition further provides that proof of profit is not required . . . ', which in other words means 'here at the ATF will charge you whether or not we have evidence of wrongdoing.'" Another commenter, an organization that runs gun shows, stated that the application of the concept of profit in the rule not only exceeds the statutory scope, but also does not appropriately account for what constitutes a profit.

And finally, some commenters stated that the rule lends itself to arbitrary and capricious interpretation and enforcement, placing citizens at risk. For example, one

commenter stated that "[u]ltimately, this rule will only impair the rights of the law[-]abiding citizens and potentially create additional felons through what is merely an arbitrary and capricious rule." Another stated that "[t]he rule would give the Attorney General broad discretion to determine who is a gun dealer and who is not, and it would subject gun owners to arbitrary and capricious enforcement actions."

Department Response

The Department disagrees that the rule is arbitrary or capricious, or otherwise violates the APA. The BSCA amended the GCA, and the Department has invoked its rulemaking authority, *see* 18 U.S.C. 926(a), to promulgate regulations necessary to implement the GCA, as amended. As stated previously, ATF has been delegated the authority to further define statutory terms, such as "engaged in the business," when necessary to administer and enforce the GCA.

While the BSCA broadened the definition of "engaged in the business" as it applies to dealers, it did not set forth or explain what specific firearms purchase and sale activities are sufficient for a person to be "engaged in the business" of dealing in firearms under the GCA. Many commenters stated that they believe this rulemaking provides much needed clarity about the persons who must obtain a license, thereby increasing the firearms transactions conducted through licensed dealers, helping to ensure that persons who are prohibited from receiving or possessing firearms do not receive them, and creating more licensed dealers who maintain records through which crime guns can be traced.

The Department disagrees that the rule is unclear or overly complex. The rule sets forth definitions of terms that are based on standard dictionary definitions and

decades of case law interpreting "engaged in the business." The rebuttable presumptions are based on specific, identifiable conduct and clearly defined in the regulatory text.

The Department explained its reasoning, both in the proposed rule and elsewhere in this final rule, for not adopting a specific numerical threshold of firearms that an individual must sell to be considered "engaged in the business." *See* Department Response in Section IV.B.3 of this preamble. The Department disagrees with commenters who argued that a single sale, standing alone, would presumptively classify the seller as "engaged in the business" under this rule. The regulatory text explains that a single sale must be coupled with additional evidence to support a determination that the seller required a license. It is important to note that, in any event, all presumptions in this rule are rebuttable.

The Department disagrees with the comments that the presumptions are arbitrary. As explained previously, and in response to particular comments about specific presumptions, the presumptions are all based on the Department's investigative and regulatory enforcement experience,[168] as well as numerous post-FOPA court and administrative decisions cited in this rule.[169] Indeed, some of the regulatory text that commenters asserted is new or represents a significant change was adopted from ATF's published guidance issued almost eight years ago in 2016.[170] That guidance explained

[168] *See Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1322 (11th Cir. 2021) ("Agencies are permitted to rely on their experience in the regulated field, so long as they explain what their experience is and how that experience informs the agency's conclusion.").
[169] *See* footnotes 71–83, *supra*.
[170] *See* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?* 5 (Jan. 2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.

that "there is no 'magic number' related to the frequency of transactions that indicates whether a person is 'engaged in the business' of dealing in firearms."[171]

The Department disagrees with the comments arguing that a firearm's condition—or the fact that a firearm is in, or sold with, original packaging that contains manufacturer instructions and other useful items—is an arbitrary basis for a rebuttable presumption. Persons who are engaged in the business of dealing in firearms often desire firearms that are in either a new condition, or a nearly new condition, accompanied by original packaging so they can command the highest price while quickly attracting buyers in the shortest amount of time. Moreover, purchasers of deadly, explosive-based weapons are more likely to trust the safety and reliability of new, factory-tested firearms, rather than used firearms in a lesser condition. Nonetheless, in response to comments regarding the presumptions that a person is engaged in the business if they repetitively resell or offer for resale new or like-new firearms, or firearms that are of the same or similar kind and type, the Department has revised those presumptions to apply only where the resales or offers for resale occurs within one year from the date of purchase (also referred to in this rule as a "turnover" limitation) to reduce the chance that personal collection firearms might fall within either of these presumptions. *See* 27 CFR 478.13(c)(3)(ii). In this regard, the Department agrees with some commenters that collectible firearms could be maintained in a like-new condition months or years after they were originally sold. However, based on the Department's extensive experience investigating and enforcing civil, administrative, and criminal cases against persons who were willfully engaged in the business without a license, it is unlikely that a collector or

[171] *Id.* at 5.

hobbyist would repetitively resell such firearms within one year after purchase if not to engage in the business of dealing in firearms. Of course, as the rule text states, the determination of whether a person is engaged in the business is a fact-specific inquiry. Thus, a person who intentionally stockpiles and sells new or like-new firearms, or the same make and model or variants thereof, with an intent to evade the one-year turnover limitation may still be considered to be engaged in the business if circumstances warrant that determination.

The Department's views have been further confirmed and supported by a survey ATF conducted of special agents who work on "engaged-in-the-business" criminal cases. The survey was conducted to better understand the appropriate turnover limitation, as these special agents have encountered bona fide collectors during the course of their work. In that survey, ATF asked how soon after purchase bona fide collectors typically resell a firearm in new or like-new condition with original packaging or firearms of the same make and model. Of the 116 agents who responded, 65 percent reported that, based on their observations, bona fide collectors typically resell a firearm that they purchased for their collection sometime after one year. Of that 65 percent, 13 percent added that many bona fide collectors do not resell for as long as five years after purchase, if ever. Another 15 percent of agents responded that they had observed some collectors resell a firearm sometime after six months. Only 6 percent of agents reported seeing a collector resell a firearm after 90 days, and only 1 percent of agents reported observing a resale within 60 days. The remaining 15 percent of agents did not provide a response because they had not closely observed the behavior of collectors. None of the agents reported collectors reselling firearms within 30 days after purchase. In addition, these results were

about single sales of firearms; they did not report on frequency of repetitive sales, or sales involving multiple firearms. Given that 65 percent of agents reported that collectors do not typically resell even one firearm in new or like-new condition with original packaging or firearms of the same make and model within a year after purchase, the likelihood that collectors or hobbyists would engage in repetitive resales of such firearms within one year is low.

It is Congress, not the Department, that identified the predominant intent to profit as a key element of being engaged in the business of dealing in firearms, so commenters' concerns with the concept of profit's role in making EIB determinations are not addressed in this rulemaking. However, the Department agrees with the commenter who stated that actually "[s]elling at a profit does not equate to engaging in [the] business" because a showing of actual profit, whether or not expenses or inflation are considered, is not required to be engaged in the business. Rather, it is the predominant intent of obtaining pecuniary gain from sale or disposition of firearms that matters. *See* 18 U.S.C. 921(a)(22). Moreover, because the person's predominant intent to profit is the relevant fact, it does not matter how actual profit is calculated.

Finally, the Department disagrees that the rule lends itself to arbitrary or capricious enforcement of the dealer licensing requirement because the rule sets forth specific, identifiable evidence that is presumed to demonstrate that a person is engaging in the business, or predominantly intends to earn a profit. In any proceedings where such evidence is presented, it may be rebutted by the party alleged to be engaged in the business of firearms dealing to the extent such rebuttal evidence is available. The presumptions are based on purchase and resale activities that, in ATF's experience, are

indicators of dealing in firearms, as well as court cases, which greatly reduces the possibility of inconsistent interpretation and enforcement.

d. Violates the Prohibitions against Creating a Gun Registry

Comments Received

Numerous commenters objected to the regulation as a ploy by the Government to subject law-abiding gun owners who have the right to buy and sell firearms to a rigorous registration requirement. They claimed that the new definition of "dealer" would require any person who sells a firearm to obtain a license, and that being licensed requires a person to register all of their firearms, thereby creating a universal backdoor gun registry. A few commenters also stated that ATF already has and maintains "nearly a billion entries of gun owner's information in a searchable database."

Department Response

The Department disagrees that this rule creates a registry of firearms. First, the definition of "engaged in the business" as a dealer in firearms as implemented in this rule does not result in a requirement, directly or indirectly, that all persons who sell a firearm must be licensed. Under this rule, persons who sell firearms but who are not engaged in the business of dealing in firearms do not need to become licensed. This includes persons who make occasional sales to family members or FFLs, to enhance their personal collection, and to liquidate inherited firearms, among others. Section 478.13(e) of the regulatory text in this rule provides more information on conduct that does not support a presumption of being engaged in the business as a dealer in firearms.

Second, and more fundamentally, the rule does not create a firearms registry. Licensees are required by the GCA, *see* 18 U.S.C. 923(g)(1)(A), (g)(2), to complete and

maintain records of production, acquisition, and disposition of all firearms at their licensed business premises for such period, and in such form, as the Attorney General may prescribe by regulations. But licensees are not required to register their firearms with ATF or to otherwise submit a listing of the firearms they own or sell. Although ATF has the authority to inspect a licensee's records under certain conditions, *see* 18 U.S.C. 923(g)(1)(B)–(C), the records belong to and are maintained by the licensees, not the government. Only after a licensee discontinues business do the GCA and implementing regulations require licensees to provide their records to ATF, which allows ATF tracing of crime guns to continue.[172] *See* 18 U.S.C. 923(g)(4); 27 CFR 478.127. In fact, 18 U.S.C. 926(a)(3) expressly provides that "[n]othing in this section expands or restricts the [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation."[173] This rule does not in any way alter the longstanding legal requirements preventing ATF from creating a national firearms registry.

e. Violates 18 U.S.C. 242

Comments Received

Out of concern regarding their rights under the Second Amendment to the Constitution, several commenters claimed that by working on this rule, ATF officials are

[172] The out-of-business firearms transaction records are indexed by abbreviated FFL number so that they may be accessed when needed to complete a firearm trace request involving a licensee that is no longer in business. Out-of-business firearms transaction records are not searchable by an individual's name or other personal identifiers. In 2006, ATF transitioned from using microfilm images of records to scanning records into a digital storage system with images that are not searchable through character recognition, consistent with ATF's design and use of its prior Microfilm Retrieval System.

[173] Federal law has long prohibited ATF from consolidating or centralizing licensee records. Since 1979, congressional appropriations have prohibited ATF from using any funds or salaries to consolidate or centralize records of acquisition and disposition of firearms maintained by FFLs. *See* Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. 96–74, 93 Stat. 559, 560 (1979). This annual restriction became permanent in 2011. *See* Pub. L. 112–55, sec. 511, 125 Stat. at 632.

violating 18 U.S.C. 242, which makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. Commenters also claimed that ATF officials and employees are likewise violating their oath of office to support and defend the Constitution (particularly the Second Amendment) under the same provision.

Department Response

The Department disagrees that any official involved in promulgating or implementing this rule is violating 18 U.S.C. 242 or any other criminal law. The regulations proposed and finalized herein do not raise constitutional concerns for the reasons given above. *See* Section IV.B.8 of this preamble.

C. Concerns with Specific Proposed Provisions

The Department received thousands of comments from the public concerned about specific provisions in the proposed rule. A majority of those concerns were in opposition to the rule, but ATF also received comments from individuals who generally supported the proposals. These specific comments originated from a variety of interested parties, including advocacy, sporting, and gun owners' organizations; gun safety organizations; lawmakers; gun enthusiasts; members of the general public; and persons with legal backgrounds. The topics included concerns regarding the proposed definitions, issues regarding the presumptions as a general matter, comments on some of the individual EIB and PEP presumptions, and questions about the transfer of firearms between licensees.

1. Definition of "Dealer"

Comments Received

In commenting on whether the rule's definition of dealer is clear, a number of commenters mentioned that the rule does not include a numerical threshold of firearms or a specified time frame establishing when a person's activities become engaged in the business. As a result, for example, one commenter stated that an average person could not reasonably be expected to understand what activities would require them to get a license, which, the commenter said, essentially means that a single sale of a firearm by a private owner would require a dealer's license unless the seller is either selling to improve their collection or is liquidating their collection.

Other commenters were concerned about the places in which the proposed rule defined firearms purchase and sales activities as dealing. For example, one commenter stated that the reference to an international marketplace in the definition of "dealer" could be read to include activities that occur wholly outside the United States, which goes against the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application. The commenter did not think the Department intended to exercise extraterritorial jurisdiction and suggested the definition of "dealer" should be revised to make this clear. As another example, one commenter expressed concerns about the rule's clarification that dealing may occur wherever, or through whatever medium, qualifying activities may be conducted, suggesting that instead of clarifying, this is likely to create more confusion because having a license would then prohibit the person from selling in some locations. The commenter said that 27 CFR 478.100 is clear that a dealer can transact sales only at its licensed premises or a "qualifying" gun show or event. To be a qualifying gun show or event, the commenter said, it must be sponsored by an organization devoted to collecting, competitive use, or

other sporting use of firearms. As an example, the commenter stated, "it would be difficult to imagine a circumstance where a licensed dealer would be allowed to sell at a flea market, though private sales there might be legal."

Finally, other commenters expressed concern about whether the rule would include certain persons as dealers. For example, one commenter, a large FFL, stated that it is unclear whether its individual employees must be separately licensed as dealers when working in the employ of an FFL. They stated that a plain reading of the proposed regulatory text suggests its employees would be required to be separately licensed. For example, they noted, an associate working in the commenter's customer service department is responsible for the physical repair of firearms returned for service. The associate is a "person," performs the repair work, and obtains monetary compensation for the repairs via paycheck. The commenter asked if, in this scenario, the associate is a "dealer" requiring license as a gunsmith, even if the repairs they perform are made at the direction of the commenter, who itself is a licensee. Similarly, another commenter inquired whether the definition of being engaged in the business as a dealer now includes those who sell only component parts of a weapon, but not the whole weapon itself. Another commenter was also concerned about those who fabricate certain parts, but for a different reason. The commenter, who supported the overall definition of "dealer" because they believe it to be consistent with the BSCA and to enhance public safety, said, "I have concerns about the broad reach concerning persons engaged in the fabrication fitment of barrels, stocks, [and] trigger mechanisms due to these parts being unregulated and not considered firearms under the current frame or receiver rule, as well as the GCA. *See* [Docket No.] 2021R-05F, AG Order No. 5374-2022. Despite this portion of the

definition being in the previous definition, I . . . would recommend that this portion be dropped from the definition."

Department Response

The Department disagrees that the rule does not explain who must be licensed as a "dealer." The definition of "dealer" is, in relevant part, "any person engaged in the business of selling firearms at wholesale or retail" and was already established in the GCA and ATF regulations prior to the BSCA amendments. *See* 18 U.S.C. 921(a)(11)(A). The rule clarifies within this definition that a person can be considered a dealer regardless of the location or medium through which a person engages in the business. In the definition of "engaged in the business" as a wholesale or retail dealer, the rule then sets forth specific and defined conduct that will be presumed to be "engaged in the business" requiring a license as a "dealer," as well as conduct that does not support a presumption and may be used as evidence to rebut any such presumption. *See* § 478.13(c), (e), (f).

The Department disagrees that a single sale of a firearm by a private owner, without more, would necessarily require a dealer's license under this rule. To the contrary, a dealer who is engaged in the business "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." 18 U.S.C. 921(a)(21)(C). To that end, one presumption established by this rule states that a person who sells or offers firearms for sale (even if a firearm is not actually sold) and then also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms (*i.e.*, to be a source of additional firearms for resale) is presumptively engaged in the business. Thus, it is clear from the rule's plain language

that, to trigger this presumption, additional evidence is required beyond merely a single sale of a firearm.

The Department disagrees that the rule seeks to assert extraterritorial jurisdiction in excess of statutory authority by referencing "international marketplaces" in the definition of "dealer." The statutory prohibition at 18 U.S.C. 922(a)(1)(A) makes it unlawful for unlicensed persons "to ship, transport, or receive any firearm in interstate or foreign commerce." Including "international" marketplaces in the definition of "dealer" is consistent with Congress's intent to regulate unlicensed sales in "foreign" commerce.[174] Additionally, the GCA, as recently amended by the BSCA, now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. *See* 18 U.S.C. 924(k)(2)(B). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see id.* 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for sale in another country would be violating 18 U.S.C. 924(k)(2)(B), among other provisions of U.S. law. This is not conduct "wholly outside the United States," as the commenter suggests. Accordingly, this rule now clarifies in the definition of "dealer" that purchases or sales of firearms as a wholesale or retail dealer may occur "at any other domestic or international public or private marketplace or premises."

[174] *See* footnote 48, *supra*.

The Department disagrees with the commenter who said that the definition of "dealer" will cause more confusion because it includes dealing that "may be conducted" at a gun show or event, due to, as the commenter stated, some gun shows or events not being qualified under 27 CFR 478.100. Persons who want to engage in the business of dealing in firearms at a gun show or event must first apply for and receive a license at a business premises in the same State as the gun show or event, regardless of whether the gun show or event is qualified. During the application process, ATF advises the applicant during an application inspection concerning their responsibilities as a dealer, to include dealing only at qualified gun shows or events within the same State as their licensed business premises. To the extent that the definition's use of the phrase "may be conducted" causes some persons to incorrectly believe they may lawfully deal in firearms at gun shows or events that are not qualified, the phrase "may be conducted" has been replaced with "are conducted" in the final definition of "dealer."

With regard to the commenter's question whether an employee of a gunsmith who performs repair work, or fitment of barrels, stocks, and trigger mechanisms to firearms, is a "dealer" who must be licensed, the rule does not address who is "engaged in the business" as a dealer-gunsmith under 18 U.S.C. 921(a)(21)(D), and therefore must be licensed under 18 U.S.C. 921(a)(11)(B).[175] This rule addresses only who is engaged in the business as a dealer under 18 U.S.C. 921(a)(11)(A). Also, this rule does not require employees of dealers to be licensed separately. Firearms businesses carry out their

[175] For more information on who must be licensed as a gunsmith, see *Definition of "Frame or Receiver" and Identification of Firearms*, 87 FR 24652 (Apr. 26, 2022).

operations through their employees.[176] Employees of dealers therefore do not require a separate license, provided the employees are acting within the scope of their duties on behalf of the licensee.[177]

Lastly, in response to the question whether the rule applies to persons who deal in component parts of a complete weapon, this rule applies to persons who engage in the business of dealing in "firearms," as that term is defined by 18 U.S.C. 921(a)(3). This includes weapons that will, are designed to, or may readily be converted to expel a projectile under 18 U.S.C. 921(a)(3)(A), and the frames or receivers of any such weapons under 18 U.S.C. 921(a)(3)(B). Persons who engage in the business of dealing in any such firearms under the GCA must be licensed.

2. Definitions of "Purchase" and "Sale"

Comments Received

In the NPRM, the Department proposed to define the terms "purchase" and "sale" as they pertain to the term "engaged in the business" of dealing in firearms. While some commenters agreed with including definitions for "purchase" and "sale" so persons cannot evade licensing through the barter or exchange of non-monetary items, other commenters believed the proposed definitions went too far. One commenter opined that the definition is so focused on barter, profit, and trade that it will allow ATF to find any

[176] *See* ATF Ruling 2010-1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee*, at 2–3 (May 20, 2010), https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download.

[177] *See United States v. Webber*, No. 2:14-cr-00443, 2017 WL 149963, at *8 (D. Utah Jan. 13, 2017) ("[A]n employee of Cabela's is not engaged in the business of dealing in firearms because Cabela's has the profit motive and Cabela's is the party engaged in the repetitive purchase and resale of firearms. However, let us assume that the employee, who did not have his own FFL, began buying hundreds of guns from Cabela's and reselling them out of his home for personal profit. Cabela's maintains the A&D book, but the employee is not paid for his extracurricular activities. Under those facts, the Gun Control Act would prohibit the employee's conduct. The employee would not be permitted to circumvent the Gun Control Act's licensing requirement by engaging in the business of dealing in firearms with Cabela's FFL.").

nexus such that the agency would be able to detain, investigate, and refer for prosecution an honest series of sales, trades, or bartering that are not in any way executed as part of a business scheme. Other commenters opined that the definitions offered for these terms "deviate from historical practices that allowed for the transfer and trade of firearms among private citizens with minimal government interference." Another considered the definitions to be generally consistent with the plain meaning of those terms.

Several commenters also offered suggestions to the regulatory text. One commenter stated that the definition of "sale" is too broad and includes "Christmas gifts, because [the proposed definition does] not require[] for the firearm's delivery to be 'bargained-for in exchange,' [which is] the core of contract that distinguishes contract from gift." The commenter stated that ATF's definition of "sale" runs counter to the dictionary definition that is quoted in footnote 45 of the NPRM, 88 FR at 61999. The commenter quoted this definition of "sale," emphasizing that it references "a *contract* transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." (emphasis added by commenter). The commenter noted that ATF's regulatory definition does not include the term "contract" and therefore ignores that there must be consideration for a sale to have occurred. In a similar vein, a couple of other commenters emphasized that sales, trades, or exchanges of firearms occur on the basis of agreements or agreed exchanges between the parties and should therefore be permitted.

Another commenter raised a concern that "the [proposed] definition of 'sale' could potentially include non-dispositional transfers. . . . Rather than use the term 'providing,' which could include many temporary transfers, the more statutorily

consistent term would be 'disposing of.' The GCA uses the terms 'disposition' or 'dispose' in connection with the words 'sale' or 'sell' seven times in section 922. 18 U.S.C. §§ 922(a)(6), 922(b)(2), 922(d), 922(d)(10), 922(d)(11), 922(j)." Therefore, the commenter suggested it would be more statutorily consistent to define the term as "disposing of a firearm in exchange for something of value" instead of "providing a firearm in exchange for something of value."

Department Response

The Department disagrees that the definitions of "purchase" and "sale" are overbroad and should not include bartering or trading firearms. As the rule points out, even before the BSCA, courts upheld criminal convictions where payment was made in exchange for firearms in the form of goods or services, rather than cash. Non-cash methods of payment may include contraband, such as drugs. A non-cash method of payment may also be used to conceal illicit firearms dealing, to include avoiding reporting requirements associated with transfers of cash.[178] Moreover, while the Department agrees with the commenters that one definition of "purchase" can include acquiring something of value by contract (*i.e.*, a "bargained for" exchange), the common definition of "purchase" is more generally defined to mean "to obtain by paying money or its equivalent."[179] Nonetheless, to ensure that acquiring the firearm is understood to be intentional, the Department has added the words "an agreed" before "exchange," as used in other comments that view an exchange more broadly than by contract. This includes

[178] *See* 31 U.S.C. 5313(a); 31 CFR 1010.330 (reports relating to currency in excess of $10,000 received by a trade or business).
[179] *Purchase*, Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/purchase (last visited Mar. 4, 2024); *Purchase*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/purchase (last visited Mar. 4, 2024) ("to obtain for money or by paying a price").

an agreement to exchange something of value indirectly, such as payment of the seller's debt owed to a third party in exchange for a firearm.

Regarding the definition of "sale," the Department disagrees that the proposed definition of that term is inconsistent with common dictionary definitions.[180] Moreover, giving bona fide gifts[181] continues to be excluded from conduct presumed to be engaged in the business, and evidence of such gifts can be used to rebut the presumptions that a person is engaged in the business. *See* § 478.13(e)(1), (f). Furthermore, the Department agrees that it is more consistent with the GCA to use the phrase "disposing of a firearm" rather than "providing a firearm," in the definition of "sale," and that change has accordingly been made.[182]

3. Definition of Engaged in the Business Generally

Comments Received

Numerous commenters did not agree with the Department's assertion in the proposed rule that a single firearms transaction or no sale at all may require a license. They believed that this runs counter to statutory language that emphasizes "regular" and "repetitive" manufacture and sale or purchase and resale of firearms. Commenters stated that "repetitive" cannot be proven by "a single firearm transaction"; that the statute

[180] *See Sale*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/sale (last visited Mar. 4, 2024) ("exchange of property of any kind, or of services, for an agreed sum of money or other valuable consideration"); *Sale*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=sale (last visited Mar. 4, 2024) ("The action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration.").

[181] For the definition of "bona fide gift," *see* footnote 69, *supra*.

[182] *See* 18 U.S.C. 922(a)(6) (prohibiting false statements in connection with the "sale or other disposition" of a firearm); *id.* 922(b)(2) (prohibiting the sale or delivery of any firearm in violation of any State law or published ordinance at the place of "sale, delivery or other disposition"); *id.* 923(g)(1)(A),(g)(2) (requiring licensees to maintain records of "sale, or other disposition of firearms"); *id.* 923(g)(3)(A) (requiring licensees to prepare reports of multiple "sales or other dispositions"); *id.* 923(j) (requiring that the gun show or event location of the "sale or other disposition" of firearms be entered in licensee records).

clearly requires a course of conduct of purchasing and reselling firearms repetitively. One commenter stated that the required repetitive purchase and resale of firearms means that "[the] firearms must be purchased 'and' resold. If firearms are not purchased with the intention of resale at time of purchase, [they] fall[] under the exception." Otherwise, the commenter argued, simple purchases and sales are something any gun owner might do; that is why Congress carefully chose the word "resale"—meaning "the act of selling something again." Along this vein, at least one commenter suggested that the Department amend all the presumptions for engaged in the business to use the word "resale" or "reselling" rather than "sale" or "selling" to be consistent with the phrase "repetitive purchase and resale of firearms" in the GCA definition of dealer.

Another commenter also rejected the Department's position that "there is no minimum number of transactions that determines whether a person is 'engaged in the business' of dealing in firearms," and that "even a single firearm transaction, or offer to engage in a transaction [without any actual transaction], when combined with other evidence, may be sufficient to require a license." The organization identified six indicators in the GCA that they argued demonstrate that more is required, including: (1) use of "firearms" in the plural; (2) "regular course," contemplating a series of events; (3) "repetitive," meaning more than once; (4) requiring actual "purchase and *re*sale," which (5) provides a contemporaneous conjunctive requirement; and (6) exempting "sales, exchanges, or purchases," in the plural. The commenter concluded that these indicators require ATF to reverse its position.

Another organization emphasized that a person who makes occasional sales, exchanges, or purchases for enhancement of a personal collection or for a hobby, or to

sell all or part of their personal firearms collection, is not engaged in the business as a dealer even if the person sells the firearms to "predominantly earn a profit." "Profit motive," they stated, "is not relevant to activities that fit within the carve-out because it is an exception to the general 'engaged in the business' rule. This construction of the statute is extremely important because it covers common behavior for law-abiding gun owners."

Some congressional commenters focused specifically on the presumptions in this light and stated that "the civil and administrative presumptions ignore the occasional seller and hobbyist protections under the law. . . . Occasional sellers may keep firearms in their original packaging or discuss the purchase and resale of firearms with friends. Occasional sellers—because they are occasional sellers—may represent that they are able to get firearms. And occasional sellers may collect or even sell firearms of the same make and model. The proposed rule paints a broad brush to attempt to regulate conduct that is protected under the law for occasional sellers of firearms." An additional commenter stated that the statute's use of the plural form of "occasional sales, exchanges, or purchases" clearly indicates that multiple sales, exchanges, or purchases can be made by gun owners without rising to the level of dealing.

Indeed, at least one commenter in support of the presumptions suggested that the rule could be clearer about what constitutes an occasional sale. "[W]hile it is not necessary for the final rule to establish a numerical ceiling for what constitutes 'occasional' sales or exchanges under 18 U.S.C. 921(a)(21)(C) (given the NPRM's general preference for a fact-specific inquiry)," they said, it "should at minimum clarify

that 'occasional' sales conduct should not be construed to include sales conduct that is consistently ongoing or that is regularly scheduled in a consistent or periodic fashion."

One commenter stated that ATF has created a nebulous moving target without including a numerical threshold to determine when one is a dealer in firearms. Indeed, two commenters otherwise in support of the rule proposed adding a rebuttable presumption that the sale or transfer of five or fewer firearms is presumed to be selling or transferring firearms occasionally, whereas another commenter suggested 8–10 firearm sales as the appropriate number. One of the commenters cited to similar provisions in California (which the commenter stated has five firearms per year as its threshold) and other States to support the proposition that it is possible to set a number, while not necessarily agreeing that five is the reasonable threshold. These commenters stated that by adding this threshold, the public and law enforcement would have a clearer idea of when one is subject to, or exempt from, becoming licensed. Similarly, another commenter suggested a threshold number of five firearms per month would be reasonable because the vast majority of individual hobbyists and collectors would not even approach half of the limit. This commenter specifically stated, "[t]his would leave no room for guessing and would send a strong message from the ATF that persons who may touch the limit would need to go ahead and obtain their FFL." Another commenter suggested that, rather than trying to define what "engaged in the business" means, it would be better to explain how a citizen may sell a firearm so as not to be considered a firearms dealer needing a license. Defining it from that direction, they added, would make any conduct outside that "non-dealer" definition presumptively conduct that requires a license.

An additional commenter suggested that, to alleviate the "occasional seller exemption" issue, ATF should treat the presumptions as permissive inferences in civil/administrative contexts as well as in criminal ones. "This is a much more lenient standard for those who have not even repetitively sold or purchased a firearm," they stated, because permissive inferences are not mandatory, do not shift the burden of proof, and do not require a specific outcome. Similarly, a final commenter suggested that the first EIB presumption should instead be a permissive inference (dealing in firearms when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms). The commenter stated that, as a mandatory presumption, this presumption is too inflexible to be fairly applied, even on a case-by-case basis, but also that it does not allow for the case-by-case analysis the commenter said ATF purports to want. There is a tension between the presumptions that indicate a person is "engaged in the business," the commenter added, and the exclusion from being engaged in the business for those who make only occasional sales. By its plain language, the commenter continued, the presumption includes anyone who intends to purchase or sell any number of firearms, regardless of whether they intend to do so for pecuniary gain or to enhance or liquidate a personal collection. "This linguistic imprecision undercuts ATF's stated exemption of persons who only make occasional purchases, sales, or trades for the enhancement or liquidation of a personal collection," they concluded.

Department Response

The Department agrees with commenters that the GCA's definition of "engaged in the business" contemplates a person's devotion of time, attention, and labor to a

regular trade or business of buying and selling more than one firearm, but disagrees that the statute requires any minimum number of firearms to actually be sold to be "engaged in the business" under the GCA, or that the EIB presumptions are contrary to the statutory language. While some commenters reference particular words or phrases in the statute, the statutory language must be considered as a whole. To be "engaged in the business" as a wholesale or retail dealer under 18 U.S.C. 921(a)(11)(A), a person must "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." 18 U.S.C. 921(a)(21)(C).

A person may "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business," for example, by spending time, effort, and money each day purchasing, storing, and securing firearms inventory, and advertising or displaying those firearms for sale. The specific resale activities identified in each presumption reflect this devotion of time, attention, and labor to dealing in firearms as well as the element of intent. But it is only the intent element of the statute—to predominantly earn a profit—that mentions "repetitive purchase and resale of firearms." There is no statutory requirement that firearms actually be sold; indeed, a dealer may routinely (*i.e.*, "regularly") devote time and resources working toward that goal as a course of trade or business, but never find a buyer or consummate any sales due to insufficient demand or poor sales practices. This is because the phrase "repetitive purchase and resale of firearms" refers to the method, or modus operandi, by which a

person intends to engage in the firearms business.[183] Thus, under the statutory text and judicial interpretations of it, no actual sales are required if the intent element is met and the person's conduct demonstrates their devotion of time, attention, and labor to dealing in firearms as a regular course of trade or business.[184]

Intent may be inferred from a person's words or conduct.[185] Unlike a numerical threshold number of sales, the rule's EIB presumptions are all activities, based on case law and ATF's experience, that are indicative of the intent to earn a profit through the repetitive purchase and resale of firearms. With respect to the suggestion that there should be a five-firearm sale or transfer threshold for determining whether a person is engaged in the business, the Department's approach will allow it to more effectively enforce the licensing requirement for individuals who are engaged in the business. For example, even before the BSCA broadened the engaged in the business definition, the

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[183] *See Palmieri*, 21 F.3d at 1268 ("Although the definition [of engaged in the business] explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi*, it does not establish a specific quantity or frequency requirement." (footnote omitted)); *Focia*, 869 F.3d at 1281–82 ("[N]othing in the [FOPA] amendments or the rest of the statutory language indicates that a person violates § 922(a)(1)(A) only by selling firearms as his primary means of income. And the word 'hobby'—which [defendant] suggests includes the regular sale of guns for profit and financial gain, so long as it is not the seller's primary source of income—simply cannot bear the weight that [defendant] seeks to put on it. The exact percentage of income obtained through the sales is not the test; rather, we have recognized that the statute focuses on the defendant's motivation in engaging in the sales.").

[184] *See, e.g.*, *King*, 735 F.3d at 1107 n.8 (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that "Section 922(a)(1)(A) does not require an actual sale of firearms"); *Nadirashvili*, 655 F.3d at 119 (2d Cir. 2011) ("[T]he government need not prove that dealing in firearms was the defendant's primary business. Nor is there a 'magic number' of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers." (quoting *Carter*, 801 F.2d at 81–82)).

[185] *See Agnew v. United States*, 165 U.S. 36, 50 (1897) (referring to a "presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent"); *cf. United States v. Scrivner*, 680 F.2d 1099, 1100 (5th Cir. 1982) ("[I]ntent may be inferred from words, acts, and other objective facts."); *United States v. Arnold*, 543 F.2d 1224, 1225 (8th Cir. 1976) ("The requisite intent may be inferred from the acts of the defendant."); *United States v. Spinelli*, 443 F.2d 2, 3 (9th Cir. 1971) ("It is clear that the Government need not adduce direct proof of intent. It may be inferred from the defendant's acts."); *United States v. Ledbetter*, 432 F.2d 1223, 1225 (10th Cir. 1970) ("Intent may be inferred from the conduct of the defendant and from circumstantial evidence which furnishes a basis for a reasonable inference.").

Department successfully prosecuted, and courts routinely upheld, multiple criminal cases in which the evidence presented would not have met a five-sale threshold, but other evidence made clear the individual was engaged in the business without a license.[186]

The terms "sale" and "resale" were used interchangeably in the NPRM because any sale after the firearm was produced and previously sold is a "resale." When speaking of a firearm resale in the context of dealing, it is generally understood that it includes any sale of a firearm, including a stolen firearm, any time after any prior sale has occurred. Nonetheless, the Department agrees with the commenters that this was not explicitly stated in the NPRM, that using the term "resale" more consistently would be clearer, and that the intent element of the statute contemplates potential repetitive "resales" of firearms to be engaged in the business. For these reasons, the Department has revised the regulatory text to change "sale" to "resale" in various presumptions where that prefix ("re") was not already used, and defined "resale" to mean "selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person." This change aligns the regulatory text with the intent element in 18 U.S.C. 921(a)(21)(C), and makes clear that the term "resale" refers to any wholesale or retail sale of a firearm any time after it was previously sold by anyone.

In response to comments, the Department has also incorporated, as examples of rebuttal evidence: bona fide gifts, occasional sales to enhance a personal collection, occasional sales to a licensee or to a family member for lawful purposes, liquidation of all or part of a personal collection, and liquidation of firearms that are inherited, or

[186] *See, e.g.*, *Orum*, 106 F. App'x 972 (sold three guns on two occasions and testimony that defendant frequented flea markets and gun shows where he displayed and sold firearms); *United States v. Shah*, 80 F. App'x 31, 32 (9th Cir. 2003) (evidence of one sale and defendant's "disposition as a person 'ready and able to procure' additional weapons"); *see also Hosford*, 82 F. Supp. 3d 660 (five transactions).

liquidation conducted pursuant to a court order. *See* § 478.13(e), (f). The Department has also added language explicitly stating that, similar to the way the presumptions operate, these are not the only types of evidence that could be presented to rebut a claim of being engaged in the business. *See* § 478.13(g). Additionally, while the term "occasional" is not defined in the regulatory text, the Department agrees that the plain and ordinary meaning of that term means "of irregular occurrence; happening now and then; infrequent."[187] The Department also agrees that regular or routine sales, exchanges, or purchases of firearms (even on a part-time basis) for the enhancement of a personal collection or for a hobby would not fall within the definition of "occasional."

The Department disagrees with the suggestion to instead define how a citizen may not be considered to be engaged in the business. Because of the myriad circumstances under which a person may sell a firearm, it would be difficult, if not impossible, for the Department to outline all the circumstances in which firearms might lawfully be sold without a license. However, the Department has set forth in the final rule a non-exhaustive list of conduct that does not support a presumption and can be used as evidence to rebut any of the narrowly tailored presumptions indicating that a person is engaged in the business of dealing in firearms. *See* § 478.13(e), (f).

Finally, the Department disagrees with the recommendation to change the rebuttable presumptions to permissive inferences in civil and administrative proceedings to alleviate concerns by occasional sellers of personal collection firearms. The Department believes that the use of rebuttable presumptions in civil or administrative proceedings will be much more effective at achieving compliance with the GCA, as

[187] *See* footnotes 70, 123, *supra*.

amended by the BSCA, than voluntary permissive inferences or the existing factor-based approach to determining whether a person is engaged in the business. ATF's 2016 guidance, for example, outlined the general factors and some examples of being engaged in the business, but compliance with that guidance document was voluntary and it was not published in the *Federal Register* for broader distribution and attention by the public.[188] As such, it resulted in only a brief increase in the number of persons engaged in the business becoming licensed dealers (around 567).[189] The rule's approach is consistent with Congress's purposes in enacting the BSCA, which included, among other things, addressing significant non-compliance in the firearms market with the engaged in the business licensing requirements. *See* Section II.D of this preamble. Using rebuttable presumptions in this context is also consistent with the use of rebuttable presumptions in the GCA and other ATF regulations. Indeed, the GCA and implementing regulations already incorporate rebuttable presumptions in various other firearms-related contexts.[190]

4. Definition of Engaged in the Business as Applied to Auctioneers

Comments Received

Some commenters asserted that the Department should reconsider or make clearer the definition of "engaged in the business" as a dealer in firearms as applied to auctioneers. At least one commenter disagreed with conditioning an auctioneer's need for a license on whether that auctioneer takes possession of the firearm prior to the auction. The commenter stated that an auctioneer may take a deceased person's firearms

[188] *See* ATF, *Do I Need a License to Buy and Sell Firearms?* (Jan. 2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.
[189] Source: ATF, Federal Firearms Licensing Center.
[190] *See* footnote 65, *supra*.

into possession prior to the auction for purposes of safety and security and indicated that this kind of action does not make one a dealer. Another commenter stated the Department's attempt to distinguish between estate-type versus consignment-type auctions generates confusion because it seems that, under the rule, whether an auctioneer must be licensed depends on who owns the firearm (*i.e.*, an individual other than the auctioneer, versus an estate). In particular, the commenter stated that ATF's statement that an auctioneer would not need a license if acting as an agent of "the owner or executor of an estate who is liquidating a personal collection," is inconsistent with other statements in the NPRM, which suggest that the exemption would apply only to estate sales (e.g., "[t]he firearms are within the estate's control and the sales made on the estate's behalf"). The commenter stated that it is the method or sale (consignment versus true auction) that determines if the auctioneer exemption applies, not the origin of the firearm (estate versus personal collection). Separately, at least one commenter believed that, because auctioneers are exempt from the requirement to have a license under the rule, a family estate, or the heirs, would have difficulty selling their collection through an auction house in the future.

One organization, though not in support of the rule overall, recognized this portion as the Department's attempt to establish by regulation ATF's longstanding guidance for auctioneers. The commenter suggested that the Department further clarify how "engaged in the business" applies in various auction contexts. For instance, the commenter said it is not clear whether auction companies, which are commonly engaged by nonprofit organizations, would need to be licensed when assisting nonprofit organizations with their auctions. The commenter questioned whether an auction

company that does not take possession of the firearms prior to the auction, or consign the firearms for sale, would be exempt from licensing requirements even though the firearms are not part of the nonprofit organization's "personal collection" as defined by the proposed rule. Separately, the same commenter asked whether nonprofit organizations that conduct auctions of donated firearms would need to obtain a license or whether their use of an FFL to facilitate the auction is sufficient. If the nonprofit itself must be an FFL, the commenter asked if it could coordinate with other FFLs out of State to facilitate auctions outside of the State where the nonprofit organization's business premises is located.

At least one commenter that supported the proposed rule overall urged the Department to provide further guidance to auctioneers that, to the extent an auctioneer operates in States that require background checks on private transactions, estate-type auctioneers risk aiding and abetting illegal transactions if they knowingly facilitate sales of guns without background checks. Further, the commenter, while recognizing the Department did not set any numerical thresholds to determine when a person is a dealer in firearms, suggested that it would be appropriate in this context to provide numerical thresholds because estate-type auctions represent a source of guns that can be purchased without background checks. They recommended that the Department clarify that if an estate-type auctioneer facilitates an individual auction involving more than five guns or facilitates auctions involving more than 25 guns in a one-year period, then they must be a licensed as an FFL or risk aiding and abetting liability under Federal law.

Department Response

This rule merely establishes by regulation ATF's longstanding understanding of the GCA's requirements with respect to auctioneers and does not affect the ability of persons to sell firearms through auction houses. Estate-type auctioneers are not required to be licensed because they are not devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. They are instead providing services as an agent of the owner on commission. These auctioneers are not in the business of dealing in firearms and do not themselves purchase the firearms. The auctioned firearms are within the estate's control and the sales are made on the estate's behalf. The rule uses the term "estate-type" auction to indicate that the firearms need not be part of a decedent's estate, but may instead have been acquired through certain other non-commercial means, such as a non-profit organization receiving a donation of firearms that the non-profit then auctions through an estate-type auctioneer who does not take ownership of the firearms or accept the firearms for resale on consignment. *See* § 478.13(a).

The Department agrees with the comment that there may be personal firearms that may be auctioned at an estate-type auction that do not fall within the rule's definition of "personal collection," such as firearms that were acquired by an individual for self-defense. For this reason, the regulatory text in 27 CFR 478.13(a) has been revised to delete the reference to a "personal collection" when discussing how the regulation applies to auctioneers. The Department also agrees with commenters' concerns about limiting the auctioneer exception where the estate-type auctioneer takes possession of firearms prior to the auction for reasons other than consignment (e.g., temporary safe storage and return to the estate). The main reason consignment-type auctions require a dealer's

license is because the auctioneer has been paid to take firearms into a business inventory for resale at auction in lots, or over a period of time, *i.e.*, consigned for sale. In a "consignment-type" auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification, and has the legal authority to determine how and when they are to be sold. Consequently, the auctioneer dealer exception has been revised in § 478.13(a) so that it does not apply where the firearms for sale have been taken into possession on consignment prior to the auction.

The Department agrees that auctioneers must comply with Federal, State, and local laws. The Department therefore agrees with the comment that estate-type auctioneers must abide by State and local laws that require background checks when the auctioneer is assisting private parties in liquidating inventories of firearms on their behalf. However, no changes are being made as a result of that comment because the requirements imposed by State and local jurisdictions to run background checks do not determine whether a person is "engaged in the business" as a dealer under Federal law. Further, with regard to those auctioneers who obtain a license, the regulations already provide that a license "confers no right or privilege to conduct business or activity contrary to State or other law." *See* 27 CFR 478.58.

Finally, as stated previously, the Department disagrees that there should be a minimum threshold number of firearms to be considered a dealer, whether through an estate-type auction or otherwise. Bona fide estate-type auctioneers are assisting persons in liquidating firearms inventories, not firearms that were acquired for the purpose of resale, and thus would not incur aiding and abetting liability.

5. General Concerns on Presumptions that a Person is Engaged in the Business

a. Overbreadth and Lack of Foundation

Comments Received

A general sentiment from commenters opposed to the proposed presumptions is that they are overbroad, would capture too many permissible sales by collectors, and are not valid indicators of unlawful activity or activity showing the person is an unlicensed gun dealer. The commenters opined that the presumptions include common, innocent behavior with firearms that firearm owners engage in every day, including the presumption, for example, that arises from evidence of selling firearms within 30 days after a purchase or selling firearms that are new or like-new, have original packaging, or are of the same or similar type of firearms. For example, one commenter stated that the presumptions would apply in a typical situation where a person has improved their financial situation and upgrades multiple of their firearms from entry-level, inexpensive items to more expensive items that have more features or better reputation for reliability. This commenter argued that such a person's conduct in upgrading their collection would likely touch upon every single presumption. Similarly, another commenter explained how a person's conduct could fall within multiple presumptions without that person necessarily being engaged in the business. For example, the commenter said, a person purchases a 9mm firearm to carry concealed, but then does not like the recoil impulse and subsequently sells it in like-new condition within 30 days and with the original box. Subsequently, the commenter continued, the person purchases a second firearm and also does not like how it operates for concealed carry. If the person sells that second firearm in like-new condition within 30 days with the original box and it is a similar kind to the previously purchased firearm, then, the commenter concluded, that person would have

multiple criteria factored against them as engaging in the business even though the person is not in fact engaging in the business of dealing in firearms.

Further, commenters stated the rule contradicts the scheme established by Congress and the new presumptions would apply to collectors in every instance despite the statutory language to specifically exempt from the licensing requirement "occasional" gun sales and gun sales from a "personal collection." The presumptions, they stated, fail to recognize this exception. Some congressional commenters opposed to the rule stated: "We merely struck the 'livelihood' language from the statute. This was done to prevent someone who should register as a firearms dealer from evading licensing requirements because he or she had another job that supported his livelihood. In other words, we wanted to clarify that if a person has a job and also operates a firearms business, he or she must still register as a firearms dealer. This was the law in many different jurisdictions across the country and consistent with the ATF's guidance. . . . In making this incremental clarification, we left in place all of the other language in the statute that needs to be considered by the ATF before deeming someone a firearms dealer. . . . Nothing in the presumptions take into account whether the individual devotes time, attention, and labor to dealing firearms. Similarly, the presumptions do not factor in whether the person repeatedly buys and sells firearms as a regular course of trade or business" (footnote omitted).

Additionally, some commenters stated the proposed rule did not provide sufficient foundation or actual evidence for how any of the presumptions are linked to or give rise to criminal activity. Even though the Department cited observations and criminal and civil actions, one commenter stated these conclusions are "based on a censored sample"

and are unreliable because the rule overstates the probative value of the behavior. The commenter argued that ATF would need to survey the likelihood that the circumstances giving rise to the presumption are present within the full class of persons who purchase firearms.

Department Response

The Department disagrees that the presumptions in the rule are overbroad and would capture innocent persons who only occasionally sell firearms from their personal collection without a license. The rebuttable presumptions are narrowly tailored to specific conduct that the Department has found through its investigative and regulatory enforcement experience, as well as numerous post-FOPA court and administrative decisions, to require a license. And crucially, the presumptions are rebuttable, so in the event a civil or administrative proceeding is brought, and a presumption is raised, it can be rebutted with reliable evidence to the contrary. Rebuttable presumptions are just that; they are not established fact, as some of the commenters suggest. And as stated previously, the presumptions shift only the burden of production; they do not change the burden of persuasion. Moreover, consistent with the statutory exclusions, the final rule expressly provides that a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms: (a) as bona fide gifts; (b) occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection; (c) occasionally to a licensee or to a family member for lawful purposes; (d) to liquidate (without restocking) all or part of the person's personal collection; or (e) to liquidate firearms that are inherited, or pursuant to a court order. *See* § 478.13(e). Evidence of

these situations may be used to rebut any presumption in the rule, and the Department has clarified that this is not an exhaustive list. *See* § 478.13(f), (g). The Department is therefore providing objectively reasonable standards for when a person is presumed to be "engaged in the business" to strike an appropriate balance that captures persons who should be licensed because they are engaged in the business of dealing in firearms, without limiting or regulating occasional sales by personal collectors and hobbyists.

The Department disagrees that the proposed rule did not provide sufficient foundation or evidence for how the presumptions are linked to or give rise to criminal activity. First, the presumptions in the rule are based on decades of pre-BSCA criminal case law that continues to be applicable, and the proposed rule cites numerous ATF criminal cases brought against persons who engaged in the business without a license based on evidence cited in each presumption. The presumptions are also based on ATF's significant regulatory enforcement experience,[191] including tens of thousands of compliance inspections of licensed FFLs in the last decade. ATF also reviewed summary information on criminal cases from Fiscal Year 2018 to Fiscal Year 2023 that it investigated, or is currently investigating, involving violations of 18 U.S.C. 922(a)(1)(A) and 923(a), to assess the extent to which the presumptions were consistent with conduct engaged in by persons who are unlawfully dealing in firearms without a license. Hundreds of cases described conduct that would fall under one or more of the EIB or PEP

[191] To further confirm that the proposed PEP presumptions were grounded in the behaviors of licensees who are engaged in the business or applicants seeking to become licensed, ATF surveyed Industry Operations Investigators ("IOIs") on their observations of active licensees and applicants during compliance and qualification inspections, respectively, regarding conduct that is described under the PEP presumptions. All PEP conduct had been observed by IOIs based on their experience inspecting various sizes and types of firearms businesses or applicants seeking to become licensed, except for the eighth PEP presumption (business insurance). For the eighth PEP presumption, IOIs indicated that, based on their experience of interacting with existing FFLs and FFL applicants who operate out of a residence, these types of businesses did not have or plan to have a business insurance policy that covered firearms inventory.

presumptions. Each of the presumptions was supported by the conduct described in these cases, except one. ATF did not find a case that included conduct that would fall under the PEP presumption on business insurance. The Department has therefore removed that presumption in this final rule. *See* § 478.13(d).

The Department disagrees with some commenters that the EIB presumptions do not indicate that a person devotes time, attention, and labor to dealing firearms. Each presumption requires conduct that demonstrates the devotion of time, attention, and labor to dealing in firearms through specific purchase and sale activities. For example, a person who purchases and resells firearms, and then offers to purchase more firearms for resale to the same person, has devoted time, attention, and labor to dealing in firearms as a regular course of business. The seller has expended time, effort, and money to locate and purchase firearms and locate interested customers, then offered to buy and sell more firearms to customers. The statutory definition of "engaged in the business" does not require a seller to have repeatedly purchased and resold firearms; rather, it is the person's intent to predominantly earn a profit through repetitive purchases and resales that must be proven. Each EIB presumption involves activities that tend to show this predominant profitmaking intent.

b. Enforcement of Presumptions

Comments Received

Several commenters stated that the proposed rule did not make clear to whom it would apply or how ATF or other law enforcement entities should consider the presumptions or criteria in an enforcement context. Commenters stated the rule needs to make clear what sales relating to personal collections or hobby are allowed without a

license, so the public knows ahead of time if what they are doing requires a license. One commenter stated that there are no safe harbors in the rule that could encourage lawful and responsible behavior. The commenter suggested that it would be simpler to include a presumption that "[a]ny seller of a firearm who first transfers that firearm to a licensee should be presumed not to be a dealer in firearms regardless of all other indicia." According to the commenter, transferring a firearm to a licensee first shows that the seller cares about creating a record of the sale more than simply maximizing profit, and so such sellers should not be considered dealers. Further, this suggested presumption would encourage the conduct of private transactions through FFLs and accomplish the statutory objectives and the Department's and ATF's policy goals. However, the commenter added that this suggested presumption should not be used to imply that a sale that does not occur through an FFL is automatically an unlawful transaction. Another commenter similarly suggested that ATF's chief concern with creating these presumptions is to keep people from avoiding background checks. As a result, they said, ATF should exclude from the presumptions all sales in which background checks are conducted, including sales to a current FFL, private sales facilitated through a current FFL, and sales of NFA firearms.[192]

Another commenter, who supported the rule, suggested that absent guidance from the Department about how the "criteria" would be weighted, an atmosphere of ambiguity and uncertainty exists for persons who sell or transfer firearms at gun shows, online, or through other means without an FFL, as well as for law enforcement and regulatory agencies enforcing the rule. The commenter suggested adding language to state that

[192] *See* footnote 7878.

while no single factor is determinative, the Department will assign different weights to each factor depending on the context and circumstances of each case. For example, the commenter suggested that if a person rented a table at a gun show, the Department would consider the person to be engaged in the business if the person has displayed signs or banners with a business name or logo, offered warranties or guarantees for the firearms sold, or transferred firearms to residents of another State. Likewise, if the transaction occurs online, the commenter suggested the Department make clear in the rule that it will consider if the person created a website with a domain name that indicates a business activity, posted advertisements on online platforms that cater to firearm buyers and sellers, accepted payments through online services that charge fees for transactions, and whether the person has shipped firearms to persons who are residents of another State through online sales or transfers.

Another suggestion was that "ATF should consider clarifying that the initial burden of producing evidence to establish an 'engaged in the business' presumption in a civil or administrative proceeding falls on the government." They further suggested the rule should also state that, after a determination that the initial evidentiary burden for a presumption has been met, the burden of producing reliable rebuttal evidence shifts to the other party, and if the other party fails to produce sufficient reliable rebuttal evidence, the presumption will stand. They also suggested that the final rule should clarify whether the examples of conduct in paragraph (c)(4) of the NPRM's definition of "engaged in the business"—that is not presumed to be "engaged in the business"—are intended to serve as rebuttable presumptions or as rebuttal evidence. "It appears," the commenter said, "from their placement outside of (c)(3) that the (c)(4) examples are not designed to be

rebuttable presumptions, but the final rule would benefit from clarifying how those examples are to be raised and applied in proceedings."

Department Response

The Department disagrees that the rule does not make clear to whom it would apply. The rule implements the provisions of the BSCA that amended the definition of "engaged in the business" in the GCA as it applies to wholesale and retail dealers of firearms. Thus, the rule is applicable to any person who intends to "engage in the business" of dealing in firearms at wholesale or retail, as the rule further defines that term. Such persons must become licensed and abide by the applicable requirements imposed on licensees under the GCA and 27 CFR part 478. And the rule further explains that the rebuttable presumptions are applicable in civil and administrative proceedings (e.g., license issuance and asset forfeiture), not in criminal proceedings, though courts in criminal cases may choose to use them as permissive inferences. *See* § 478.13(c), (h). The Department will exercise its discretion to utilize the presumptions set forth in the rule in civil and administrative cases and may recommend their use as permissive inferences in criminal proceedings, when appropriate.

The Department disagrees that the rule does not make clear what sales relating to personal collections or hobbies are allowed without a license. The proposed rule explicitly recognized the GCA's "safe harbor" provision that a person is not engaged in the business if the person makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby. 88 FR at 61994, 62001–02. It also stated that a person would not be presumed to be engaged in the business if the person transfers firearms only as bona fide gifts. *Id.* Transfers of firearms for these

reasons do not support a presumption that a person is "engag[ing] in the business," and reliable evidence of these purposes may also be used to rebut any presumption and show that a person is not engaged in the business under the statute. *See* § 478.13(e), (f). The final rule also specifies that a person shall not be presumed to be engaging in the business when reliable evidence shows that the person is transferring firearms only to liquidate all or part of a personal collection of firearms. *See id.* In addition, the term "personal collection" is defined consistently with dictionary definitions to include firearms acquired "for a hobby," and explains the circumstances under which firearms transferred to a personal collection by a former licensee prior to license termination may be sold or otherwise disposed.

Nonetheless, to further allay the concerns of commenters who sought further clarification of the "safe harbors," the Department is adding to this rule a list of conduct that does not support a presumption, as previously stated. *See* § 478.13(e). Reliable evidence of such conduct may also be used to rebut the presumptions. *See* § 478.13(f). The Department has also stated in the rule that the list of rebuttal evidence is not exhaustive. *See* § 478.13(g). Additionally, while the Department disagrees with the commenter that the regulatory text in the final rule needs to explain how the rebuttable presumptions shift the burden of production, the Department agrees with the commenter as to how they are to be applied. As an initial matter, a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person only sells or transfers firearms for one of the reasons listed in § 478.13(e). Determining whether a presumption applies is a fact-specific assessment, as is determining whether a person is engaging in conduct that does not support a presumption,

such as buying or selling firearms to enhance or liquidate a personal collection. For example, unlicensed individuals selling firearms at a gun show or using an online platform cannot merely display a sign or assert in their advertisement that the firearms offered for sale are from a "personal collection" and preclude application of a presumption. Instead, whether a presumption would apply requires an assessment of the totality of the circumstances, including an evaluation of the reliability of any such assertion regarding a "personal collection."

Once a proceeding is initiated, the burden of persuasion never shifts from the Government or plaintiff. If evidence sufficient to support a presumption is produced in a civil or administrative proceeding, the responding person has the opportunity to produce reliable rebuttal evidence to refute that presumption. If the responding person produces such reliable evidence, additional evidence may be offered by the Government or plaintiff to further establish that the person has engaged in the business of dealing in firearms, or had the intent to predominantly earn a profit through the repetitive purchase and resale of firearms, depending on which set of presumptions is applied. If the responding person fails to produce evidence to rebut a presumption, however, the finder of fact would presume that the person was "engaged in the business" of dealing in firearms, or had a predominant intent to earn a profit from the repetitive sale or disposition of firearms, as the case may be.

The Department agrees that a person should be able to rebut a presumption that they are engaged in the business of dealing in firearms requiring a license if the sales are occasionally only to an FFL or to a family member for lawful purposes. A person who only occasionally sells a firearm to a licensee is not likely to have a predominant intent to

earn a profit because a licensee typically will offer less than a non-licensee for the firearm given the licensee's intent to earn a profit through resale.[193] The same reasoning applies to family members because the seller is less likely to have a predominant intent to earn a profit due to their pre-existing close personal relationship (*i.e.*, a less than arms-length transaction). For this reason, the occasional sale of firearms to a licensee or to a family member for lawful purposes has been added to the non-exhaustive list of examples of evidence that may rebut any presumption. § 478.13(e)(3), (f). However, the Department is not excluding from the presumptions a person who engages in private sales that are facilitated by a licensee. Even though such sales are certainly allowed,[194] a private seller likely intends to predominantly earn a profit from those arms-length sales even if the licensee requires a fee for the service of running a background check.

The Department disagrees with the comment that the rebuttable presumptions in the rule should be considered only as criteria that should be weighted and not as rebuttable presumptions. Of course, in the final determination of whether someone is "engaged in the business," all the evidence, for and against, will be weighed by the fact

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[193] *See* Enlisted Auctions, *How Do I Sell My Firearms?*, https://www.enlistedauctions.com/resources/how-do-i-sell-my-firearms (last visited Mar. 6, 2024) ("You can take your firearm to a local gun shop. Typically gun shops will buy your firearm from you at a lower price and then try to resell the firearm at a profit. Pros to this method are that you can take the firearm to the store, drop it off, receive your payment and you are done. Downside is that you do not typically receive market value for your firearm. Think of it as trading in a vehicle. When you trade in your car at a dealership, the dealer never pays you what the car is worth on the open market."); Dunlap Gun Buyers, *How to Sell a Gun in Maryland: A Comprehensive Guide* (Sept. 8, 2023), https://www.cashmyguns.com/blog/how-to-sell-a-gun-in-maryland ("Gun owners can sell their firearm to a local dealer. This is a good way to help ensure gun owners are complying with gun laws in Maryland for firearm sales. However, sellers may be leaving money on the table by selling for much less than the gun's actual market value.").

[194] *See* ATF, *Facilitating Private Sales: A Federal Firearms Licensee Guide*, https://www.atf.gov/firearms/docs/guide/facilitating-private-sales-federal-firearms-licensee-guide/download (last visited Mar. 6, 2024); ATF Proc. 2020-2, *Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers* (Sept. 2, 2020), https://www.atf.gov/rules-and-regulations/docs/ruling/atf-proc-2020-2-%E2%80%93-recordkeeping-and-background-check-procedure/download.

finder. But that does not preclude the use of reasonable and supported rebuttable presumptions as part of that process. In that vein, to best clarify who is presumptively required to be licensed as a dealer, the rule identifies specific conduct that will be presumed to be "engaging in the business" with the intent to "predominantly earn a profit." The presumptions are not factors; nor are they weighted according to the various circumstances described in each presumption because any one of them is sufficient to raise the presumption, and any may be rebutted by reliable evidence to the contrary.

c. Exemption from Presumptions

Comments Received

At least one commenter in support of the proposed rule raised concerns about the exception from the presumptions where a person "would not be presumed to be engaged in the business requiring a license as a dealer when the person transfers firearms only as bona fide gifts or occasionally sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby, unless their conduct also demonstrates a predominant intent to earn a profit."[195] The commenter stated that, although a bona fide gift should suffice to rebut a presumption, the exclusion of these types of situations "risks creating a significant loophole whereby firearms traffickers could shift the burden of proof simply by claiming that any suspicious transaction was a gift." The commenters cited *United States v. Gearheart*, No. 23-cr-00013, 2023 WL 5925541, at *2 n.3 (W.D. Va. Sept. 12, 2023) as an example of when a straw purchaser initially told investigators that she bought the gun as a gift.

[195] 88 FR at 62001–02.

By contrast, another commenter not in support of the rule stated that "Congress affirmatively exempted from licensure *all* sales to expand or liquidate a private collection and occasional transactions—even with some profit motive—to enhance a collection or for a hobby. But ATF now seeks to presume the opposite for a wide array of transactions."

Department Response

The Department disagrees that the bona fide gift exception is a "loophole" for multiple reasons. First, transferring a firearm as a bona fide gift to another person is not a "sale" because there is no "exchange" or payment of money, goods, or services for the firearm. Second, a person who is not otherwise engaged in the business as a dealer and truly intends to give a firearm as a gift does not ordinarily devote time, attention, and labor to firearms dealing as a trade or business or show the predominant intent to earn a profit through the repetitive purchase and resale of firearms. The *Gearhart* case cited by one of the commenters is not a case of dealing in firearms without a license; rather, it is a case where a person aided and abetted a straw purchaser to buy a firearm for himself—the actual buyer—not for resale to others. Third, as in all fact-based proceedings, a party must establish through evidence that a claim of fact is reliable in order to use that fact in their favor. That determination is made by the finder of fact, not the proponent of the argument. Fourth, to the extent that gifts are mutually exchanged between both parties, as the commenter recognizes, the transfer of bona fide gifts is evidence that can be used to rebut any presumption. Once the Government proves an exchange, or offer to exchange, firearms for something of value, the responding party may submit evidence to show that the firearms were transferred only as bona fide gifts.

The Department disagrees with the commenter that this rule causes all firearms transactions to be deemed engaged in the business of dealing in firearms, but agrees that the rule should make clear that an occasional sale only to obtain more valuable, desirable, or useful firearms for a personal collection or hobby, or liquidation of all or part of a personal collection, should not be presumed to be engaging in the business. Based on the Department's agreement with this comment, the final rule adds this activity to the list of conduct that does not support a presumption and as evidence that can rebut any presumption should a proceeding be initiated. *See* § 478.13(e)(2), (e)(4), (f). However, as explained previously, the term "liquidation" is inconsistent with a person acquiring additional firearms for their inventory (*i.e.*, "restocking"), and that has been made clear in a parenthetical in the regulatory text. *See* § 478.13(e)(4).

d. Use of Presumptions in Particular Proceedings

Comments Received

Several commenters expressed concerns about the application of the presumptions in criminal contexts or in administrative or civil contexts. More than one commenter expressed that there was confusion as to whether ATF will use the presumptions (either the engaged in the business presumptions or the intent to predominantly earn a profit presumptions) in criminal proceedings. One of the commenters raised concerns about when and how ATF will use the presumptions in administrative or civil proceedings. The commenter stated that much of ATF's administrative jurisdiction is over existing FFLs, which are already engaged in the business and thus not affected by the rule. The commenter then asked whether ATF intends to apply the presumptions to "FFLs who transfer firearms for unlicensed individuals that ATF believes are 'engaged in the

business?'" They expressed concerns that this would mean holding FFLs responsible for whether their customers are unlawfully engaging in the business "under the nebulous standards of the proposed rule," which would make it too risky for any FFL to ever facilitate a third-party transfer. The commenter suggested that the only other possibility was to use the presumptions in forfeiture actions, but these were substantially restricted as part of FOPA and were not amended as part of the BSCA.

Department Response

The Department acknowledges commenters' confusion about the application of the presumptions to criminal, civil, and administrative proceedings. This final rule makes clear that the rebuttable presumptions are to be used by persons potentially subject to the licensing requirement to consider whether they must obtain a license, as well as in civil and administrative proceedings, but they do not apply to criminal proceedings. Civil and administrative proceedings include, for example, civil asset forfeiture and administrative licensing proceedings.[196] However, as discussed in Section IV.B.9.b of this preamble, this final rule indicates that a court in a criminal case, in its discretion may, for example, elect to use the presumptions as permissive inferences in jury instructions.[197] Criminal investigations, prior to formal charging, are covered by separate policies, rules, and legal limitations, and are not within the scope of this rule. The final rule does not suggest the presumptions be used in criminal proceedings to shift the Government's burden of proof to the defendant. In criminal proceedings, the Due Process Clause prohibits the prosecution from using evidentiary presumptions in a jury charge that have the effect of

[196] *See* footnote 85*, supra*.
[197] *See* footnote 66, *supra*.

relieving the prosecution of its burden of proving every element of an offense beyond a reasonable doubt.[198] This rule does no such thing.

Regarding civil or administrative proceedings involving existing licensees, the Department disagrees that the standards in the rule are "nebulous." The presumptions identify specific conduct that is presumed to be engaging in the business, and the presumptions are to be applied in all civil and administrative proceedings where there is evidence of such specific conduct. Indeed, licensees have long been prohibited by the GCA from willfully assisting persons they know are engaged in the business of dealing in firearms without a license. *See* 18 U.S.C. 2; 922(a)(1)(A). Moreover, the BSCA's amendment at 18 U.S.C. 922(d)(10) now prohibits licensees or any other person from selling or otherwise disposing of a firearm to a person knowing or having reasonable cause to believe that such person intends to sell or otherwise dispose of the firearm in furtherance of a Federal or State felony, including 18 U.S.C. 922(a)(1). These violations of the GCA may be brought against a licensee, or the licensee's firearms, in a civil forfeiture or administrative licensing proceeding. For example, if a licensed dealer sold firearms to a known member of a violent gang who the dealer knew was repetitively selling the firearms within 30 days from purchase to other gang members, the dealer's license could be revoked under 18 U.S.C. 923(d)(1)(C) for willfully aiding and abetting a violation of section 922(a)(1)(A), and potentially for willfully violating section 922(d)(10). Under these circumstances, the gang member would be presumed to be engaged in the business, and evidence of the gang member's repetitive sales could be put forward in the administrative action to revoke the dealer's license.

[198] *See Francis*, 471 U.S. at 313.

However, for the Government to take administrative action on that basis against an existing licensee, or a license applicant, it would still need to prove the person committed the conduct willfully. *See* 18 U.S.C. 922(a)(1)(A), 923(d)(1)(C), 923(e). Even if a presumption applied in a given case against a licensee, the Government would still have to prove that a licensee facilitating a private sale knew of an unlicensed dealer's purchase and resale activities without a license, and either purposefully disregarded the unlicensed dealer's lack of a license or was plainly indifferent to it. Thus, a licensed dealer who inadvertently facilitates occasional private sales for an unlicensed person whom the licensee does not know is engaged in the business, and who is not plainly indifferent to the seller's need for a license, would not be liable for the private seller's misconduct.

6. EIB Presumption—Willingness and Ability to Purchase and Sell More Firearms

Comments Received

Generally, commenters opposing this EIB presumption stated it was too broad and provided several examples of typical conduct that would be captured under the presumption requiring a person to obtain an FFL. Gun collectors' associations stated that most people who collect firearms or engage in the sale of firearms for a hobby are willing to buy or willing to sell. A commenter provided additional examples in which the commenter stated that ATF could presume a person is unlawfully engaged in the business, such as a person downsizing a personal collection by a single firearm while expressing a desire to continue downsizing, selling one firearm while offering to buy another, or trading one firearm for another in someone else's collection. Likewise, some commenters believed that any gun owner who discusses sales of firearms with friends or

relatives or who makes repetitive offers to sell a firearm in order to secure a reasonable price will need to be licensed because of the first presumption.

Specifically, some commenters argued that this presumption would capture and penalize sellers who make statements as a part of normal interactions, such as "I need money to settle my divorce. That's why I'm selling this Colt 1911. If you like this one, I also have another with a consecutive serial number. Yeah, I'm losing money on them, but I need the cash." This type of statement or innocuous statements such as, "[M]y wife makes me sell a gun to buy a new one, so I'm always buying and selling guns" are being wrongfully equated to criminal actors who may say to an undercover officer, "I can get you whatever you want" or that he can "get plenty more of these guns" and "in a hurry" for the right amount of money. Commenters indicated that a huge difference between these two scenarios is the totality of the circumstances. The rule, they argued, is incorrectly crafted to avoid the need for any totality of the circumstances analysis, so that only one firearm, one presumptive circumstance, or "possibly one overriding circumstance" is necessary, coupled with the subjective assessment of an agent.

Another commenter suggested that ATF could amend the presumption to correct the issue. "Presently," the commenter said, "the language is too broad to function as a rebuttable presumption because its plain language meaning places it in conflict with the presumption that an occasional seller is *not* 'engaged in the business.' If ATF amended this presumption to include a frequency element, it would rectify this issue." (emphasis added by commenter). The commenter suggested one option could be, "[a] person will be presumed to be engaged in the business of dealing in firearms when the person, on a recurring basis, sells or offers for sale firearms, and also represents to potential buyers a

willingness and ability to purchase and sell additional firearms, or otherwise demonstrates the person's willingness and ability to act as a dealer in firearms on a recurring basis," and added that this alternative would add the necessary frequency element and also correct a disjunctive "or" included in the original to make the presumption clearer.

Department Response

The Department disagrees with the comments that the first EIB presumption is too broad, or that collectors or hobbyists will be unable to maintain or downsize their personal collections without a license under the first EIB presumption in the rule. A person who makes repetitive offers to sell firearms to downsize or liquidate a personal collection does not fall within the presumption, which requires not only that the person sell or offer for sale firearms, but also demonstrate a willingness and ability to purchase and resell additional firearms that were not already part of their personal collection. This conduct is sometimes referred to as "restocking."[199] Nonetheless, to make this point clear, the following parenthetical has been added in the first EIB presumption: "(*i.e.*, to be a source of additional firearms for resale)." § 478.13(c)(1). This presumption, like the others, may be rebutted with reliable evidence to the contrary in any proceeding.

The Department disagrees that the first presumption is too broad to function as a presumption without a time limitation because it conflicts with the statutory exception for occasional sales to enhance a personal collection. Persons who resell (or offer for resale)

[199] *See Restock*, Cambridge Online Dictionary, https://dictionary.cambridge.org/us/dictionary/english/restock (last visited Mar. 7, 2024) ("to replace goods that have been sold or used with a new supply of them"); *Restock*, The Britannica Online Dictionary, https://www.britannica.com/dictionary/restock (last visited Mar. 7, 2024) ("to provide a new supply of something to replace what has been used, sold, taken, etc.").

firearms and hold themselves out to potential buyers or otherwise demonstrate a willingness and ability to purchase and resell additional firearms for resale are engaged in the business, according to well-established case law. For example, in *Carter*, 801 F.2d at 82, the Second Circuit found there was sufficient evidence that the defendant engaged in the business in violation of 18 U.S.C. 922(a)(1) even though he made only two sales four months apart. The Court explained that, "[a]lthough the terms 'engage in the business of' and 'dealing in' imply that ordinarily there must be proof of more than an isolated transaction in order to establish a violation of this section . . . [the] defendant's conduct was within the intended scope of the statute" because "the statute reaches those who hold themselves out as a source of firearms."[200] There is no need for a time limitation because such persons are holding themselves out as a source of additional firearms for resale, thereby demonstrating a present intent to engage in repetitive purchases and resales for profit. This presumption merely shifts the burden of production to the responding person to show that those resales occurred only occasionally to enhance a personal collection, liquidate inherited firearms, or were otherwise not sold to engage in the business as a dealer.

7. EIB Presumption—Spending More Money on Firearms than Reported Income

Comments Received

Numerous commenters stated that this presumption is broad and unclear. A couple of commenters questioned the meaning of "applicable period of time" in this presumption, with one commenter claiming that the presumption would "assume the majority of purchasers of high end collectible firearms [are] 'engaged in the business' off

[200] 801 F.2d at 81, 82 (internal quotation marks omitted); *see also* footnote 6868, *supra*.

of merely the fact [that] they purchased a gun more expensive than their income for some period." Other commenters also stated there are many ways people might not have reportable gross income. For example, adult children may not have any gross taxable income, so buying and selling even two firearms in a year could trigger the presumption. Similarly, commenters noted that retired collectors with little or no reportable gross income compared to their assets could be at significant risk of being considered dealers without even offering a gun for sale or for spending as little as $200 to advertise the sale of a firearm on GunBroker.com or in a similar publication.

Another commenter provided specific examples of how law-abiding gun owners who should not be considered dealers could easily be dealers under this presumption. For instance, a California peace officer, who suffers career-ending injuries and goes through the appropriate process, would be eligible for ongoing disability payments of 50 percent of base pay, none of which is taxable. Under this pattern of facts, the commenter argued, a law-abiding gun owner with such a disability award and no other income could be presumed to be a dealer if they sold only one firearm of any value. The commenter asserted that many military members are in a similar situation where they may receive disability pay that is not taxable. In all these cases, these people might need post-separation income or to buy and sell firearms without ever desiring to be dealers or making a profit on the sales, but they run the risk of being presumed to be dealers based on this second presumption. An additional commenter similarly stated the "provision that a person who spends more money than their reported gross taxable income on purchasing firearms for resale, has no basis what-so-ever in 'profit.' Profit is based on a

sum in excess of all costs. Not gross income. Further, many retired people have a small gross taxable income compared to their assets."

One commenter claimed that assorted welfare benefits are excluded from gross income and that, to the extent that those benefits "benefit disproportionately persons based on race or other classification," the second presumption is constitutionally suspect. The commenter said that ATF needs to justify the use of gross income in this presumption, which could have a disproportionate impact on persons on the basis of race. Similarly, at least one commenter in support of the proposed rule also suggested that this presumption could potentially create an "unreliable" standard, whereby high-income dealers could sell large amounts of firearms without ever being subject to the presumption, while a single sale could be enough to subject a person with low or fixed income to the presumption of unlawful dealing. The commenter advised that for this specific presumption, the Department adopt a numerical threshold of ten gun sales per year, which would make applying this presumption easier for courts and law enforcement while avoiding the inequities of ATF's income-based approach.

Department Response

In proposing this presumption, the Department noted that the likely intention of a person who expends more funds on the purchase of firearms in an "applicable period of time" than the total amount of their reported gross income for that period would be to resell the firearms for a profit. As noted by several commenters, however, there are several situations in which individuals with income that is not reportable as gross taxable income—such as those receiving disability or welfare benefits, retired firearm collectors, retirees drawing on Roth IRAs, and young adult children—could expend that non-

reportable income at levels in excess of their gross reported income to purchase firearms, yet not intend to resell those firearms for a profit. Application of a gross income presumption to such individuals, commentors argued, would unfairly require them to disprove that they were engaged in the business when they purchased a firearm or firearms. While such circumstances would seem to be unlikely, the Department acknowledges they could occur. The Department similarly acknowledges that commenters' observations regarding the potential disparate effect of a gross income-based presumption on low-income individuals, while also unlikely, may occur. In light of these considerations, the Department has decided not to include a gross income-based presumption in this final rule and has removed it from the final rule.

Although the Department has determined not to include a gross income-based presumption in this final rule, the Department notes that evidence of expenditures for the purchase of firearms in excess of an individual's reported gross income may nevertheless be relevant to the factual assessment as to whether an individual is engaged in the business. As amended by BSCA, the relevant assessment under the GCA is whether a person's intent in engaging in firearms sales is predominantly one of obtaining pecuniary gain; the financial circumstances of an individual engaged in the repetitive acquisition and sale of firearms is therefore relevant to this assessment.

8. EIB Presumption—Certain Types of Repetitive Transactions

a. Repetitively Transacting Firearms through Straw Persons/Sham Businesses

Comments Received

With regard to this presumption, at least one commenter questioned why it was needed if straw purchasing is already a felony, while another commenter raised no

objection to a presumption that relied on other crimes to establish the presumption. A couple of commenters did not agree with the straw purchaser presumption because it could unfairly capture unlicensed persons, as demonstrated in the following scenarios. For example, they said, collectors purchase firearms on the used firearms market, which is the only place to find vintage firearms, but they could trigger this presumption without being aware they had purchased the firearm through a straw seller. Similarly, an unlicensed person who innocently sells two firearms that he no longer finds suitable for self-defense would be presumed to be engaged in the business if the buyers of the firearms turn out to be straw purchasers.

One commenter suggested that "[t]he final rule should clarify that while firearm sales involving illicit straw middlemen and contraband firearms are indicative of the seller's criminal purposes, these sales are also indicative of an individual's predominant intent to profit when undertaking the sales. The conduct can indicate both at the same time, and, as the NPRM notes, it is the illicit nature of the middleman activity and firearm types that increases the profitability of the sale. While the criminal purposes involved in such sales obviate ATF's need to prove profit under BSCA's definition of 'to predominantly earn a profit,' it does not obviate the fact that such sales are in fact predominantly motivated by profit."

The same commenter, who generally supported the rule, had a suggestion for improving this presumption. They stated that, "[w]hile sensible as currently drafted and deserving of inclusion in the final rule, this presumption would benefit by clarifying whether the word 'repetitively' in the Proposed Rule is intended to apply to the phrase

'sells or offers for sale' in the same way that it clearly applies to 'purchases for the purpose of resale.'"

Department Response

The Department disagrees that the presumption addressing straw purchasers is not needed because straw purchasing is already a felony. While it is true that straw purchasing is a felony,[201] all persons who engage in the business of dealing in firearms are required to be licensed, even if the means by which those firearms are purchased and sold is unlawful. Moreover, the Department agrees with the comment that firearms purchases and sales through straw individuals and sham businesses are indicative of an individual's predominant intent to profit from those repeated illicit sales. In any event, Federal law provides that the Government is not required to prove profit, including an intent to profit, where a person is engaged in regular and repetitive sales for criminal purposes, pursuant to 18 U.S.C. 921(a)(22). Making repetitive resales through straw individuals or sham businesses for the purpose of engaging in the business without a license is a criminal purpose.[202] The statute itself thereby provides notice to such persons that they may be unlawfully engaging in the business of dealing in firearms.

At the same time, collectors who innocently purchase and sell firearms from or through a straw purchaser without knowing the person was acting for someone else, or purposefully disregarding or being plainly indifferent to that fact, would not incur liability for engaging in the business without a license. The Government must prove

[201] *See* 18 U.S.C. 932 (prohibiting straw purchasing of firearms); 922(a)(6) (prohibiting false statements about the identity of the actual purchaser when acquiring firearms); 924(a)(1)(A) (prohibiting false statements made in licensee's required records).

[202] *See* 18 U.S.C. 922(d)(10) (making it unlawful for any person to sell or otherwise dispose of a firearm to any person knowing or having reasonable cause to believe that such person, including as a juvenile, intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, including § 922(a)(1)).

willful intent in all relevant licensing and forfeiture proceedings. For example, if the Government were to deny an application for a license because of previous unlawful unlicensed dealing, it must show that the applicant "willfully violated" the unlicensed dealing prohibition at 18 U.S.C. 922(a)(1). *See* 18 U.S.C. 923(d)(1)(C).

The Department agrees that the term "repetitively" applies to purchases of firearms in the same way as it applies to sales of firearms. Consequently, the Department has added the word "repetitively" before "resells or offers for resale" with respect to the straw/sham business and unlawfully possessed firearms presumptions. *See* § 478.13(c)(2).

b. Repetitively Purchasing Unlawfully Possessed Firearms

Comments Received

As with the presumption related to straw purchasing or sham businesses, at least one commenter said that the presumption is unnecessary because unlawful possession of certain firearms can already be prosecuted as a stand-alone felony. The commenter also questioned the need for this presumption because no legitimate business would deal in illegal firearms, and so buying and selling such firearms would show that a person is not engaged in the business. The commenter further noted that there is no way for a person to know if the firearm they acquire is stolen because "[t]here is no database where a would-be purchaser, or seller for that matter, may check if a gun is stolen." The commenter similarly questioned how an average person would know if a particular firearm was imported illegally, providing the example of a vintage World War I Luger that could have been brought to the United States legally in 1919 as a souvenir, or smuggled into the country illegally in 1970. Another commenter noted that the NPRM

did not explain how possession of certain unlawful firearms (stolen guns, those with serial numbers removed, or those imported in violation of law), in addition to its own separate crime, also constitutes unlawful dealing. The commenter added that the GCA draws no connection between being engaged in the business as a dealer in firearms and the unlawful possession of certain types of firearms.

By contrast, at least one commenter in support of the rule suggested that the Department add "weapons, the possession of which is prohibited under [S]tate or local laws" to the list of examples in the presumption of firearms that cannot be lawfully purchased or possessed.

Department Response

The Department disagrees that the presumption addressing buying and selling of prohibited firearms is not needed because possession of such firearms is already a crime. As with dealers who transact through straw individuals, which is also a Federal crime, all persons who engage in the business of dealing in firearms are required to be licensed even if the firearms purchased and sold by the business are also unlawful to possess. Contraband firearms are actively sought by criminals and earn higher profits for the illicit dealer because of the additional labor and risk to acquire them. Illicit dealers will often buy and sell stolen firearms and firearms with obliterated serial numbers because those firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing. However, bona fide collectors who occasionally purchase and resell firearms from their personal collections without knowing the characteristics of the firearms that make them unlawful to possess would not incur liability for engaging in the business without a license. There is always a requirement for the Government to prove a

willful intent to violate the law in any proceeding arising under 18 U.S.C. 922(a)(1), 923(a), 923(d)(1)(C), or 923(e). In addition, each presumption may be refuted with reliable evidence that shows the person was not engaging in the business, such as evidence that they were occasionally reselling to obtain more valuable firearms for their personal collection. *See* § 478.13(f). Moreover, under the BSCA, 28 U.S.C. 534(a)(5), once licensed, dealers who may have innocently purchased unlawful firearms will now have access to the FBI's National Crime Information Center database to verify whether firearms offered for sale have been stolen.

The Department agrees with the comment that it should revise this presumption on repetitive purchases and resales to clarify that it includes firearms unlawfully possessed under State and local law. The fact that profit motive is buttressed by the illicit nature of the product applies equally to firearms that are illegal under State law. One of the primary purposes of the GCA was to enable the States effectively to regulate firearms traffic within their borders. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, sec. 901(a), 82 Stat. 197, 225–26.[203] And, according to the comment from Attorneys General representing 20 States and the District of Columbia, "many guns are trafficked across [S]tate lines, exploiting the differences in [S]tate regulations." Accordingly, the Department has revised the presumption to make it clear that it includes all firearms that cannot lawfully be purchased, received, or possessed "under Federal, State, local, or Tribal law," and cites the Federal prohibitions only as examples. § 478.13(c)(2)(ii).

9. EIB Presumption—Repetitively Selling Firearms in a Short Period of Time

[203] *See also* S. Rep. No. 90–1097, at 28 (1968); H.R. Rep. No. 90–1577, at 6 (1968); S. Rep. No. 90–1501, at 1 (1968).

a. Repetitively Selling Firearms within 30 days after Purchase

Comments Received

Numerous commenters disagreed with the presumption that a person is a dealer if they repetitively sell or offer for sale a firearm within 30 days after originally purchasing the firearm. Commenters noted that this presumption shows ATF's lack of understanding of the firearms community. Commenters stated it is common for people, including collectors and firearm enthusiasts, to find themselves in a situation where they buy a firearm and quickly regret the purchase. They disagreed with the Department basing the presumption on the assertion that stores have a 30-day return period. Some commenters stated that stores frequently have strict no-return policies, and other commenters stated that stores frequently offer a "non-firing inspection period" within which a customer can return the firearm. This means that if the customer fires the gun after purchase and does not like it, the person has no choice but to sell the firearm as used. Another commenter provided common scenarios where they claimed a person would be presumed to be a dealer under this presumption. In one example, a non-licensee who buys two firearms that do not work or fulfill their intended role and subsequently sells them within 30 days would be presumed to be engaged in the business because of the "repetitive" sales of the firearms within 30 days of purchase. The commenter also suggested that a person who inherits a firearm collection from a parent and chooses to sell those firearms by auction or by other private sale within 30 days would be subject to prosecution under this presumption.

At least one commenter in support of the rule recommended that the period for this presumption be extended from 30 days to 90 days to make it more difficult for people

to structure transactions in a way that would evade licensing and background check obligations.

Department Response

The Department disagrees with commenters that it is common for persons to repetitively purchase and resell firearms within 30 days without a predominant intent to profit, such as by selling unsuitable or defective firearms. Common sense and typical business practices dictate that it is more consistent with profit-based business activity than collecting to buy and resell inventory in a short period, and as stated previously, that is true especially when the firearm could be returned yet is resold instead. For one thing, multiple firearms would have to be purchased and resold within that 30-day period of time to trigger the presumption. Thus, even assuming a person could not return a firearm, which is not always the case, it is unlikely that there would be more than one unsuitable or defective firearm that would need to be resold during the 30-day period unless the person is engaged in the business.[204] And, as with the other presumptions, this presumption may be refuted by reliable evidence to the contrary to account for less common circumstances raised by the commenters.

[204] Further support for a 30-day resale presumption comes from ATF's experience observing persons who sell firearms at gun shows. Because of the frequency of gun shows, unlicensed dealers have a readily available marketplace in which to buy, display, and sell numerous firearms for a substantial profit within one month. According to one study, there were 20,691 guns shows in the United States that were promoted and advertised between 2011 and 2019, with 2,299 gun shows per year. *See* David Pérez Esparza et al., *Examining a Dataset on Gun Shows in the US, 2011–2019*, 4 Journal of Illicit Economies and Development 86, 87 (2022), https://storage.googleapis.com/jnl-lse-j-jied-files/journals/1/articles/146/submission/proof/146-1-1646-1-10-20220928.pdf; *see also* Crossroads of the West, *2024 Gun Show Calendar* 1, https://www.crossroadsgunshows.com/wp-content/uploads/2024/03/Calendar-2024.pdf (last updated Mar. 20, 2024) (48 gun shows in Arizona, California, Nevada, and Utah in 2024); Gun Show Trader, *Missouri Gun Shows*, https://gunshowtrader.com/gunshows/missouri-gun-shows/ (last visited Mar. 26, 2024) (57 gun shows in Missouri and Arkansas in 2024); Gun Show Trader, *Central Indiana Gun Show Calendar*, https://gunshowtrader.com/gunshows/central-indiana/ (last visited Mar. 8, 2024) (54 gun shows in Indiana in 2024).

With regard to the suggestion to extend the 30-day period to 90 days, the Department disagrees. The Department believes that the turnover presumption for persons actively engaged in the business of dealing in firearms of varying conditions, kinds, and types is more likely to occur within a relatively short period of time from the date of purchase. While the Department understands that some licensees will not accept returns, 30 days is a reasonable time frame within which ATF can distinguish those who are engaged in the business from those who are not because many licensees, including licensed manufacturers, will accept returns of unsuitable or defective firearms within that period of time. *See* footnote 81, *supra*.

Finally, the Department disagrees that a person who inherits a personal collection and liquidates it within 30 days after inheritance falls within the 30-day turnover presumption. The presumption applies only to persons who repetitively resell firearms within 30 days "after the person purchased the firearms." § 478.13(c)(3)(i). A person who inherits a personal collection does not, in the absence of other factors, "purchase" or exchange something of value in order to receive the firearms. To further clarify, the final rule also lists, as rebuttal evidence, the specific example of a person who liquidates inherited firearms. *See* § 478.13(e)(5)(i), (f).

b. Repetitively Selling New or Like-New Firearms

Comments Received

Of the several presumptions, some commenters believed that this presumption hurts collectors, who are not licensees, the most because they value the original condition of firearms and, as such, frequently keep firearms in like-new condition and with their original packaging. Again, commenters stated that including this presumption

demonstrates the Department's and ATF's lack of understanding of how the community values firearms. One commenter pointed out, as an example, that "[t]he National Rifle Association has three collector grades for new or like new modern firearms—'New,' 'Perfect,' and 'Excellent'—which represent the three most coveted and sought-after grades," and included a link to an article on how to evaluate firearms. Another commenter noted that it is fairly standard for a person to buy a firearm, shoot it a few times, and then sell it in the original box in a private sale because selling the firearm in its original box contributes to the value of the firearm. This, the commenter noted, should not be considered to be engaging in the business. Numerous commenters noted that owners keep firearms in the original boxes not out of criminality, but for collectability. At times, the packaging may be more valuable than the firearm. Therefore, a gun might appear to be "like new" possibly months or years after a transaction and one may be presumed to be engaged in the business under this presumption if the person later sells their like-new firearm with the original packaging. Further, "like new in original packing firearms are . . . the most sought after of collectible firearms," said one commenter. At least one commenter stated that this rule will make firearms less safe if individuals discard the original packaging, which often includes warnings and safety information about the firearm, in order to avoid being considered a dealer under the presumption when they later want to sell the firearm.

Department Response

The Department does not agree that most persons who repetitively purchase and resell firearms that are in a new condition, or like-new condition in their original packaging, lack a predominant intent to earn a profit. That is too broad an assessment.

On the contrary, the Department has found—based on its experience as described above—that this type of behavior is an indicator of being engaged in the business with a predominant intent to earn a profit from dealing in firearms in pristine condition.[205] This is even more likely to be the case when the new or like-new firearms are repetitively purchased and resold within a one-year period of time. However, the Department acknowledges commenters' concerns and agrees that true collectors may hold collectible firearms for a long period of time, and that some collectible firearms may appear to be like-new months or years after purchase. Therefore, to reduce the possibility that these "new" or "like-new" firearms[206] are part of a personal collection, and to account for the higher likelihood that repetitive resales of such firearms in a relatively short time period are made with an intent predominantly to earn a profit, the Department has incorporated a one-year turnover limitation into the presumption. *See* § 478.13(c)(3)(ii)(A). The Department believes that persons acting with a predominant intent to earn a profit are likely to repetitively turn over firearms they purchase for resale within this period. In addition, ATF's experience[207] is that collectors and hobbyists routinely retain their personal collection firearms for at least one year before resale, so the Department believes this is also a reasonable period that would not pose a burden on collectors and

[205] *See* footnote 82, *supra*.
[206] For purposes of this rule, the Department interprets the term "new" in accordance with its common definition to mean, "having recently come into existence," and the term "like new" to mean "like something that has recently been made." *See, e.g.*, *New*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/new (last visited Mar. 8, 2024); *Like New*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/like%20new (last visited Mar. 8, 2024). The Department understands that collectors commonly grade or rate collectible firearms as a means of determining their appreciated value over time, insurance, collectability, etc. However, this presumption is not aimed at collectible firearms and is not making a distinction based on a firearm's grade or rating in relation to commonly accepted firearms condition standards, such as those contained in the NRA Modern Gun Condition Standards or the Standard Catalog of Smith & Wesson. *See* Jim Supica, *Evaluating Firearms Condition*, NRA Museums, https://www.nramuseum.org/gun-info-research/evaluating-firearms-condition.aspx (last visited Mar. 26, 2024).
[207] See the discussion under the Department's response in Section IV.B.9.c of this preamble.

hobbyists.[208] As with the other presumptions, this one may be refuted with reliable evidence to the contrary.

c. Repetitively Selling Same or Similar Kind/Type Firearms

Comments Received

Numerous commenters stated that this presumption targets collectors who often focus on collecting a specific type or kind of firearm (e.g., Colt single action revolvers, over-under shotguns, or World War II-era bolt-action rifles) and would thus be more likely to sell firearms by the same manufacturer or of the same type to enhance their collection. "Virtually every collector or hobbyist focuses their efforts on specific manufactures and types of firearms. They are for the most part devoted to something," said one commenter. The commenters claimed that "a collector liquidating his collection will almost assuredly be presumed to be engaged in the business, especially if he requires more than one incident to sell his collection," but the collector "is doing exactly that which is explicitly allowed by statute."

Some commenters strongly disagreed with ATF's description that "[i]ndividuals who are bona fide collectors are less likely to amass firearms of the same kind and type than amass older, unique, or less common firearms" because this disregards not only the fact that collectors can purchase and sell common firearms that do not hold antique value, but also what is known in the firearms community as "pattern collecting." According to commenters, some people purchase the same type of pistol or rifle over and over again, in every single iteration imaginable, which can vary due to manufacturing date,

[208] In further support of a one-year time limit, 18 U.S.C. 923(c) provides that after one year, firearms transferred by a licensee from the licensee's business inventory to the licensee's personal collection are no longer deemed business inventory.

manufacturing location, minute changes in the firearms, or any number of reasons. In pattern collecting, a person would have multiple firearms for sale that look exactly the same to a lay person. For instance, one commenter asked if a seller would be subject to this presumption if they sold a small collection of highly valuable 19th century Winchester lever action rifles, which would be of the same kind and type. Similarly, another commenter said that large portions of the modern firearms market can be considered "of similar kind," pointing out that a "Gen 3 Glock in 9mm Luger is of similar kind to a polymer Walther in 9mm or a Palmetto State Armory Dagger in 9mm. The 9mm polymer pistol market has a lot of variety, but [those firearms] can all be considered 'of similar kind.'" The commenter noted further that individuals might have numerous 9mm polymer pistols in their personal collection because it makes it easier to acquire ammunition, and if magazines or accessories are interchangeable, it makes it easier to have a variety of configurations at hand at a lower cost. The commenter also noted that many modern sporting rifles would also be considered of "similar kind" if they can all be chambered in the same caliber. The commenter stated that it is overbroad for the Department to assume that someone selling modern firearms of the same type is more likely to be a dealer in firearms because collecting is not limited to curio and relic firearms.

One commenter expressed concerns about how firearms of the same or similar kind and type could be ascertained and quoted an example from the proposed rule's discussion about the "same kind and type" presumption. As quoted by the commenter, the proposed rule stated that this presumption may be rebutted based on "evidence that a collector occasionally sells one specific kind and type of curio or relic firearm to buy

another one of the same kind and type that is in better condition to 'trade-up' or enhance the seller's personal collection." The commenter added, "using 'same kind and type' is not correct. For instance, a [Curio and Relic] (C&R) [license] holder sells a bolt-action Mosin-Nagant rifle in 7.62x54r, then uses the funds to purchase a Star Model B pistol in 9x18. Are these (Mosin-Nagant & Star Model B) the 'same kind and type' or not? Both are clearly collectable C&R firearms, while one is a bolt-action rifle and the other a pistol."

Department Response

As with the previous EIB presumption, the Department disagrees that collectors are likely to repetitively purchase and resell firearms that are of the same or similar kind and type without a predominant intent to earn a profit, at least not within a relatively short period of time. If a person is accumulating and repetitively reselling the same or similar kinds and types of firearms as part of a personal collection as defined in this rule, they can use evidence that they are doing so to enhance or liquidate their personal collection to refute the presumption.

Nonetheless, to substantially reduce the possibility that these "like-kind" firearms are part of a personal collection, as stated previously, a one-year turnover limitation has been incorporated into the presumption and, as always, any presumption may be rebutted with reliable evidence to the contrary.[209] *See* § 478.13(c)(3)(ii)(B). It is unlikely that persons who collect the same or similar kinds and types of firearms for study, comparison, exhibition, or for a hobby will repetitively resell them within one year after they were purchased.

[209] Per footnote 208, this time period is also supported by 18 U.S.C. 923(c).

Finally, in response to commenters' concerns about determining which firearms would be of the same kind and type, the Department has made some changes. First, as to the comment on whether the Mosin and Star firearms described would be the same kind and type, the Department notes that the Mosin-Nagant rifle in 7.62x54r and the Star Model B pistol in 9x18 are not the same or similar kind and type of firearms. They are of a different manufacturer (Mosin-Nagant v. Star), model (M1891 v. BM), type (rifle v. pistol), caliber (7.62x54R v. 9x18), and action (bolt action v. semiautomatic). They share almost no design features and would thus not be subject to the "same kind and type" presumption. Nonetheless, to avoid any confusion about the meaning of "same kind and type" of firearms, and to allow for collectors who obtain multiple firearms of the same type, but from different makers and of different models, the Department has substituted the more precise term "same make and model" in the final rule. *See* § 478.13(c)(3)(ii)(B).

Further, to clarify the meaning of "similar" in this context, the final rule now instead refers to "variants thereof" (*i.e.*, variants of the same make and model). *See id*. The term "variant" is already defined in 27 CFR 478.12(a)(3) to mean "a weapon utilizing a similar frame or receiver design, irrespective of new or different model designations or configurations, characteristics, features, components, accessories, or attachments." Thus, to identify a "variant" of a particular make and model, the design of the frame or receiver of one firearm is compared to the design of the frame or receiver of the other firearm, regardless of newer model designations or configurations other than the

frame or receiver.[210] For example, an AK-74M is a rifle variant of the original AK-47 rifle. "The notable changes in the AK-74M include a 90-degree gas block, a lightened bolt and bolt carrier, a folding polymer stock, a new dust cover designed to resist the recoil of an attached grenade launcher, [and] a reinforced pistol grip." Alexander Reville, *What are all the AK Variants?*, guns.com (Jan. 5, 2024), https://www.guns.com/news/what-are-ak-variants. But none of the changes found in the AK-74M involve a design modification to the receiver—the housing for the bolt—so that firearm is a rifle variant of the original make and model (AK-47 rifle). *See* 27 CFR 478.12(a)(4)(vii). Likewise, an AR-type firearm with a short stock (*i.e.*, pistol grip) is a pistol variant of an AR-15 rifle because they share the same or a similar receiver design. *See* 27 CFR 478.12(a)(3), (f)(1)(i). Repetitive resales of firearms that are the same make and model, or variants of the same make and model, within a year of purchase, demonstrate that the firearms were likely purchased and resold as commodities (*i.e.*, business inventory), as opposed to collectibles. Thus, to identify a firearm subject to this presumption, the rule now looks to the make and model of a firearm and its "variants" (as defined in 27 CFR 478.12(a)(3)) which are generally easy to determine by comparing the design of the frame or receiver—the key structural component of each firearm repetitively sold. As with the other presumptions, this one may be rebutted with reliable evidence to the contrary.

10. EIB Presumption—Selling Business Inventory after License Termination

[210] In addition to the fact that the term "variant" was incorporated into ATF regulations in 2022, *see* 87 FR at 24735, this term is well understood by the firearms industry and owners. *See, e.g.*, Alexander Reville, *What are all the AK Variants?*, guns.com (Jan. 5, 2024), https://www.guns.com/news/what-are-ak-variants ("[T]he AK has gone through several revisions over the years, creating more modern variants. In fact, what you find yourself calling an AK-47 might just be something different."); Aaron Basiliere, *The AR-15 Pistol: The Rise of America's Rifle Variant*, catoutdoors.com (Apr. 19, 2022), https://catoutdoors.com/ar-15-pistol/.

Comments Received

Commenters raised concern over the impact of this presumption on certain former licensees. Commenters stated that they believe this EIB presumption will hurt recently retired FFLs who might need to sell off firearms due to financial hardship. Some commenters stated that the rule would punish former FFLs, holding them to a different and more onerous standard than persons who were never licensed, and disagreed with ATF's statement in justification of the presumption that a "licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a 'personal collection.'" 88 FR at 62003. They stated that ATF offered no citation for this proposition and ignored that a firearm might be acquired first for business inventory and later become a part of a personal collection. They argued that the former FFL should be entitled to sell part or all of that collection under the statute without becoming a dealer. Further, they argued that, unlike the other presumptions affecting former FFLs, there is no time limitation, which in essence means this presumption bars a former FFL from ever selling firearms that were in their business inventory for any purpose without triggering the presumption of again being engaged in the business. This puts former licensees in an untenable position never contemplated by Congress. One commenter suggested that, at a minimum, the rule should grandfather in former FFLs who went out of business prior to this rule becoming effective and allow them to treat those former business-inventory firearms as a personal collection even if all the proposed criteria of that presumption (now § 478.13(c)(4)), such as formal transfer from the A&D book, were not followed.

An additional commenter suggested that ATF should consider supplementing this presumption with an additional presumption that any formerly licensed firearms dealer, or person acting on their behalf, that sells or offers to sell multiple guns that were in the former FFL's business inventory at the time the license was terminated will be presumed to be "engaged in the business" unless the firearms are disposed of through a sale to another FFL.

Department Response

The Department disagrees that this EIB presumption is contrary to the GCA, or that firearms that were repetitively purchased for resale by licensees can be considered part of a "personal collection" if they were not transferred to a personal collection prior to license termination. The GCA at 18 U.S.C. 923(c) clearly contemplates that any business-inventory firearms transferred while the person is a licensee must be held in a personal collection by the licensee for at least one year before the firearms lose their status as business inventory. However, when a licensee does not transfer business inventory firearms to a personal collection prior to license termination, the firearms remain business inventory.[211] Such firearms were not acquired for a personal collection, and were not transferred to one, and cannot be said to have lost their status as firearms purchased for resale with a predominant intent to profit simply because the licensee is no longer licensed to sell them. Moreover, allowing former licensees to continue to sell business inventory after license termination without background checks and records

[211] *See* ATF, *Important Notice: Selling Firearms AFTER Revocation, Expiration, or Surrender of an FFL* 1 (June 3, 2021) ("If a former FFL is disposing of business inventory, the fact that no [firearms] purchases are made after the date of license revocation, expiration, or surrender does not immunize him/her from potential violations of 18 U.S.C. § 922(a)(l)(A). Instead, business inventory acquired through repetitive purchases while licensed are attributed to the former FFL when evaluating whether subsequent [firearms] sales constitute engaging in the business of dealing in firearms without a license."); ATF, *Important Notice: Selling Firearms AFTER Revocation, Expiration, or Surrender of an FFL* 1 (Dec. 1, 2014) (same).

through which crime guns can be traced clearly undermines the licensing requirements of the GCA. It also places such former licensees at an unfair competitive advantage over current FFLs, who are continuing to sell firearms while following the rules and procedures of the GCA. Indeed, there would be little point revoking a license for willful violations of the GCA by a non-compliant FFL if the former licensee could simply continue to sell firearms without abiding by the requirements under which they purchased the firearms with the predominant intent to profit, and by which the compliant FFLs abide. As to concerns that a former licensee might need to quickly sell its inventory to stave off financial hardship, the former licensee is still free to sell firearms from this inventory on occasion to a licensee. *See* §§ 478.57(b)(1), (c); 478.78(b)(1), (c).

Under the rule, this presumption operates in conjunction with the new liquidation-of-business-inventory provisions in 27 CFR §§ 478.57 (discontinuance of business) and 478.78 (operations by licensee after notice), which allow former licensees to either liquidate remaining business inventory to a licensee within 30 days after their license is terminated (or occasionally to a licensee thereafter), or transfer what is now defined as "former licensee inventory" (firearms that were in the business inventory of a licensee at the time of license termination, as distinguished from a "personal collection" or other personal firearms) to a responsible person of the former licensee within that period. Under these new provisions, when firearms in a former licensee inventory are transferred to the responsible person, they remain subject to the presumptions in this rule. Such firearms were repetitively purchased for resale and cannot be considered part of a "personal collection" as that term is defined in the rule. Firearms in a former licensee inventory differ from those in a personal collection or other personal firearms in that they

were purchased repetitively as part of a business inventory with the predominant intent to earn a profit. Persons who continue to sell those business inventory firearms, including those transferred to a responsible person of the former licensee, other than occasionally to an FFL, will be presumed to be engaged in the business without a license, though the presumption may be refuted with reliable evidence to the contrary.

The Department disagrees with a commenter's suggestion to grandfather in former FFLs who went out of business prior to the effective date of the rule and allow them to treat former business inventory as a personal collection. Prior to the rule, former licensees and their responsible persons were not entitled to sell their business inventories after license termination if their predominant intent was to obtain livelihood and pecuniary gain from those sales. This rule merely establishes by regulation the guidance ATF has provided for at least ten years and of which the FFL community has been aware; that is, ATF has long advised former licensees in written notices of revocation, expiration, and surrender not to engage in the business after license termination by selling the business inventory. [212] Continuing to sell business inventory would undermine the licensing requirements of the GCA.

The Department agrees with a commenter's suggestion to incorporate a presumption that a formerly licensed dealer who sells firearms from the former business inventory is engaging in the business unless the firearms are sold to a licensee. An occasional sale to a licensee generally does not show a predominant intent to profit because a licensed dealer is likely to pay less than fair market value to buy a firearm for resale from an unlicensed person given the licensed dealer's intent to profit. Nor does it

[212] *See* footnote 211, *supra*.

present the same public safety concerns associated with unlicensed dealing because the purchasing dealer would record the acquisitions and dispositions and run background checks when they resell the firearms. For these reasons, in addition to allowing liquidation of a business inventory to a licensee within 30 days, this presumption has been amended by the final rule to allow former licensees (or a responsible person acting on their behalf) to occasionally sell "former licensee inventory" firearms to an active licensee after the initial 30-day liquidation period in accordance with the discontinuation of business provisions at §§ 478.57(b)(2) and 478.78(b)(2) without triggering the EIB presumptions. However, if the former licensee (or responsible person) sells former licensee inventory more frequently than occasionally to a licensee after the initial 30-day liquidation period, they are subject to the presumptions in this rule.

11. EIB Presumption—Selling Business Inventory Transferred to a Personal Collection Prior to License Termination

Comments Received

Commenters disagreed with inclusion of this last presumption in which a former licensee (or responsible person acting on behalf of the former licensee) is presumed to be a dealer if they sell or offer to sell firearms that were transferred to their personal collection prior to license termination, unless those firearms were transferred to the former licensee's personal collection without intent to willfully evade firearms laws and one year has passed from the date of transfer to the personal collection.

At least one commenter stated that prior unlawful transfers do not necessarily taint a future transfer, nor do they demonstrate that a former FFL continues to be engaged in the business. The commenter stated that there would be no possible way for former

FFLs, whose licenses were revoked and who may be prohibited or facing practical circumstances that preclude them from being re-licensed in the future, to liquidate their former inventory that was not transferred to a personal collection to ATF's satisfaction. The commenter also noted that section 923(c) applies only to licensees and that none of the provisions apply to an unlicensed person who happened to formerly have held an FFL. In other words, the commenter seemed to question how the Department could require former FFLs or even responsible persons, who are non-FFLs, to abide by certain restrictions upon license revocation, such as disposing of the former business inventory in a particular manner; as former licensees, the commenter argued, they automatically do not have "business inventory." This is particularly true, the commenter stated, as a former licensee whose license was revoked—and who, by law, may never be able to be a licensee again—may be precluded from ever transferring their firearms under any circumstances (other than by giving them away as free gifts).

Furthermore, a commenter stated, section 923(c) adds that "nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer." The commenter concluded that this means, under the statute, a dealer may acquire a personal collection while they are a dealer or while going out of business and may later dispose of that collection under the same rules as other non-dealers, except as provided in 18 U.S.C. 923(c). The commenter also noted that nothing in either 18 U.S.C. 921(a)(21)(C) or 923 discusses a required intent at the time the firearm is acquired, and ATF provided no citation to support the "proposition that

firearms acquired by an FFL are not (or cannot be) for a 'personal collection.'" While all can agree that the predominant purpose of the FFL is to earn a profit, the commenter stated the proposed rule ignores the fact that many FFL holders are also firearm collectors or enthusiasts, and that often many of the firearms that are put into the business inventory are for the personal collection of the FFL holder or its responsible persons.

One of the commenters stated that this presumption seems to apply to all firearms transferred to any responsible person of an FFL, even if those guns were transferred to that responsible person via an ATF Form 4473 and a background check was conducted. They stated this presumption overlooks the fact that an FFL may have dozens of responsible persons who may change frequently, and that a former responsible person may have no say in the business dealings once they are gone; in fact, the person may not even know that the business has given up or lost its license. Yet, they said, ATF's presumption now seeks to hold that former responsible person to a burdensome presumption based on their former employer's decision to cease its firearms operations.

The commenter stated that this presumption seems contrary to ATF's existing position that a transfer to a personal collection happens as a matter of law once the license is given up because there is no more business inventory as a result of the firearms business ceasing operations. They cited ATF's National Firearms Act Handbook, ATF E-Publication 5320.8 (Apr. 2009), https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download ("NFA Handbook"), as an example of the agency's position; they said that, in section 14.2.2 of the NFA Handbook, ATF stated, "FFLs licensed as corporations, partnerships, or associations, who have been qualified to deal in NFA firearms and who go out of the NFA business, may lawfully retain their

inventory of these firearms . . . as long as the entity does not dissolve but continues to exist under State law." Further, as a practical matter, the commenter stated that it is not clear how a company going out of business would store the firearms "separately from, and not commingled with the business inventory" to meet the definition of "personal collection" when the company no longer has a business inventory due to its going out of business. The rule, they argued, provides no clarity for how former FFLs are to treat their business inventory if the former FFL just allowed firearms to come into their collection after their business ceased but did not meet all of the requirements set out by ATF.

Department Response

The Department disagrees that this EIB presumption is contrary to section 923(c) of the GCA. Contrary to the implicit views of the commenters, an FFL that loses or surrenders its license is not thereby immune from the provisions of the GCA. As provided by section 923(c), for licensees to dispose of firearms from a personal collection, they must be transferred from the business inventory to a personal collection and maintained in that collection for at least one year before they lose their status as business inventory. This rule implements section 923(c) by establishing a presumption that resales or offers for resale of such firearms show that the former licensee is engaging in the business. Thus, licensees who know they will be going out of business by reason of license revocation, denial of renewal, surrender, or expiration cannot simply transfer their business inventory to a "personal collection" the day before license termination, and two days later, sell off the entire inventory as liquidation of a "personal collection" without background checks or transaction records. Such firearms were not personal

firearms acquired for "study, comparison, exhibition . . . or for a hobby." However, consistent with section 923(c) and this rule, once the one-year period has passed, the former licensee will no longer be presumed to be engaged in the business without a new license if they later liquidate all or part of the personal collection, assuming the firearms were received and transferred prior to license termination without any intent to willfully evade the restrictions placed on licensees by the GCA. This includes licensees whose licenses were revoked or denied renewal due to willful violations if they transferred business-inventory firearms to their personal collection or otherwise as personal firearms prior to license termination in accordance with the law.

The Department disagrees with the comment that, under the law, prior unlawful transfers do not "taint a future transfer." The GCA at 18 U.S.C. 923(d)(1)(C) authorizes approval of an application for firearms license if the applicant "has not willfully violated any of the provisions of this chapter or regulations issued thereunder." If ATF previously revoked or denied license renewal for willful violations of the GCA or its implementing regulations, then under the law, that former licensee may be denied a firearms license in the future. *See id.* This provision shows that prior unlawful activity is relevant to future dealing in firearms. Moreover, section 923(c) deems firearms to be part of a business inventory if their transfer to a personal collection "is made for the purpose of willfully evading the restrictions placed upon licensees." This demonstrates that Congress was specifically concerned with licensees evading the requirements of the GCA through improper transfers to a personal collection. Therefore, as to the comment that ATF cannot require former licensees (or a responsible person acting on their behalf) to abide by regulations addressing their former business inventory, the Department believes that it

has the authority under the GCA to take enforcement action, such as to deny a license or seize firearms for forfeiture, when a former licensee (or a responsible person acting on their behalf) has willfully violated the rules concerning winding down licensed business operations, 27 CFR 478.57 or 478.78 (as applicable). The former licensee (or a responsible person acting on their behalf) is presumed to be engaged in the business without a license if they thereafter sell off that business inventory (unless they transfer it within 30 days after license termination to a former licensee inventory, and thereafter only occasionally sell a firearm from that inventory to a licensee)—inventory that they did not transfer to a personal collection or otherwise as a personal firearm prior to license termination and then retain for a year, as required.

Regarding responsible persons while they are acting on behalf of such licensees, the Department does not agree that such persons will be unaware of the termination of the license. As set forth in 18 U.S.C. 923(d)(1)(B) and this rule, responsible persons are only those responsible for the management and policies of the firearms business. They are not sales associates, logistics personnel, engineers, or representatives who might have little control over or understanding of the firearms business operations or license status. Responsible persons acting on behalf of a former licensee must therefore be careful not to sell business inventory of the former licensee without a license. Nonetheless, the final rule makes clear that responsible persons of former licensees who (1) after one year from transfer, sell firearms from their personal collection that were transferred from the former licensee's business inventory before license termination, or (2) occasionally sell firearms to a licensee that were properly transferred to a former licensee inventory after license termination, are not presumed to be engaged in the business due to those sales (assuming

they did not acquire or dispose of those firearms to willfully evade the restrictions placed on licensees).

Regarding the comment that this presumption applies to all firearms transferred to any responsible person of a licensee, even if those firearms were transferred to that responsible person on an ATF Form 4473 and a background check was conducted, the Department disagrees that the presumption applies. Responsible persons who properly received a firearm from the then-licensee's business inventory on an ATF Form 4473 for their own personal use, in accordance with 27 CFR 478.124, are not subject to the liquidation presumption because they now own the firearm disposed to them by the business. Subsequent termination of the license has no bearing on the responsible person's prior acquisition of a personal firearm. The liquidation presumption does not apply to former responsible persons who are selling what are now their own personal firearms. Any subsequent sale of those personally owned firearms is evaluated the same way as any other firearm transactions by unlicensed persons.

12. Definition of "Personal collection (or personal collection of firearms, or personal firearms collection)"

Comments Received

At least one commenter noted that the proposed definition of personal collection, which excludes any firearm purchased for the purpose of resale with the predominant intent to earn a profit, is problematic because collectors buy guns with the purpose of eventual resale when they locate and can afford guns of higher quality and rarity. This sentiment was echoed by several commenters who asserted that the proposed rule negatively affects collectors and hobbyists by requiring them to become licensed dealers

simply because they want to sell or trade some firearms from their personal collection. For instance, one commenter stated that a hobbyist may purchase a firearm in degraded condition, or lacking components. This commenter indicated that they should not be considered engaged in the business of dealing even if they made a reasonable profit simply because they refurbished or upgraded the lawfully acquired firearm and sold it for a personal reason.

Another commenter stated the definition of "personal collection" was too vague, leaving room for misinterpretation. The commenter stated that, without more clarity, licensees will have difficulty determining whether their occasional sale for personal collection enhancement falls within that scope, and the definition will create further confusion among licensees and law enforcement officials.

Some commenters stated that the definition of "personal collection," and also the examples of what constitutes a hobby, are too narrow. First, they explained that the hobbies mentioned in the statute and the regulation as examples focus heavily on activities that involve shooting firearms (e.g., hunting, skeet, or target shooting) but do not mention non-shooting hobbies, such as curio collecting. Further, they questioned why "personal collection" is limited to non-commercial purposes and pointed out that commercial entities that are not engaged in the business of dealing in firearms frequently use firearms for commercial business purposes. They provided examples, including a hunting outfitter that might have a collection of firearms for use in the commercial hunting enterprise, yet the firearms would still be considered part of a personal collection, or an armored car company having firearms for protection that would be in the company's personal collection and not in a business inventory. These businesses are

engaged in a business and have firearms, but they are not engaged in the business of dealing in firearms even if they, for example, buy firearms to upgrade ones used by the truck drivers or replace old ones taken on hunting trips by clients. Similarly, at least one commenter noted that firearms acquired as part of teaching and safety instruction activities would not be covered under the proposed definition of personal collection and therefore, according to the commenter, an owner whose firearm ownership grew because of these activities and who then sold some firearms would not be exempt from being engaged in the business even though that person might not have acquired the firearms for purposes of resale with the predominant intent to earn a profit.

Another commenter stated that the definition of personal collection is so narrowly defined it would exclude transfers of firearms to law enforcement and make "the somewhat common 'Gun Buy-Back' scheme unlawful." The commenter suggested the following scenario: "An estate may include any number of firearms. The inheritor receives what previously may have been considered a personal collection. Whatever the size or value, the new owner has no association with any 'study, comparison, exhibition, or hobby' and would like to be rid of them. Currently, some new owners transfer their firearms to municipal police at a local 'gun buy-back event.'" But under the new definition, the commenter added, "[t]ransferring any number of firearms for even limited pecuniary gain (even directly to law enforcement in exchange for marginally valued gift cards) would be a [F]ederal crime. Byrne grants could no longer fund these activities."

Other commenters also noted that the proposed definition means that firearms acquired by an individual for any other purpose, such as for self-defense, would not be part of a personal collection. Commenters stated that studies show that about two-thirds

of Americans report owning firearms primarily for "defense" or "protection." Without including firearms acquired for self-defense as part of a personal collection, commenters believed that ATF is trying to create a third classification of owned firearms, *i.e.*, firearms that are owned by non-licensees but are not acquired for "study, comparison, exhibition, or for a hobby." In essence, commenters argued that the definition is incorrectly limited to firearms that are for noncommercial, recreational enjoyment.

Some commenters, including some gun collectors' associations, argued that the proposed definition erodes statutory protections for nonbusiness conduct by conflating "sales, exchanges, or purchases of firearms for the enhancement of a personal collection" and "for a hobby." In other words, the proposed definition includes "hobby" within "personal collection" rather than it being its own safe harbor. Commenters stated that the "for a hobby" provision and the "for a personal collection" provision are two separate and distinct items, meaning that a person who purchases or sells firearms occasionally as a collector or for a hobby is not a firearms dealer and not required to be licensed, and that "personal collection" and "hobby" must have distinct meanings.

Commenters provided suggestions on how the term "hobby" could be defined. One commenter suggested the definition be broader to mean "a group [of] firearms that a person accumulates for any reason, other than firearms currently in the business inventory of a current licensee." One commenter, while supporting ATF in considering the "totality of the circumstances when determining if one is 'engaged in the business,'" suggested the rule "could benefit from specific examples that help collectors and hobbyists understand when they may incite the need for licensure and to help confirm the intent of the rule."

In a similar vein, another commenter in support of the rule provided a suggested clarification of when a gun sale would be part of a hobby. They said the rule parenthetically describes "hobby" in the definition of "personal collection" as follows: "(*e.g.*, noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting)." As a result, the commenter suggested the rule "could clarify that, to be covered by the exception, a hobbyist may only engage in gun sales to serve an interest in such 'noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting.'" The same commenter also suggested that the rule "should clarify that the hobby exception to the 'engaged in the business' definition does not cover an individual whose hobby is gun selling to generate profit."

A different commenter in support of the rule proposed other clarifying language to create a rebuttable presumption for when a sale or transfer of a firearm is presumed to be part of a hobby. The proposed addition would specify that a person who meets all of the following criteria will be presumed to be selling or transferring firearms as part of a hobby: when the collection (A) has been appraised by an expert who is qualified to evaluate firearms; (B) has been documented by photographs that show each firearm and its serial number; (C) has been catalogued by serial numbers and other identifying features; (D) has been insured by an insurance company that covers firearms; (E) has been displayed in a secure location that is not accessible to unauthorized persons; and (F) has not been used for hunting, sporting, or self-defense purposes. The commenter proposed that this presumption would help infrequent sellers or those who transfer

firearms for personal reasons distinguish between regular commercial sales and "occasional" or "hobby" sales.

The same commenter also suggested adding a similar rebuttable presumption providing that a person is presumed to be selling or transferring firearms for hunting, sporting, or self-defense purposes when the person sells or transfers a firearm that is suitable for hunting certain game animals, participating in certain shooting competitions, or providing protection against certain threats. The commenter also suggested a presumption based on a threshold number of sales per year as an additional way to help distinguish infrequent sellers. This suggested presumption would read, "a person who sells or transfers five or fewer firearms per calendar year shall be presumed to be selling or transferring firearms occasionally. This presumption may be rebutted by evidence that shows that the person is engaged in the business of dealing in firearms. A person who sells or transfers more than five firearms per calendar year shall be presumed to be engaged in the business of dealing in firearms. This presumption may be rebutted by evidence that shows that the person is not engaged in the business of dealing in firearms."

Other commenters stated that the portion of the definition of "personal collection" stating that licensees can only consider firearms as a part of their personal collection if they are stored separately from and not comingled with business inventory and appropriately tagged as "not for sale" would be difficult to operationalize and would make things complicated not only for the business but also for the employees of that business. These commenters stated that the rule does not allow for licensed (or otherwise lawfully permitted) concealed carry activities. For instance, a business could be cited for a violation if an employee carries their personal firearm to work on their person if the

employee temporarily puts it in desk drawer or work bench. Additionally, to avoid potential liability, they opined that the employee would have to tag their personal firearm as not for sale. These commenters argued that ATF should either remove the requirement for FFLs to store personal collections separately from business inventory or clearly exclude firearms owned by persons and carried on or about the person for self-defense.

Another commenter stated that the rule inappropriately requires FFLs going out of business to "dispose" of the firearms in their business inventory to themselves in order for such firearms to be considered part of their personal collection. They added that such a transfer to a personal collection happens as a matter of law once the license is given up, because there is no more business inventory, because the firearms business has ceased.

Department Response

The Department agrees that collectors who purchase firearms for a personal collection are permitted under the GCA, as amended, to occasionally sell them to enhance their collection or liquidate them without being required to obtain a license. However, firearms that are purchased by collectors or hobbyists for the purpose of resale with the intent to predominantly earn a profit cannot be said to primarily have been accumulated for study, comparison, exhibition, or for a hobby.[213] They are considered commercial firearms or firearms obtained for financial gain, not part of a personal collection. Many of the criticisms of the definition of "personal collection" have one

[213] *See The Federal Firearms Owner Protection Act*: *Hearing on S. 914 Before the S. Comm. on the Judiciary*, 98th Cong. 50–51 (1983) (response of Robert E. Powis, Deputy Assistant Secretary, Dep't of the Treasury, to questions submitted by Sen. Hatch) ("The proposed definition states that the term ["with the principal objective of livelihood and profit"] means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and necessary gain, as opposed to other intentions such as improving or liquidating a personal firearms collection. It does not require that the sale or disposition of firearms is, or be intended as, a principal source income or a principal business activity. This provision would make it clear that the licensing requirement does not exclude part-time firearms businesses as well as those firearms collectors or hobbyists who also engage in a firearms dealing business.").

misconception in common: that any person who amasses multiple firearms without a license and without criminal purpose has, by definition, a "personal collection," or is a "collector" under the statute.[214] But that is not correct. This assertion is akin to saying that any person who walks around with change in their pockets for daily use has a coin collection or is a coin collector.

The Department has revised the definition of "personal collection" in the final rule to make it clear that firearms a person obtains predominantly for a commercial purpose or for financial gain are not within that definition. This distinguishes such firearms from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, which are included in the definition of "personal collection," but which the person may also intend to increase in value. Nonetheless, the Department agrees that collecting "curios or relics" (as defined in 27 CFR 478.11), "collecting unique firearms to exhibit at gun club events," "historical re-enactment," and "noncommercial firearms safety instruction" should be added to the specific examples of firearms acquired for a "personal collection," and has added them to this final rule.

The Department disagrees that the definition of "personal collection" is so narrowly defined that it would preclude personal firearms that are inherited from being sold under a common government "gun-buy-back" program. First, the occasional sale of inherited firearms to a government agency is not conduct that would likely fall within any presumption or otherwise rise to the level of being engaged in the business of dealing in

[214] Under the GCA, 18 U.S.C. 921(a)(13), the term "collector" means "any person who acquires, holds, or disposes of firearms as curios or relics." A firearm is a "curio" or "relic" when it: (1) is "of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons"; and (2) either (a) was manufactured at least 50 years prior to the current date, (b) was certified by a museum curator to be a curio or relic of museum interest, or (c) derives a substantial part of its monetary value from the fact that it is novel, rare, bizarre, or because of its association with some historical figure, period, or event. 27 CFR 478.11.

firearms. Second, sales of inherited firearms, whether or not they are part of a personal collection, are generally not made by a person who is devoting time, attention, and labor to dealing in firearms with a predominant intent to profit. To make this clear, the Department has added liquidation transfers or sales of inherited firearms as conduct that does not support a presumption of being engaged in the business. The Department also included reliable evidence that a person was liquidating inherited firearms in the types of evidence that can be used to rebut any presumption. *See* § 478.13(e)(5)(i), (f). For these reasons, a person would not be presumptively engaged in the business if they only sold inherited firearms to a government agency as part of a "gun-buy-back" program, regardless of whether the firearms fell within the definition of "personal collection."

The Department disagrees with commenters who said that the definition of "personal collection" is too vague and acknowledges that the definition does not include firearms owned by commercial entities and used for commercial business purposes. The definition is from standard dictionary definitions, and firearms acquired by commercial entities are not "personal" or a "collection," and cannot be said to be part of "personal collection."[215] That, however, does not necessarily mean commercial entities that own firearms are engaged in the business of dealing in firearms under the statute or this rule. When a company, such as an armored car company or hunting outfitter, purchases firearms for a business inventory, their predominant intent is not likely to be earning a profit by repetitively purchasing and reselling firearms. While the operations of each company must be examined on a case-by-case basis to determine, for example, if they are

[215] *See* footnote 88, *supra*.

engaged in the business of dealing in firearms on a part-time basis, such companies generally do not need to be licensed.

The Department also disagrees with commenters who indicated that "personal collection" is too narrow because it does not include firearms purchased for self-defense. The dictionary definition of "collection" means "an accumulation of objects gathered for study, comparison, or exhibition or as a hobby."[216] This common definition is consistent with how the GCA views a "collection." The GCA, 18 U.S.C. 921(a)(13), defines the term "collector" as "any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define." The regulations have long further defined the term "curios or relics" as "[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended . . . as offensive or defensive weapons." For this reason, the definition of "personal collection" in this rule does not include firearms that have no special interest to the collector or hobbyist other than as weapons for self-defense or defense of others, as has been clarified in the final rule.[217] At the same time, the Department recognizes that 18 U.S.C.

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[216] *Collection*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/collection (last visited Mar. 7, 2024); *see also Collection*, Brittanica Online Dictionary, https://www.britannica.com/dictionary/collection (last visited Mar. 7, 2024) ("a group of interesting or beautiful objects brought together in order to show or study them or as a hobby").

[217] *See, e.g.*, *Tyson*, 653 F.3d at 202–03 ("Tyson called himself a firearms 'collector,' which, if true, would also have shielded him from criminal trafficking liability. See 18 U.S.C. § 921(a)(21)(C) (stating that one who 'makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms' is not a 'dealer in firearms'). These were lies designed to game the system. After all, none of the firearms purchased by Tyson were antiques and his behavior was decidedly inconsistent with that of a collector."); *Idarecis*, 164 F.3d 620, 1998 WL 716568, at *3 (unpublished table decision) ("[Defendant] nevertheless argues that the definition of a gun 'collection' in § 921(a)(21)(c) should be read more broadly than the definition of a gun 'collector' in order to encompass the guns [Defendant] owned and sold. We cannot say that the district court's failure to instruct the jury on the collection exemption pursuant to § 921(a)(21)(C) was plain error. There is no case authority to suggest that there is a distinction between the definition of a collector and of a collection in the statute."); *Palmieri*, 21 F.3d at 1269 ("[A] 'collector' is defined as 'any person who acquires, holds, or disposes of firearms as curios or relics . . . . ' *Id.* § 921(a)(13). Section 922(a) requires

921(a)(21)(C) allows persons to make occasional sales, exchanges, or purchases of firearms "for a hobby." For this reason, the Department has defined the term "personal collection" more broadly than just a collection of curios or relics, and has included firearms for "noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction."

Moreover, by definition, all firearms are "weapons" that will, are designed to, or may readily be converted to expel a projectile, and are therefore instruments of offensive or defensive combat.[218] 18 U.S.C. 921(a)(3)(A). Some firearms that can be used for personal defense may also be collectibles or purchased for a hobby, while others may not. Additionally, including all firearms usable for self-defense in the definition of "personal collection" is inconsistent with the statutory scheme of the GCA. The GCA places restrictions on dealing in firearms, but permits individuals to make "occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby" or sell all or part of a personal collection. 18 U.S.C. 921(a)(21)(C). Including all firearms usable for self-defense in the definition of "personal collection" would allow the limited definitional exclusions for enhancing and liquidating a personal collection to swallow the rule that dealers in firearms must be licensed, because one could nearly always claim that a firearm was purchased or sold to improve or liquidate the firearms

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inquiry into both the defendant's conduct and status. If the conduct constituted engaging in the business of dealing in firearms, then it is illegal unless the defendant is a licensed dealer. On the other hand, sales by a licensed or unlicensed collector from a personal collection in furtherance of a hobby are not illegal. Once the conduct is deemed equivalent to the business of dealing, however, collector status will not shield a defendant from liability under § 922(a).").

[218] *See Lunde Arms Corp. v. Stanford*, 107 F. Supp. 450, 452 (S.D. Cal. 1952), *aff'd*, 211 F.2d 464 (9th Cir. 1954) ("To be a firearm an implement must be a weapon. . . . A weapon is defined in Webster's New International Dictionary, 2nd edition, as: 'An instrument of offensive or defensive combat[.]'").

one keeps for self-defense. That assertion is not consistent with the common definitions of "collection" or "hobby." In addition, it would potentially create similar problems with the GCA provision that places limitations on the disposition of firearms transferred by licensees to their "personal collection." 18 U.S.C. 923(c). It could also create a conflict with the provision of the United States Sentencing Guidelines that allows persons convicted of certain firearms violations in some situations to receive a reduction in their sentencing offense level if they possessed firearms "solely for lawful sporting purposes or collection."[219] U.S.S.G. 2K2.1(b)(2).

Whether a firearm is part of a personal collection or for a hobby depends on the kind and type of firearms,[220] and courts have also looked to the nature and purpose for which they are accumulated.[221] This is not to say individuals or companies cannot buy or

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[219] *See United States v. Miller*, 547 F.3d 718, 721 (7th Cir. 2008) ("Miller concedes that he kept the shotgun for security against intruders, rather than as part of a collection. It follows that § 2K2.1(b)(2) does not reduce Miller's offense level."); *United States v. Bertling*, 510 F.3d 804, 807, 811 (8th Cir. 2007) (defendant was not entitled to sentencing guidelines calculation reduction for sporting purposes or collection where he possessed a handgun for personal protection); *United States v. Halpin*, 139 F.3d 310, 310–11 (2d Cir. 1996) (possession or use of a gun for purposes of personal protection, or protection of others, does not qualify a defendant for a sentence reduction for sporting purposes or collection); *United States v. Dudley*, 62 F.3d 1275, 1277 (10th Cir. 1995) (same); *United States v. Gresso*, 24 F.3d 879, 881–82 (7th Cir. 1994) ("[T]he Sentencing Commission allows a reduction in *penalty* for certain types of possession; these favored uses [of sporting purposes or collection] do not include self-protection. It is easy to understand why self-protection is not included. Attempting to distinguish as a practical matter between defensive and potentially offensive purposes might be next to impossible."); *United States v. Cousens*, 942 F.2d 800, 803–04 (1st Cir. 1991) (same).

[220] *Cf. United States v. Hanson*, 534 F.3d 1315, 1319 (10th Cir. 2008) ("[T]he type of gun here, which is most commonly used for self-protection, weighs against Mr. Hanson's claim that he purchased it entirely for a sporting purpose."); *United States v. Wilder*, 12 F. App'x 297, 299 (6th Cir. 2001) (some of the defendant's firearms were not suited for hunting or target practice, and so the U.S.S.G. 2K2.1(b)(2) sentence reduction did not apply); *United States v. Lewitzke*, 176 F.3d 1022, 1028 (7th Cir. 1999) (affirming the district court's finding that defendant's guns were not of the type normally used for target shooting and therefore weighed against granting the reduction); *United States v. Hause*, 26 F. App'x 153, 154 (4th Cir. 2001) (same with inexpensive handgun that was not the sort of firearm that would be considered collectible).

[221] *See United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1314–15 (M.D. Fla. 2005) ("[Defendant] did not merely make occasional sales or exchanges of firearms to enhance his personal collection or for a hobby. Rather, he possessed a significant number of inexpensive shotguns, rifles, and handguns for resale."); *Hannah*, 2005 WL 1532534, at *3 (rejecting a defendant's argument that purchases and sales of firearms were made for the enhancement of his personal collection or for a hobby where

sell firearms that are primarily for self-defense or protection of others under this rule. It just means that those other personal firearms are not necessarily part of a "personal collection," and persons who buy or sell such firearms cannot avail themselves of the statutory exception for personal collections in 18 U.S.C. 921(a)(21)(C) unless the firearms are of a type and purpose to qualify as personal collection firearms. To make this point clear, the definition of "personal collection" has been revised to state that "[i]n addition, the term shall not include firearms accumulated primarily for personal protection: *Provided,* that nothing in this section shall be construed as precluding a person from lawfully acquiring firearms for self-protection or other lawful personal use." § 478.11.

The Department has made it explicit in this final rule that firearms acquired for a hobby—including noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting, or historical re-enactments—may be part of a "personal collection." Therefore, reliable evidence of occasional sales of such

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"[n]one of the firearms had any historical value"); *cf. United States v. Baker*, 501 F.3d 627, 629 (6th Cir. 2007) (affirming the district court's decision not to apply sentencing guideline 2K2.1(b)(2) because "the gun was not 'stored in a manner showing that it was valued or treasured,' nor was it 'polished and treated as one would treat something that was part of a collection'"); *United States v. Denis*, 297 F.3d 25, 33–34 (1st Cir. 2002) (same where a rifle was stored loaded and near cash to protect marijuana sales, rather than kept for sporting purposes as alleged); *United States v. Clingan*, 254 F.3d 624, 626 (6th Cir. 2001) (upholding denial of the collection sentence reduction, and noting that "[n]one of the weapons were antiques or of other special value"); *United States v. Miller*, 224 F.3d 247, 251 (3d Cir. 2000) (affirming the district court's denial of the 2K2.1(b)(2) sentence reduction to the defendant's sentence for dealing in firearms without a license under 18 U.S.C. 922(a)(1)(A) because the firearms sold were not "solely for sporting purposes or collection" where the defendant was convicted for firearms trafficking); *United States v. Zakaria*, 110 F.3d 62, 1997 WL 139856, at *3 (4th Cir. 1997) (unpublished table decision) ("In the present case, there was substantial evidence showing that Zakaria purchased the firearms with the sole intent of selling them to his cousin for illegal export to Pakistan; not for placing them in his private collection."); *United States v. Andrews*, 45 F.3d 428, 1994 WL 717589, at *3 (4th Cir. 1994) (unpublished table decision) (denying sentence reduction, saying "[a]lthough Andrews possessed a large number of guns that were unloaded and on display in his den, they generally were common shotguns and rifles typically not 'collected' in the narrow sense of being 'collectors' items'"); *United States v. Gonzales*, 12 F.3d 298, 301 (1st Cir. 1993) (same with respect to accumulation by a felon of "a small arsenal of handguns" allegedly for sporting purposes or collection).

firearms only to obtain more valuable, desirable, or useful firearms for the person's personal collection would not support a presumption and may be used to rebut any EIB presumption.[222] *See* § 478.13(e)(2), (f). However, as stated previously, the Department will not set a minimum threshold number of firearms to determine when a person is engaged in the business or occasionally selling firearms to enhance a personal collection. While not included in the regulatory text, the plain and ordinary meaning of the term "occasional" should be read to mean "infrequent or irregular occurrence,"[223] and to exclude firearm sales, exchanges, or purchases that are routinely or regularly made (even on a part-time basis).

The Department agrees with the comment that the phrase "or for a hobby" in 18 U.S.C. 921(a)(21)(C) has a meaning independent of the term "collection." The rule therefore incorporates that phrase into the definition of "personal collection," and expressly recognizes that firearms that may not be considered "collectibles" are also included in the definition of "personal collection." Under this combined definition, firearms acquired "for a hobby" are, for example, those acquired for "noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction."

The Department agrees with commenters that the requirement, in the definition of "personal collection of a licensee," that licensees must segregate business inventory from

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[222] *See, e.g.*, *Approximately 627 Firearms*, 589 F. Supp. 2d at 1135 ("[Claimant] offered credible testimony that he was an avid hunter, and that 'maybe 20 to 25' of the firearms at issue were his personal guns. The firearms which [Claimant] held for personal use are not subject to forfeiture simply because the vast majority of seized firearms were 'involved in' [dealing without a license]." (citation omitted)).
[223] *See* footnote 123123, *supra*.

personal firearms in the proposed rule was not meant to apply to personal firearms ordinarily carried by the licensee. It was meant to apply only to personal firearms that are stored or displayed on the licensee's business premises, which should not be commingled with business inventory. For this reason, the applicable language in this final rule's definition of "personal collection of licensee" has been revised to clarify that it applies only to personal firearms "when stored or displayed" on the business premises.

The Department disagrees that transfer of firearms in a business inventory to a personal collection (or otherwise as a personal firearm) by an FFL "happens as a matter of law" when the FFL goes out of business. Under the GCA, 18 U.S.C. 923(c), a business inventory of firearms held by a licensee only becomes part of a "personal collection" (or otherwise a personal firearm) if the firearms were transferred from the licensee's "business inventory into such licensee's personal collection" (or other personal firearms) while the person is licensed, and one year has passed from the time of transfer. Additionally, such disposition or any other acquisition cannot have been made by the licensee for the purpose of willfully evading the restrictions placed on licensees. Under this rule, the licensee must take affirmative steps to accomplish this task.[224] It does not occur automatically by operation of law, and it would frustrate the operation of the GCA for such restrictions to apply to a licensee one day before discontinuance of business but not one day after.

[224] 27 CFR 478.11 (definition of "personal collection" requires that for a firearm to be in a "personal collection," the acquisition of the firearm must be recorded in the licensee's acquisition book, recorded as a disposition from the licensee's inventory to a personal collection, maintained and stored separately for one year, and not have been acquired or transferred with the intent to willfully evade the GCA); *cf. Zakaria*, 110 F.3d 62, 1997 WL 139856, at *2 (holding that licensee's sale to his cousin was from his business inventory as a matter of law, saying "[w]e find that the district court reasonably interpreted 18 U.S.C. § 923(c) (1994) and 27 C.F.R. § 178.125a (1996) to contain a default provision which provides that the sale of firearms held for less than one year which are not properly recorded pursuant to 27 C.F.R. § 178.125a(a), regardless of how acquired, are to be considered to be from the licensee's business inventory.").

13. Definition of "Responsible person"

Comments Received

Some commenters generally agreed with the Department's proposed definition of "responsible person," stating it is important for accountability and oversight. Other commenters stated that the definition of "responsible person" needed more clarity because, without it, there may be unintended consequences for individuals engaged in legitimate firearms transactions, further complicating what they referred to as an already complex regulatory landscape. For instance, one commenter, a large FFL with thousands of employees, stated the definition of "responsible person" is overbroad and could capture hundreds of employees in its company. As examples, they listed logistics and shipping associates; marketing and sales associates; value stream managers; group and team leads; associates responsible for establishing and disseminating standard work and job instructions as they pertain to firearms manufacture, destruction, transfer, and testing; customer service associates; engineers; and product and project managers involved in firearms design and manufacture. The commenter added that, were all these employees to be considered responsible persons, it would become extremely burdensome to add them to their license as well as timely update the license as people join or leave the company. The commenter, therefore, suggested that the designation of a responsible person should be based on (1) the person's responsibilities, and (2) the licensee's designation of the person as a responsible person.

Another commenter stated that the proposed regulatory definition of "responsible person" is contrary to the statute at 18 U.S.C. 923(d)(1)(B), which they said describes an applicant for a license to include, "in the case of a corporation . . . any individual

possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association." The commenter stated that the proposed regulatory definition adds words that are not in section 923(d)(1)(B), specifically "**business practices** of a corporation, partnership, or association **insofar as they pertain to firearms**." The commenter argued that "practice" is the "actual performance" of something or even "a repeated customary action," regardless of whether the action is permitted by or contrary to the organization's management or policies. Despite the Department's explanation that store clerks or cashiers cannot make management or policy decisions with respect to firearms and are unlikely to be considered a "responsible person," the commenter asked whether gun store clerks who direct "business practices" each time they perform their job duties could be captured under the regulatory definition. The commenter asserted that the Department was trying to capture more people as responsible persons than Congress intended by adding those emphasized phrases, which the commenter characterized as amorphous and unexplained.

Another commenter also stated the definition is too broad on grounds that the words "indirectly" and "cause the direction" are unclear terms. The commenter suggested the Department adopt the definition of "responsible person" from the explosives context, where it is defined in 18 U.S.C. 841(s) as "an individual who has the power to direct the management and policies of the applicant pertaining to explosive materials."

Department Response

The Department disagrees that the definition of "responsible person" is overbroad; it merely establishes by regulation the longstanding definition used on ATF Form 7/7CR, Application for Federal Firearms License, based on statutory language in 18 U.S.C. 923(d)(1)(B). The Department declines to fully adopt the definition set forth in the Federal explosives laws at 18 U.S.C. 841(s), because, although it is similar, it does not include persons who indirectly possess the power to direct or cause the direction of the management and policies of an entity, as identified in section 923(d)(1)(B). The Department does not intend, by means of this rule, to change how persons apply the current definition of "responsible person" on ATF Form 7/7CR. Nonetheless, the Department agrees with commenters that the term "responsible person" would benefit from some additional clarity, as follows. First, to help ensure that persons do not interpret the term "business practices" to cover sales associates, logistics personnel, human resources personnel, engineers, and other employees who cannot make management or policy decisions on behalf of the licensee with respect to the firearms business, the Department has removed the term "business practices" from the definition of "responsible person" in the final rule and intends to remove the term "business practices" from ATF Form 7/7CR in the future. Second, to ensure that persons understand the term "applicant" in 18 U.S.C. 923(d)(1)(B) to include as "responsible persons" sole proprietors and individuals with authority to make management or policy decisions with respect to firearms for companies (including limited liability companies) the definition in this final rule includes sole proprietorships and companies. This will make it clear that all licensees (including sole proprietors and limited liability companies) must inform ATF of responsible persons who have the authority to make management or

policy decisions with respect to firearms, and ensure they undergo a background check. At the same time, the Department does not intend to include in the definition of responsible persons those employees who have no authority to make management or policy decisions that impact the firearms portion of a licensed business.

14. Definition of "Predominantly earn a profit"

a. Overbreadth

Comments Received

Numerous commenters expressed concern over the scope of the term "predominantly earn a profit." Some commenters raised questions regarding "intent to earn a profit," noting that it is only logical for a person selling a good, like a firearm, to want to earn a profit and that it would be ridiculous to expect any private seller to sell a firearm for less than its expected value. For instance, one commenter stated they had a small gun collection of primarily curio and relic firearms and would set a sales price based on their perception of the firearm's market value. This person stated that while they might make some money, their motivation is not to make a profit (noting that their last sale was to pay a medical bill) but they believe they would be required to get an FFL under the rule.

In a similar vein, some commenters opined that they would have to sell their firearms at a loss to avoid generating a "profit" and that the proposed rule would prevent an owner from receiving fair market value for their firearms. Similarly, other commenters pointed out how a person might avoid the "intent" requirement. One commenter asked if a person who states that their primary goal is not to earn a profit and acts as a nonprofit organization can, as a result, sell as many guns as they like without

becoming licensed. Another commenter noted that under IRS rules of "income," an even exchange of goods means there is no income or profit, and that if there is no profit, there is no business activity. This commenter believed that, if the buyer and seller determine the value of the items and make an even exchange, then the buyer should not be captured under the definition of "predominantly earn a profit." Other commenters questioned who would determine who made a "profit" where a trade involved no cash, but a person instead traded a gun and a laser sight for a different gun.

Another commenter critiqued the definition, stating that it has been expanded to include any pecuniary gain, which they stated is overbroad. The commenter argued that the definition fails to recognize that all sales have some motive of pecuniary gain; otherwise a seller would give away or destroy their firearm. They stated that not only does the GCA expressly allow non-licensees to make occasional sales, but nothing in the GCA prohibits non-licensees from attempting to derive pecuniary gain from their occasional sales. One organization argued that the definition would apply even when a person is selling a firearm on consignment because, if a person consigned their firearm to an FFL, that person would be reselling with the intent to predominantly earn a profit and therefore would need to be licensed, even though the transaction is facilitated by an FFL.

Department Response

The Department disagrees that the rule's definition of "predominantly earn a profit" is overbroad. The definition merely implements the statutory definition "to predominantly earn a profit" in 18 U.S.C. 921(a)(22), which defines that term, in relevant part, to mean that "the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as

improving or liquidating a personal firearms collection." The Department agrees that some persons who sell firearms do not have the predominant intent to profit through repetitive purchase and resale even if they do intend to obtain pecuniary gain from firearms sales (e.g., where the intent to obtain such gain is a secondary motive). However, even if a person has a predominant intent to earn a profit, it does not automatically follow that they are always engaged in the business. A predominant intent to profit through repetitive resale of firearms is only one element of being engaged in the business.

Under the BSCA, a person's intended use for the income they receive from the sale or disposition of firearms is not relevant to the question of whether they intended to predominantly obtain pecuniary gain. If a person must sell their previously acquired firearms to generate income for subsistence, such as to pay medical or tuition bills, they are still subject to the same considerations as persons who intend to sell their firearms to go on a vacation, increase their savings, or buy a sports car. If persons repetitively resell firearms and actually obtain pecuniary gain, whether or not it was for support or subsistence, that gain is evidence demonstrating the intent element of being engaged in the business. However, the Department emphasizes that a single or isolated sale of firearms that generates pecuniary gain would not alone be sufficient to qualify as being engaged in the business without additional conduct indicative of firearms dealing. For example, a person who bought a firearm 40 years ago and now sells it for a substantial profit to augment income during retirement is not engaged in the business because the person's intent was not to earn that pecuniary gain through repetitive purchases and resales of firearms.

With regard to the comment about nonprofit organizations, they can also have the predominant intent to earn a profit from the sale or disposition of firearms. They just do not distribute their profits to private owners (although their employees can receive compensation).[225] In response to commenters who questioned whether a like-kind exchange would result in a profit, or whether the IRS would consider it "profit," the Department reiterates that the relevant standard is not whether an actual profit is earned under the definition of "engaged in the business." The standard is whether the person who exchanged the firearms for money, goods, or services had the predominant intent to earn a profit—meaning to obtain pecuniary gain—through repetitive firearms purchases and resales.

The Department disagrees with some commenters who said that a person always has a *predominant* intent to earn a profit when selling or disposing of a firearm. For example, a person may wish to get rid of unsuitable or damaged firearms quickly, so the person intends to sell them at a loss for less than fair market value. In that case, there is only an intent to minimize a pecuniary loss, not obtain a pecuniary gain. Likewise, a person who only transfers firearms: as bona fide gifts; occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection; occasionally to a licensee or to a family member for lawful purposes; to liquidate (without restocking) all or part of a personal collection; or to liquidate firearms that are inherited, or pursuant to court order, does not usually have a predominant intent to earn a profit from those

[225] *See Myths About Nonprofits*, Nat'l Council of Nonprofits, https://www.councilofnonprofits.org/about-americas-nonprofits/myths-about-nonprofits (last visited Mar. 7, 2024) ("The term 'nonprofit' is a bit of a misnomer. Nonprofits can make a profit (and should try to have some level of positive revenue to build a reserve fund to ensure sustainability.) The key difference between nonprofits and for-profits is that a nonprofit organization cannot distribute its profits to any private individual (although nonprofits may pay reasonable compensation to those providing services).").

activities. This is true even if the seller has a secondary motive to obtain pecuniary gain from those sales. To make this clear, the final rule now expressly states that any such evidence may be used to rebut the presumptions. *See* § 478.13(e), (f).

The Department agrees with commenters who suggested that a person who consigns firearms for sale (consignor) may have a predominant intent to earn a profit from the sale of the firearms; however, that does not end the inquiry because that person is often not devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. The person engaged in the business is the seller who accepts the firearms on consignment (consignee), is paid to take the firearms into a business inventory for resale, and determines the manner in which to market and resell them on the consignor's behalf.[226] Like consignment-type auctioneers, firearms consignment businesses must be licensed because they are devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.

b. Government Proof of Intent to Profit through Repetitive Purchase and Resale

Comments Received

Other commenters raised concerns that the proposed definition of "predominantly earn a profit" does not require a person to have actually obtained pecuniary gain. Some congressional commenters stated, "under the proposed rule, the ATF would require someone to prove he or she is not a firearms dealer in instances where no firearms are

[226] *See, e.g.*, *United States v. Strunk*, 551 F. App'x 245, 246 (5th Cir. 2014) (Defendant "without being licensed, sold firearms entrusted to him by others for the purpose of sale. Such conduct is unquestionably prohibited by the legislation's text.").

actually exchanged or sold" and opined that that situation was not consistent with the statute.

Some commenters stated that even though the proposed rule incorporates to "predominantly earn a profit" from the BSCA, the proposed definition includes language that directly contradicts the statute and legislative history of the GCA. They stated that Congress made clear that it is not necessary for the Government to prove profit in cases involving the repetitive purchase and disposition of firearms for criminal purposes or terrorism, meaning that it is necessary for the Government to prove profit in all other cases. Thus, they argued that the added phrase "[f]or purposes of this definition, a person may have the intent to profit even if the person does not actually obtain pecuniary gain from the sale or disposition of firearms" and explanation from ATF that one can be a dealer without ever making a purchase or sale are both contrary to the statute. Commenters stated that ATF may not relieve itself of the congressionally imposed burden to prove profit. Another commenter pointed out that eliminating the need for profit is in tension with the concept of being in a business; if a business does not make a profit, then they cease to exist.

Moreover, at least one commenter disagreed with all the cases that were cited in support of the claim that the Government does not need to prove that the defendant actually profited. The commenter claimed that three of the cases cited—*United States v. Wilmoth*, 636 F.2d 123 (5th Cir. Unit A Feb. 1981), *United States v. Mastro*, 570 F. Supp. 1388 (E.D. Pa. 1983), and *United States v. Shirling*, 572 F.2d 532 (5th Cir. 1978)—were decided before there was any statutory mention of "profit" as it relates to dealing. They noted that two other cases—*Focia*, 869 F.3d 1269 and *United States v. Allah*, 130 F.3d 33

(2d Cir. 1997)—were not on point because in both cases the Government had shown that defendants profited.

Department Response

The Department disagrees with commenters who said that the GCA requires that a person actually obtain pecuniary gain. The only "profit" element in the GCA—both before and after the BSCA was enacted—is the intent to profit through the repetitive purchase and resale of firearms. This is because the statutory terms "to predominantly earn a profit" through the repetitive purchase and resale of firearms in 18 U.S.C. 921(a)(22), and "with the principal objective of livelihood and profit" in 18 U.S.C. 921(a)(23), are both defined to mean "the intent underlying the sale or disposition of firearms is predominantly one of obtaining . . . pecuniary gain." One does not need to realize a profit to have the intent to profit.

The Department does not agree with commenters who argued that the proviso concerning the disposition of firearms for criminal purposes demonstrates otherwise. The statement that "proof of profit shall not be required" in that proviso requires neither proof of profit nor proof of intent to profit for persons who engage in the regular or repetitive purchases and dispositions of firearms for criminal purposes or terrorism. *See United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1324 (M.D. Fla.), *adopted by* 362 F. Supp. 2d 1323 (M.D. Fla. 2005) ("[P]roof of profit motive is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." (citing 18 U.S.C. 922(a)(22) and Eleventh Circuit Pattern Jury Instruction No. 34.1). Reading that proviso to, by negative implication, require proof of profit—and intent to profit—with respect to other forms of engaging in

the business would be contrary to the plain text of the definition of "to predominantly earn a profit," which refers to the "intent underlying the sale or disposition of firearms." 18 U.S.C. 921(a)(22); *see also id.* 921(a)(23) (definition of "with the principal objective of livelihood and profit," similar). It would also be contrary to decades of Federal case law on 18 U.S.C. 922(a)(1).[227]

Some commenters asserted that, because some of the criminal cases cited in the proposed rule referenced the fact that the defendant actually profited from firearms sales, the cases support their conclusion that actual profit must be proven in an engaged in the business case. The Department disagrees. Of course, proof of actual profit may be presented in a case, but that does not mean it is required. Proof of actual profit is merely cited by courts in cases, such as *Focia*, 869 F.3d at 1282 (defendant "immediately turned around and sold them at a steep profit"), and *Allah*, 130 F.3d at 44 (defendant "had several people bring him 'dough' from selling guns for him 'in the streets'"), as evidence that supported findings that the defendant had the requisite intent to profit. But evidence of actual profit is not necessary where the totality of the facts otherwise demonstrates the predominant intent to profit. For example, if the defendant admitted to an undercover officer that he wanted "to make a whole lot of money" from reselling the firearms to the officer, that evidence would likely be sufficient to prove a predominant intent to earn a profit from those sales. Moreover, where a person engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism, no proof of profit, including, as explained above, the intent to profit, is required at all in an engaged in the business case. *See* 18 U.S.C. 921(a)(22).

[227] *See* footnote 96, *supra*.

c. Suggestions on Meaning of Profit

Comments Received

Numerous commenters stated that the definition of "predominantly earn a profit" with its presumptions will capture practically all firearms owners who wish to sell their personal or inherited firearms because the value of firearms typically increases over time and will thus always result in a profit. Several commenters stated that profit should be defined to avoid misinterpretation while others asked how profit should be calculated or made suggestions. For example, one commenter asked if the labor to customize a firearm or any additional parts that are added should be included in a calculation of profit.

Similarly, numerous commenters pointed out that determining profit does not account for inflation and indicated that it should. Commenters provided examples of how they would not earn a profit, or would make a minimal profit, from the sale of a firearm due to inflation. For example, one commenter posited that if a person purchased a firearm for $600 ten years ago and sold it in the present for $750, this could be viewed as making a profit, but it would actually be a loss in real terms because the purchasing power of $600 was greater ten years ago than the purchasing power of $750 is today due to inflation. At least one commenter asserted that ATF's proposed definition of "profit" is problematic under the U.S. tax code, as inflation is not allowed to be accounted for in the ATF definition, even though it is an adopted measure of the price of all goods.

Gun collectors' associations said the definition does not take into account any other expense or time value of money associated with the sale of the firearm, which is a part of any normal calculation of "profit" and hence is beyond proper basis of an

interpretive regulation. Additionally, they stated that the costs gun collectors incur to attend events should be factored into any reasonable definition of "profit."

Similarly, to account for the change in time in the fair market value of goods, another commenter proposed adding language providing that "[i]f a private individual sells a firearm that they have purchased for more than the original purchase price, they are not considered to be selling the firearm for the purpose of primarily making a profit if the fair market price of the firearm has increased since the original date of purchase."

Department Response

The Department agrees that a person who liquidates inherited firearms from a personal collection at fair market value, absent additional circumstances indicating otherwise, typically does not have a predominant intent to profit from those sales. While the person may have an intent to receive pecuniary gain when they sell these firearms and may or may not have a predominant intent to profit, the person would not be "engaged in the business" because liquidating this one set of inherited firearms does not constitute dealing as a regular course of trade or business. Nevertheless, because the Department believes that persons in such a scenario typically do not have a predominant intent to profit, the Department has incorporated, as conduct that does not support a presumption, and as rebuttal evidence, a person who only "liquidate[s] firearms [t]hat are inherited." § 478.13(e)(5)(i), (f)

In response to commenters who said that any profit should account for inflation, or expenses incurred, again, the statute does not require proof of actual profit. The statute's and rule's focus is on the person's predominant intent to profit, not on whether a person actually profits. Because the focus is on a person's intent, it makes no difference

whether the costs or inflation mentioned by the commenters are included in the sales price or in assessing actual profit.

The Department disagrees with the commenter who suggested that a private individual automatically does not have an intent to profit if they sell a firearm that was purchased for more than the original purchase price if the fair market price of the firearm has increased since the original date of purchase. The Department declines to make this a blanket exception or rebuttal evidence to the current presumptions because the fair market value of the firearm may have increased substantially more than the original purchase price. The details of any particular situation may vary, and those facts may impact the determination of intent. Based on these facts, the seller may or may not have had a predominant intent to earn a profit from that sale.

d. Other Suggestions Related to Definition of "Predominantly earn a profit"

Comments Received

Many commenters proposed various changes to the definition of the term "predominantly earn a profit" that they felt would narrow the scope of when a person has intent to predominantly earn a profit such that they are "engaged in the business" of dealing in firearms. Proposed exceptions included excluding when a person earns less than $5,000 per year or when they sell fewer than ten guns a month. One commenter suggested that certain scenarios be excluded because while there may be monetary gain there is no desire to increase the collection or buy firearms. These scenarios include liquidation at fair market value of inherited firearms or firearms passed down through a family member, liquidation of firearms at fair market value due to financial hardship or

disability, and liquidation of firearms at fair market value due to loss of interest or change in a hobby.

Similarly, one commenter pointed out that "predominantly" under 26 U.S.C. 118(c)(3) means "80 percent or more" and argued that ATF's proposed definition should be consistent with this statutory provision in the Internal Revenue Code. Therefore, the commenter suggested that ATF's definition of dealer should be amended to someone who engages in selling or disposing of firearms "where the intent is to obtain a pecuniary gain in 80 or more of the total transactions involving firearms as defined by" 18 U.S.C. 921.

Another commenter suggested that the term be revised to be clear that a collector can liquidate all or part of their collection by having a table at a gun show without requiring them to become a Type 01 FFL. Still another commenter suggested that the text should make clear the sources or methods used to acquire the firearm that is subsequently resold to "predominantly earn a profit."

Department Response

The Department disagrees that the scope of the PEP presumptions should be limited to when a person earns less than $5,000 per year from selling firearms, or when they sell fewer than ten guns per month. The amount of money a person makes when intending to earn a profit through repetitively purchasing and reselling firearms may be relevant in determining whether a person is engaged in the business. The fact that a person earns a large amount of profit from repetitively reselling firearms may be evidence that a person had a predominant intent to profit from those sales. However, there is no statutory requirement that a person make a certain amount of money (or any money at all) to have a predominant intent to profit. Persons who operate a part-time

firearms business that earns less than $5,000 per year, or even a firearms business that loses money due to poor salesmanship or lack of demand, would still be engaged in the business if they devote time, attention, and labor to dealing with the predominant intent to profit through repetitive purchases and resales of firearms. As stated previously, it is the seller's intent to predominantly earn a profit that determines whether a person needs a license, not the number of sales or amount of profit.

The Department disagrees that the sale of firearms at fair market value due to financial hardship or disability is evidence sufficient to exclude a person from being considered engaged in the business, or to rebut the presumptions. The statute's definition of "engaged in the business" does not create an exception for people who intend to engage in firearms dealing to earn income for support or subsistence; the definition as amended by the BSCA focuses only on a person's devotion of time, attention, and labor to that business and intent to earn a profit, not the uses to which they put any resulting profit or income. As a result, providing evidence that a person is engaging in the business of firearms dealing for livelihood reasons does not rebut any of the elements that constitute being engaged in the business.

As to the suggestion that the term "predominantly" be defined consistently with 26 U.S.C. 118(c)(3) as "80 percent or more," such that 80 percent of the transactions must be for pecuniary gain, the Department declines to do this. First, 26 U.S.C. 118(c)(3) is a definition of "predominantly" that is used to determine whether a regulated public utility that provides water or sewage disposal services may exclude certain amounts expended on those services from their gross income. This calculation has no connection or similarity to intent, let alone the context of firearms sales. Second, the GCA contains

no such limitation. A person may have the predominant intent to profit from the sale or offer to sell a single firearm, even if the person has no such intent with respect to other firearms being sold.[228]

In response to a commenter who suggested that the regulations be changed to make it clear that a collector can liquidate all or part of their collection by having a table at a gun show without a license, the Department has revised the final rule to state that reliable evidence that the person resells firearms only occasionally to obtain more valuable, desirable, or useful firearms for their personal collection, or to liquidate a personal collection, does not support a presumption and can be used to rebut any presumption. § 478.13(e)(2), (e)(4), (f).

15. Presumptions that a Person Intends to Predominantly Earn a Profit

Comments Received

Commenters stated that none of the individual presumptions that a person has the intent to predominantly earn a profit are supported by the Federal statute and raised concerns that they generally penalize entirely innocent and natural conduct of non-licensee sellers. Commenters stated these criteria are overbroad and fail to differentiate between genuine business activity and casual or incidental actions related to firearms. They stated that it is unfair for ATF to presume an intent to profit in scenarios where no such intent exists and that these presumptions make it effectively impossible for an unlicensed person to sell their firearm without running afoul of the rule. Indeed, one

[228] The term "predominant" is commonly defined as "more noticeable or important, or larger in number, than others." *Predominant*, Cambridge Online Dictionary, https://dictionary.cambridge.org/us/dictionary/english/predominant (last visited Mar. 17, 2024); *see also Predominant*, Oxford English Dictionary, https://www.oed.com/dictionary/predominant_adj?tab=meaning_and_use#28860543 (last visited Mar. 17, 2024) ("Having ascendancy, supremacy, or prevailing influence over others; superior, predominating.").

commenter stated that all avenues to make a personal sale were cut off and that he "cannot fathom how [he is] supposed to sell ANY firearm without being presumed to be engaged in the business under these rules. This rule says that [he] can sell part of [his] collection, but [he] cannot see a way to do so without being presumed to be engaged in the business under this rule." At least one commenter stated that all the presumptions ignore the statutory requirement that the intent "underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain."

Similarly, one commenter noted that determining when someone acts to "predominantly earn a profit" requires not determining that a profit was made, but rather, the underlying motivating factor for that person's actions. The commenter disagreed that any of the presumptions listed are indicators of such motivation; rather, they said, these presumptions reflect efficient and timely ways to sell a firearm and do not speak at all to the person's motivation when buying the firearm initially. For instance, they said, a person who wants to sell their car will take all actions possible to get the best price for it, such as advertising, providing maintenance records, renting space to list it online or a visible place to park it. A person wanting to sell their firearm would take similar steps, but these actions that trigger the presumptions do not shed light on the motivation for the purchase or transaction.

A few other commenters were concerned about the fact that they have owned firearms for a long time and are reaching an advanced age at which they will need to sell them. One such commenter stated, "The idea of a profit is to sell something for more than it was purchased for. In my collection I have firearms that were obtained over 40 years ago. Inflation has raised their value so that any sale will make a profit. This means

I am a dealer." Another explained that he is not a collector per se, but is a firearms competitor who thus has a number of firearms that "one day I must dispose of due to my advancing age. This would eliminate me from making private sales from my own holdings. The sale of which would generate a 'profit' since all were bought years ago when prices were much lower. The only choice this would leave me would be to sell on concession through a dealer. . . if I could find one willing to take the goods."

Commenters stated that many businesses have a large inventory of firearms for business purposes but are not licensed; these include armored car services, security companies, farmers, ranchers, and commercial hunting operations. If "predominantly earn a profit" is separate from "engaged in the business" as a set of presumptions, the commenters added, then a security company keeping track of its firearm inventory and the cost of obtaining those firearms for tax or other reasons would be captured under any of the presumptions listed under "predominantly earn a profit." Or a hunting outfitter with a large inventory of firearms for client use would easily be captured under a "predominately-earn-a-profit" presumption if they have security services like monitored alarms or cameras. The commenters concluded that the rule might therefore have the unintended consequence of reducing public safety if some people avoid certain security measures, such as monitored alarms, to avoid being presumed to be engaged in the business because they qualified for one of the "predominantly earn a profit" presumptions.

One comment noted that "while this set of presumptions is separate from the presumptions that establish that a person meets the definition of 'engaged in the business,' evidence of the conduct described in this set of presumptions can serve to rebut

evidence of conduct that, under paragraph (c)(4) of the Proposed Rule's definition of 'engaged in the business,' is presumed not to be engaged in the business." They suggested that ATF further clarify this.

Department Response

The Department disagrees that the presumptions that separately address the BSCA's new intent element—"to predominantly earn a profit" through the repetitive purchase and resale of firearms—penalize innocent and natural conduct of sellers who are not engaged in the business. Nothing in this rule creates any new penalties. The PEP presumptions serve only to establish the intent element. Even when that element is satisfied, a person would not be engaged in the business unless the other statutory requirements are present, including the requirements that the person "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business" and that the person is engaging, or intends to engage, in "the repetitive purchase and resale of firearms." 18 U.S.C. 921(a)(21)(C).

As the preamble and regulatory text explain, the EIB presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. *See* § 478.13(g). There are many other fact patterns that could support a finding that a person is engaged in the business requiring a license. The presumptions are tools that assist persons, including firearms sellers, investigators, and fact finders, to understand a set of common situations that have been found over the course of decades to indicate that a person is engaged in the business. Similarly, these PEP presumptions are not the only fact patterns that could support a finding that a person has a predominant intent to earn a profit, but they are tools

to assist in assessing the element of intent. At the same time, there are other fact patterns, such as where a person advertises a valuable collectible firearm for sale from a personal collection that could generate a substantial profit, that would not require a license. The fact that the collector, or even a company, intends to earn a profit from the sale or disposition of a firearm is not, by itself, dispositive as to whether that person is engaged in the business of dealing in firearms requiring a license. These presumptions apply only to an individual's or entity's predominant motivation in selling the firearm, and like other presumptions, they may be refuted with reliable evidence to the contrary.

The Department disagrees that these presumptions do not address a person's motivation. First, as stated previously, actual profit is not a requirement of the statute—it is only the predominant intent to earn a profit through the repetitive purchase and resale of firearms that is required. Indeed, a person may repeatedly advertise and display firearms for sale, and therefore demonstrate a predominant intent to earn a profit from repeatedly reselling the firearms purchased, but never actually find a buyer. Second, as stated previously, intent appropriately may be inferred from a person's words or conduct demonstrating such intent.[229] The motivation to predominantly obtain pecuniary gain from the repetitive sale or disposition of firearms can be demonstrated when a person takes certain preliminary steps to earn a profit, such as those reflected in the PEP presumptions. Generally, persons who do not intend to profit from firearms sales are not going to expend time, attention, labor, and money to repetitively advertise, secure display space, maintain profit documentation, hire security, set up business accounts, or apply for business licenses. And even if they do expend such time, attention, and labor without a

[229] *See* footnote 186, *supra*.

predominant intent to earn a profit, the person can bring forward reliable rebuttal evidence to refute the presumed intent.

The Department disagrees with the commenter who stated that a collector who holds firearms in a personal collection for many years would always show a profit due to inflation when they are sold, and would therefore automatically be considered a dealer. As stated previously, a showing of actual profit is not dispositive as to whether a person is engaged in the business. Rather, it is the predominant intent of obtaining pecuniary gain from the repetitive purchase and resale or disposition of firearms that matters. *See* 18 U.S.C. 921(a)(22). However, a person who is occasionally selling firearms from a personal collection to enhance it, or who liquidates it, typically does not have that intent, which is why this final rule states that reliable evidence of those activities and intent does not support a presumption and may be used to rebut any presumption. *See* § 478.13(e), (f).

The Department agrees that security companies, farmers, ranchers, and hunting outfitters that do not purchase firearms primarily for resale would be unlikely to have a predominant intent to earn a profit from liquidating their businesses' firearms, particularly since these firearms have likely lost their value over time due to constant use and handling. Non-firearms-dealing businesses may simply want to quickly sell them in bulk to a licensee for less than fair market value, in order to purchase new firearms. However, even if such businesses were to resell their firearms with a predominant intent to profit, that would not automatically mean that they were engaged in the business of dealing in firearms. The intent to profit is only one element of being engaged in the business; the other elements of dealing would also have to be established. Therefore, if

these businesses engaged in conduct that falls under one of the PEP presumptions and are presumed to have a predominant intent to profit, that does not mean they are also necessarily presumed to be engaged in the business of dealing in firearms.

The PEP presumption on recordkeeping is about keeping records to document, track, or calculate profits and losses from firearms purchases and resales, not about general recordkeeping of a firearms inventory or merely the cost of obtaining the firearms. Nonetheless, to avoid confusion as to when it applies, this PEP presumption has been revised to read, "[m]akes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale." § 478.13(d)(2)(iii). Therefore, as revised, the presumption is clarified to show that it does not include persons who merely keep track of their firearms or what they spend on them.

The Department does agree that the PEP presumption on securing a business security service to protect inventory is somewhat overbroad as drafted in the NPRM, and has therefore limited it in this final rule to maintaining security for both firearms assets and repetitive firearms transactions. *See* § 478.13(d)(2)(v). While some businesses may purchase firearms, and eventually liquidate them, such activity may be for reasons completely unrelated to any profit motive for the firearms transactions. In contrast, if they secure business security services to protect both their firearms assets and transactions, they are presumed to have a predominant intent to profit from those transactions. The focus of the licensing provisions in the GCA is on firearms transactions, not merely storing or maintaining firearms as assets. So, for example, if a business or other person merely purchases firearms for their own use, but not to enter into

transactions involving those firearms, they would not fall under this presumption because it is unlikely they would hire business security to protect firearms transactions.

The Department declines to adopt a commenter's suggestion that evidence of conduct identified in the PEP presumptions be used to "rebut" conduct not presumed to be engaged in the business (listed in paragraph (c)(4) of the NPRM's definition of engaged in the business, and now in § 478.13(e)). Section 478.13(e) is not a list of rebuttable presumptions. Rather, it is a nonexhaustive list of conduct that does not support a presumption of engaging in the business. As such, reliable evidence that a person is or was engaging only in such conduct can be used to rebut any presumption. In addition, the rule has been revised to state that the examples of rebuttal evidence set forth in the rule are not an exhaustive list of evidence a person may present to rebut the presumptions. *See* § 478.13(g).

16. PEP Presumption—Promotion of a Firearms Business

Comments Received

Several commenters disagreed with the inclusion of "[a]dvertises, markets, or otherwise promotes a firearms business (*e.g.*, advertises or posts firearms for sale, including on any website, establishes a website for offering their firearms for sale, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally" as a presumption in determining whether a person has the intent to predominantly earn a profit.

First, commenters noted that Congress explicitly rejected limitations on the private transfers of firearms pursuant to classified ads and gun shows, implying that ATF cannot now include in its rule a presumption that advertising or promoting a firearms

business shows predominant intent to profit. Additionally, commenters stated that such advertisements in a classified advertisement hardly qualify someone as having such intent and that this is criminalizing protected behavior. For instance, the commenters said, if a person is liquidating a personally owned NFA weapon because of a move to a State where possession of the item would be unlawful, they believed that the presumption would capture such a person who posts an advertisement on the Internet to sell their NFA weapon even if they lose money on the sale. In fact, stated one commenter, the presumption is so broad it could apply to posting even a single firearm for sale on a website, which is a common occurrence where the seller did not purchase the firearm with intent to profit and is most likely losing money on the sale. The commenter stated that there is "no indicia that a seller who posts on a website is doing so for pecuniary gain" so "the presumption lacks any connection to the statutory definition of 'predominantly earn a profit.'"

Similarly, a couple of gun collectors' associations stated this first presumption essentially limits all sales to word of mouth if a seller does not want to be captured under the presumption. A third association added, "[m]ost who collect firearms or engage in the sale of firearms for a hobby are willing to buy or willing to sell, but this in and of itself [does] not establish by a preponderance that they are doing so to 'predominately earn a profit'. . . . The changes in the law did not provide that a person could not advertise a firearm for sale, put a price tag on it, place it for sale on the internet, or rent a table at a gun show." In another commenter's view, the presumptions also preclude word-of-mouth sales. They stated that the definition of "engaged in the business" does not require that a firearm actually be sold, so long as the person holds themselves out as a

dealer. So, they added, "[i]n other words, if I *converse* with another person and *offer* to sell a personal firearm or represent to that person that I have a willingness, and ability, to purchase and/or sell other personal firearms [which occurs regularly if one is a collector], I am a Dealer. I would ask how, exactly, a person who wanted to actively seek out and add firearms to his/her collection would do so if you are not allowed to actually converse about it or negotiate with the owner of that firearm? . . . You can't 'spread the word' among other people as that activity also presumes you are a dealer." One company raised a concern over whether certain brand ambassadors that promote company products, or associates that go to trade shows who promote their company, would now be presumed to be engaged in the business of dealing in firearms.

In contrast, another commenter made a suggestion to strengthen this presumption with regard to online sales advertising because they found, through their own research, that the number of online sales advertisements for firearms through sites such as Armslist was overwhelmingly listed by unlicensed sellers rather than licensed dealers. They suggested that ATF should also consider stating that any person who engages in online conduct that falls within this presumption on more than one discrete occasion will qualify for a rebuttable presumption that the person is "engaged in the business" of firearms dealing. "Put differently," they explained, "the [I]nternet is the epicenter of the unregulated firearm sales market—and repeatedly advertising for sales online should be presumptively considered to be holding oneself out as a dealer. Plainly describing such an additional rebuttable presumption . . . would make it much clearer that a person's second or subsequent use of online advertising, marketing, or posting of firearms for sale

puts the burden on the seller to provide rebuttal evidence demonstrating that their multiple online advertisements are not engaging in the business of firearms dealing."

Department Response

The Department disagrees that the presumption that a person demonstrates a predominant intent to profit from selling firearms if the person "advertises, markets, or otherwise promotes a firearms business" is unfounded. Advertising or promoting a firearms business has long been recognized as a primary way of increasing sales and profits[230] and nothing in this rule prohibits or criminalizes isolated private transfers of firearms using classified advertisements and at gun shows. The presumption is narrowly tailored based on the Department's regulatory and enforcement experience, court decisions with similar fact patterns, and the investigations and prosecutions it has brought over the years. Because promoting a firearms business requires investing time and money, persons typically do not engage in such activities without intending to profit from resulting sales and recoup potential advertising costs in the process. As a result, advertising or promoting a firearms business is activity that indicates a person has a predominant intent to profit from firearms sales. This presumption does not prevent or hinder individuals from advertising to promote occasional private transactions, as intent to predominantly earn a profit is just one element of being engaged in the business.

[230] *See, e.g.*, *The Importance of Marketing for Your Firearms Company*, The Coutts Agency, https://couttsagency.com/digital-marketing-for-firearms-companies (last visited Mar. 18, 2024) ("Whether you're an established name in the firearms manufacturing sector or you're a new firearm company looking to find your niche on the national level, marketing is how you'll achieve your goals."); Joshua Claflin, *Maximizing ROI With Effective Firearms Marketing Tactics (The Complete Guide)*, Garrison Everest (Nov. 24, 2023), https://www.garrisoneverest.com/firearms-marketing/maximizing-roi-with-effective-firearms-marketing-tactics-complete-guide ("Marketing serves as the bridge between firearms businesses and their target audience. It's not just about promoting products; rather, it's about building firearm brand recognition, establishing trust, and nurturing long-term customer relationships.").

Nonetheless, the Department acknowledges commenters' worries that an advertisement for an isolated firearms sale might cause them to be presumed to have a predominant intent to profit through the repetitive purchase and resale of firearms. Therefore, to increase the likelihood that promoting or advertising a firearms business as covered by this presumption relates to persons who predominantly intend to earn pecuniary gain from the sale of firearms, the presumption has been revised to add the words "repetitively or continuously" before "advertises, markets, or otherwise promotes a firearms business." § 478.13(d)(2)(i). Thus, persons who do not repetitively or continuously advertise or otherwise promote a firearms business are excluded from the presumption that they predominantly intend to profit from repetitive sales of firearms. Of course, like the other presumptions, this one may be rebutted with reliable evidence to the contrary.

With regard to employees of licensees who promote a firearms business, such individuals do not need to be licensed because businesses "carry out operations through their employees," and no transfer or disposition of firearms occurs when they are temporarily assigned firearms for business purposes. ATF Ruling 2010-1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee*, at 2 (May 20, 2010), https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download. These employees operate under the license of the business, and the business sells firearms under the requirements of the GCA (e.g., background checks). However, a contractor who is not an employee would demonstrate a predominant intent to earn a profit from firearms sales by promoting another person's firearms business, or posting firearms for sale for someone else, particularly a company.

This does not mean that such persons are themselves engaged in the business, but they are promoting a firearms business with the predominant intent to earn a profit from the sale or distribution of those firearms, and thereby assisting another person engaging in the business of dealing in firearms without operating under their license.

The Department also disagrees with the alternative suggestion that any person who advertises firearms online on more than one discrete occasion should qualify for a rebuttable presumption that the person is "engaged in the business" of firearms dealing. The presumption relates to advertising a "business," and the Department recognizes that persons who wish to dispose of all or part of a personal collection, or "trade up" to enhance their personal collection, for example, are likely to occasionally offer for resale firearms from their personal collection online. To be engaged in the business, the Department believes those offers must be accompanied by additional evidence. That could include repetitive offers for resale within 30 days after the firearms were purchased, or within one year after purchase if the firearms are new or like-new in their original packaging or the same make and model, or a variant thereof. That is not to say that other fact patterns will not demonstrate engaging in the business; however, the Department has carefully considered these issues and narrowly tailored the presumptions in this rule based on its regulatory and enforcement experience, court decisions with similar fact patterns, and the investigations and prosecutions it has brought over the years.

17. PEP presumption—Purchases or Rents Physical Space

Comments Received

Commenters disagreed with this PEP presumption that purchasing, renting, or otherwise securing or setting aside permanent or temporary physical space to display firearms at gun shows or elsewhere is an indication of intent to profit. Commenters stated this presumption is contrary to the statutory protection for those who wish to sell all or part of a personal collection and contrary to Congress's intent in passing 18 U.S.C. 923(j), which permits licensees to temporarily conduct business at certain gun shows. Citing FOPA's legislative history, S. Rep. No. 98–583 (1984), one commenter stated that Congress's intent in passing section 923(j) was to put licensed dealers at parity with non-licensees, whom Congress assumed could already sell at gun shows. Further, another commenter stated that, "[t]he act of renting space at a gun show is obviously protected under the BSCA if the person is only making 'occasional sales, exchanges, or purchases' or if the person is using the space to sell 'all or part of his personal collection of firearms.'"

At least one commenter indicated that collectors or individuals often rent temporary physical space at gun shows to dispose of any excess guns such as World War II firearms, like Mausers, and to complete firearms transactions face-to-face. Likewise, at least one commenter stated that often private persons display firearms at a gun show, and they will have FFLs process the transactions. This does not demonstrate that these private persons are dealers with an intent to profit, they said. At least one commenter said that a space to store firearms is not an indicator of intent to profit or being engaged in the business; rather, that person might simply want to store their firearms safely.

One commenter stated that these criteria are so broad "that a seller of popcorn who rents a table at a gun show would presumptively be engaged in the business of

selling firearms under the proposed rule." Another commenter went so far as to state that this presumption "would turn literally every gun owner who has ever sold a gun into an unlicensed firearms dealer" because everyone who possesses firearms sets aside physical space to display or store them.

Department Response

The Department agrees with commenters that collectors may secure or set aside physical space in which to store firearms from their personal collections that they offer for resale, including at a gun show. For this reason, the presumption in the final rule deletes the words "or store," and replaces the phrase "otherwise secures or sets aside" with "otherwise exchanges (directly or indirectly) something of value to secure," to ensure that merely setting aside space to store or display firearms is not included in the presumption, and that only persons who secure space at a cost in order to profit from firearm sales are included. *See* § 478.13(d)(2)(ii). In this regard, the Department continues to believe that it is appropriate to presume that persons who repetitively or continuously secure permanent or temporary physical space at a cost to display firearms they offer for resale primarily intend to earn a profit from those sales. This is true even if the firearms are sold at a gun show, and nothing in the GCA purports to authorize non-licensees to rent space at a gun show to deal in firearms without a license. The GCA provision addressing guns shows, 18 U.S.C. 923(j), authorizes licensees to conduct operations temporarily at gun shows under certain limited conditions, not non-licensees. Again, this does not mean that a collector who occasionally sells a firearm from a personal collection at a gun show is required to be licensed. The presumption means only that the collector likely has a predominant intent to obtain pecuniary gain from the sale of

that firearm. To be considered a dealer, evidence would be required to show that the collector has devoted time, attention, and labor to dealing in firearms as a regular course of trade or business. And if a proceeding were to be brought against a collector, that person could refute the presumption with reliable evidence to the contrary.

To make this clear, the final rule has been revised to state that certain conduct, including liquidating a personal collection or occasionally reselling firearms to improve a personal collection, is conduct that does not support a presumption that a person is engaged in the business. *See* § 478.13(e)(2), (e)(4). Additionally, to increase the likelihood that this presumption targets persons who predominantly intend to earn pecuniary gain from the sale of firearms, the Department has revised the presumption to add the words "repetitively or continuously" before "purchases, rents, or otherwise exchanges (directly or indirectly) something of value to secure permanent or temporary physical space to display firearms they offer for resale." *See* § 478.13(d)(2)(ii). The word "continuously" was added to cover instances where a person buys a single location and occupies it for this purpose over an extended period. This presumption includes nontraditional commercial arrangements to secure display space (such as charging a higher membership or admission fee in exchange for "free" display space, or authorizing attendance at a gun show or sales event in exchange for something else). The phrase "directly or indirectly" was added to include indirect exchanges and clarify that nontraditional commercial arrangements are included. The presumption excludes persons who do not repetitively or continuously purchase, rent, or otherwise exchange something of value to secure physical space to display firearms they offer for resale. Of course, like

the other presumptions, this one may be rebutted with reliable evidence to the contrary. *See* § 478.13(f).

18. PEP Presumption—Records of Profits and Losses

Comments Received

Numerous commenters objected to including records to calculate profits or losses from firearms purchases and sales as a presumption that determines one has intent to earn a profit as a dealer in firearms because it is a common behavior for any firearms owner to keep such records. The commenters stated that the presumption is overbroad based on their belief that a person who keeps any sort of records of firearms, often for insurance purposes just like they would for a car or home, would be considered a dealer. They noted that keeping such records is important not only for insurance purposes but also to help with recovery of a stolen firearm. Some commenters also thought that this presumption could hurt collectors who have a Type 03 license because they are required to keep a collector's bound book where they record their purchases and sales. They noted that, under this presumption, ATF could presume they have the wrong type of license and they would be forced to get a dealer's license. Similarly, some commenters noted that the IRS requires investors or collectors to keep information on purchase history including acquisition date, improvement to the asset and cost of the asset to determine taxable gain upon sale. An additional commenter stated that businesses like a security company would keep track of their firearms inventory and track the cost of obtaining those firearms for tax and other reasons, but the law surely does not presume such a company is a firearms dealer. The commenters appeared to indicate that keeping such documentation for a transaction does not necessarily make the person a dealer. At least one commenter

stated this presumption discourages the very behavior (*i.e.*, personal recordkeeping) that ATF should want to encourage while other commenters noted that the Personal Firearms Record, P3312.8, that ATF encourages people to keep for purposes of protecting their property and to aid in recovery of stolen firearms, could now be used against them to make them a dealer. One of these commenters added that even a licensed collector of curios and relics "would risk liability under this presumption, because they are in fact *required* by ATF to maintain such documentation. However, the NPRM will presume that even *these* FFLs simply have the *wrong* FFL (collector, not dealer)."

Department Response

The Department disagrees that keeping records to calculate profits and losses does not indicate a predominant intent to earn a profit from the sale or disposition of firearms. The point of making or maintaining such a record is to document profits or other pecuniary gain from firearms transactions. However, to further clarify this point, and to address comments regarding businesses that purchase and use firearms for purposes other than resale, the final rule revises this PEP presumption to say that the person "[m]akes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale," not merely to document profits and losses from firearms purchased for other commercial (or noncommercial) purposes. § 478.13(d)(2)(iii).

The commenter is incorrect that the collector bound book, maintained by Type 03 licensed collectors of curios or relics pursuant to 27 CFR 478.125(f), is a record that documents profits and losses from firearms purchases and sales. The format for that record in section 478.125(f)(2) does not require any information concerning the purchase

or sales prices of the curio or relic firearms, or profits and losses from those sales. Another commenter is incorrect that ATF Form 3312.8, Personal Firearms Record (revised Aug. 2013), https://www.atf.gov/firearms/docs/guide/personal-firearms-record-atf-p-33128/download, is a record of profits and losses. It does not document profits and losses from the purchase and resale of firearms, nor does it document the sales price—it documents only the cost of the firearm(s) at the time the person acquired them and the person or entity to whom the firearms are transferred, if any. Contrary to commenters' assertions, individuals can certainly make and maintain records of their personal inventories of firearms for insurance purposes without documenting profits and losses from firearms transactions. The presumption requires the latter, which is rebuttable by reliable evidence to the contrary.

Finally, in response to the comment that tracking profits is necessary for tax purposes, the Internal Revenue Code taxes only income from capital gains on personal property, meaning a positive difference between the purchase price and the sales price.[231] Money or other benefits a person receives from sales of depreciated personal firearms would not be reported as income (or treated as a capital gain for tax purposes). Thus, the primary reason for a person to track, for tax purposes, funds a person receives from selling firearms would likely be to account for pecuniary gain they predominantly intend to make from the sales. To the extent that the pecuniary gain is recorded for tax purposes from appreciating collectible or hobby firearms, or to record capital losses on firearms sales, that evidence can be used to rebut the presumption that the pecuniary gain recorded

[231] *See Topic No. 409, Capital Gains and Losses*, IRS, https://www.irs.gov/taxtopics/tc409 (last updated Jan. 30, 2024).

was the person's predominant intent.[232] But it is inconsistent with the case law and ATF's regulatory and enforcement experience (and common sense) to say that maintaining these types of financial records is not indicative of profit-motivated business activity.

19. PEP Presumptions—Secures Merchant Services for Payments and Business Security Services

Comments Received

Commenters disagreed with, and stated they were confused by, the presumptions that a person is intending to predominantly earn a profit as a dealer in firearms if they use a digital wallet or use the services of a credit card merchant to accept payments, or if they hire business security services, such as a monitored security system or guards for security. At least one commenter argued that the presumption for using third-party services to "make[] or offer[] to make payments" seems to target buyers of firearms who make electronic payments rather than purported dealers who accept electronic payments when they sell the firearms. They noted that one case that the Department cited in footnote 97 of the NPRM, *United States v. Dettra*, 238 F.3d 424, 2000 WL 1872046, at *2 (6th Cir. 2000) (unpublished table decision), focuses on a defendant selling firearms, *i.e.*, accepting payments, rather than making payments. The commenter opined that the presumption is overbroad because it could make a dealer out of anyone who makes electronic payments for firearms using a business account. This would capture any business that purchases .22LR rifles for instructional purposes. The commenter said that even if the presumption is meant to target people who accept payments, the language is

[232] This evidence could include, for example, that the 28 percent collectibles capital gains tax was paid on income earned from those sales, as reported on IRS Form 8949.

still overbroad. The commenter offered a particular hypothetical in which, they said, it would seem that ATF would presume a dentist has intent to earn profit as a firearms dealer if the dentist sells a patient a firearm after a visit, tacks it onto the dental bill, and accepts credit card payment for that entire bill. Because the presumption could include a case such as the hypothetical dentist, they argued that it is clear the presumption is overbroad. They claimed every eBay seller must worry about becoming a dealer under this presumption. Another commenter stated that electronic transactions are commonplace even for occasional firearms transactions. The commenter stated that the Department should not focus on a specific method of payment but rather focus on other factors such as the frequency, volume, and commercial nature of sales as well as the person's intent to earn a profit.

Some commenters were of the opinion that having a security service to protect one's firearms is simply a means of responsible firearm ownership and that they are now being penalized for the use of a digital payment app for a single firearms transaction. At least one commenter disagreed with the characterization in footnote 98 of the NPRM where the Department stated, "for profit business are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property." The commenter stated that it is fairly common for individuals to have a personal security system in their home that can cost as little as $100 per year after initial installation, and that such a system is not necessarily an item reserved for business owners alone. Similarly, other commenters stated that the presumption for using security services needs to be clarified because it seems entirely too broad. They argued that a plain reading of the presumption is that intent to predominantly earn a profit exists when

the person selling a firearm has an alarm system at their business to protect any business assets. For example, they questioned whether a gas station with a centralized alarm service where the owner keeps a firearm that is the gas station's property is considered a dealer because the station has an intent to predominantly earn a profit for an entirely unrelated transaction (such as selling gas). The commenters also questioned whether a company that keeps its company firearms in a securely monitored warehouse would be considered a dealer if it one day sells its old firearms to a dealer so it can buy new ones for its employees. The commenters argued this could extend even to a sheriff's department with a security system when it trades in old duty guns. One commenter characterized the projected outcomes in these scenarios as nonsensical and overbroad, and questioned whether the security services presumption was instead meant to cover firearms transactions and business assets that include firearms rather than, as the commenter had read the NPRM, security services purchased to secure any business assets.

Department Response

The Department agrees with commenters that the presumption about securing merchant services, such as electronic payment systems, is meant to be directed at firearms sellers, not at individual firearms purchasers. For this reason, the phrase "makes or offers to make payments" has been deleted from the presumption, which now applies only to merchant services "through which the person intends to repetitively accept payments for firearms transactions." § 478.13(d)(2)(iv).

The Department disagrees that individual firearms sellers that use online services, such as eBay, purchase or secure "merchant services as a business." These sellers are not

securing merchant services as a business, and the online companies often distinguish between the services they provide to merchants and the services they provide to individuals seeking to sell personal items.[233]

Additionally, the manner in which merchants accept payments is a strong indicator of a predominant intent to earn a profit. Private citizens generally do not sign up for credit card processing services. Merchants are persons engaged in a profit-making business, and those services are designed to accept payments on behalf of profit-seeking sellers,[234] though individual firearms sellers may also have an intent to earn a profit when selling online. Again, this does not mean that a person is "engaged in the business" requiring a license when they occasionally sell a firearm from a personal collection with the intent to profit. That person must also devote time, attention, and labor to dealing in firearms as a regular course of trade or business. For this reason, the Department does not believe the merchant service PEP presumption is overbroad, especially as revised in this final rule in light of comments received. And, as with the others, the presumption may be refuted with reliable evidence to the contrary (e.g., by the hypothetical dentist).

Some commenters also misunderstood the security service presumption, which applies only to "business security services . . . to protect business assets or transactions," not to personal security services. The Department recognizes that some individuals have a central-station monitoring system, but the regulatory text is clear that it applies only to a

[233] *See, e.g.*, *eBay for Business*, eBay, https://www.ebay.com/sellercenter/ebay-for-business (last visited Mar. 26, 2024).
[234] *See, e.g.*, *Venmo for Business*, Venmo, https://venmo.com/business/profiles/ (last visited Mar. 26, 2024); *Sell in person with Shopify Point of Sale*, Shopify, https://www.shopify.com/pos/free-trial/sell-retail; *Your unique business. Our all-in-one solution*, PayPal, https://www.paypal.com/us/webapps/mpp/campaigns/business/contact (last visited Mar. 26, 2024); *I'm a Small Business Using Zelle*, Zelle, https://www.zellepay.com/faq/small-business-using-zelle (last visited Mar. 26, 2024).

central-station monitoring system registered to a business. In addition, what is being protected are business assets that include firearms or transactions that include firearms. Nonetheless, to reduce the concern that a business not engaged in the business of dealing in firearms would be considered to have the predominant intent to earn a profit by securing business security services, the Department has revised the presumption to replace the word "or" with "and" so the presumption applies only where business security services have been secured to protect both firearms "business assets" and firearms "transactions." *See* § 478.13(d)(2)(v). This clarifies the scope of the presumption in response to commenter concerns.

20. PEP Presumptions—Establishes a Business Entity, Trade Name, or Account, or Secures or Applies for a Business License

Comments Received

For these two presumptions under "predominantly earn a profit," commenters argued that they were too broad and that whether a person establishes a business entity or has a business license has nothing to do with intent to predominantly earn a profit. Some commenters asserted that a lot of people have an all-purpose business license that could be for any number of purposes. Some States require multi-use licenses, the commenters said, such as combined resale and use ones. In those cases, a company that simply uses firearms as part of their business operations, rather than dealing in firearms as their business, would have a business license and be presumed to be dealing in firearms. Having one, these commenters argued, does not necessarily mean that a person has intent to earn a profit as a dealer in firearms. One commenter believed that a business that sells gun accessories would be forced to register as a licensee. Another suggested that the

presumption would also treat other businesses that have firearms, like a security company, as dealers merely because they have a business license or are established as a business entity in an arena other than firearms sales.

Another commenter, who identified as a firearm owner, stated that a true FFL is a legal business but that a trade or transaction between two law-abiding citizens does not constitute a reason for one to obtain an FFL. One commenter noted that the case, *United States v. Gray*, 470 F. App'x 468, 469–70 (6th Cir. 2012), cited in the NPRM in support of the business entity presumption, involved facts much more indicative of unlicensed dealing than simple use of a business name. The commenter said the circumstances of that case stand in stark contrast to a situation where an owner of an antique store who decides to sell the family's World War I-era firearm at the store and could now be captured as a dealer under this presumption.

Department Response

The Department disagrees that the business entity and business license presumptions have nothing to do with an intent to predominantly earn a profit from its firearm sales or dispositions. Establishing a business entity or account "through which the person makes or offers to make firearms transactions" is often a preliminary step to engaging in the business of dealing in firearms with the predominant intent to earn a profit. A separate business entity can potentially provide liability protection, which is particularly advantageous when selling dangerous instruments, like firearms. A business entity or account can make it easier to sell firearms for a profit and may provide certain discounts or benefits when doing so. Likewise, a business license to sell firearms or merchandise that includes firearms is direct evidence of an intent to earn a profit from

repeated firearms transactions. Indeed, a firearms business cannot operate lawfully without it.[235] While the Department agrees that there may be businesses that primarily sell merchandise other than firearms, such as an antique store, such businesses are profit-seeking, and are likely to sell any firearms at least on a part-time basis with the predominant intent to earn a profit. As stated previously, even part-time firearms businesses are required to be licensed.[236] Again, intent to predominantly earn a profit is just one element of engaging in the business.

In response to commenters who said that some States may have general business licenses that are required to engage in any business, the presumption would apply only if the license allowed them to sell firearms as part of their business operation. Of course, if they do not resell firearms, then that business would not be presumed to have a predominant intent to profit from firearms purchases and resales. To the extent commenters asserted that there are licensed businesses that may technically be licensed to sell firearms, but primarily buy and use firearms, and do not devote time, attention, and labor to dealing in firearms as a regular course of business, they can offer reliable rebuttal evidence, as with any of the presumptions.

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[235] *See, e.g.*, State of Maryland, *Obtain Licenses or Permits*, https://businessexpress.maryland.gov/start/licenses-and-permits (last visited Apr. 2, 2024) ("State and local governments require many industries to have permits or licenses to operate. A business license is required for most businesses, including retailers and wholesalers. A trader's license is required for buying and re-selling goods."); State of Colorado, *Do I Need a Business License*, https://www.coloradosbdc.org/do-i-need-a-business-license/ (last visited Apr. 2, 2024) ("In Colorado, if you are selling tangible goods, you are required to collect State Sales Tax and will need a Sales Tax License."); State of Michigan, *Who Needs a Sales Tax License*, https://www.michigan.gov/taxes/business-taxes/sales-use-tax/resources/who-needs-a-sales-tax-license (last visited March 2, 2024) ("[R]etailers must be licensed to collect tax from their customers and remit the sales tax to the State of Michigan"); State of Ohio, *Licenses & Permits*, https://ohio.gov/jobs/resources/licenses-and-permits (last visited Apr. 2, 2024) ("Businesses are required to register with the Ohio Secretary of State to legally conduct business in the state—this is commonly called a business license.").

[236] *See* 27 CFR 478.11 (definition of "dealer" includes those engaged in the business on a part-time basis); *In the Matter of S.E.L.L. Antiques*, Application No. 9-87-035-01-PA-00725 (Phoenix Field Division, July 14, 2006) (denied applicant for license that repetitively sold modern firearms from unlicensed storefront).

21. PEP Presumption—Purchases a Business Insurance Policy

Comments Received

A few commenters, including an FFL, stated that one cannot presume that a person or company has intent to earn a profit and is engaged in the business of dealing in firearms merely because they have a business insurance policy that covers firearms. They noted that many non-firearms businesses, whether it be a hunting outfitter or an armored security company, have one or more firearms owned by the entity or business. If the business has insurance for its property, which would cover the firearms owned and used by the business, it is not clear why this should result in a presumption that a completely unrelated transaction is an indication of intent to predominantly to earn a profit. The commenters said that these are not the types of entities meant to be FFLs.

Department Response

The Department notes that most firearms businesses purchase business insurance policies that cover their firearms inventory in the event of theft or loss, which, unfortunately, is not uncommon. The Department also agrees with commenters that a business insurance policy may also be purchased by a variety of companies that purchase and use firearms and are not necessarily primarily intending to profit from selling or disposing of their business inventory. For example, a firearms business inventory maintained by a security company whose guards use the firearms daily, or a hunting outfitter that rents firearms on its business premises, likely have firearms that have lost their value over time due to constant use and handling. The company may decide to sell these firearms simply to upgrade from old to new firearms without intending to earn a profit. In addition to these considerations, as discussed in detail earlier in this preamble

(*see* Section IV.C.5.a (Department Response) of this preamble, *supra*), ATF examined records of cases and investigations it initiated between 2018 and 2023 for examples of fact patterns that align with the rebuttable presumptions in the proposed rule. The agency did not find examples other than the criminal case cited in the NPRM involving business insurance. 88 FR 62006 n.101. For these reasons, the Department has revised the final rule to remove this presumption. *See* § 478.13(d)(2).

22. Concerns with Disposition of Business Inventory after Termination of License

Comments Received

Commenters stated that while they thought it was notable that the Department addressed the disposition of an FFL's business inventory upon license revocation or termination, they did not think that ATF struck the "right balance" between law enforcement concerns and business owners so that a licensee can avoid financial ruin after having its license terminated. One commenter said the Department created a "Catch-22" situation regarding transfers because, in the commenter's opinion, "1. Former inventory not transferred to a personal collection **may never be transferred**; 2. Former inventory that was unlawfully transferred **may never be transferred**; and 3. Former inventory that was transferred **cannot be transferred for one year**." Other commenters stated that the additional requirements that establish how to dispose of remaining inventory are unwarranted burdens that make it more challenging to wind down operations in an efficient manner. They stated that the process should be more streamlined to ensure fairness and flexibility. At least one commenter criticized the 30-day period in which a licensee is expected to liquidate their inventory, stating that it would take a minimum of 90 or 120 days. Similarly, another commenter stated it was

completely unreasonable that an FFL who has voluntarily surrendered their license or has had it revoked would have to wait a year before they could start selling their inventory privately.

One commenter said the proposed rule was arbitrary and had conflicting standards within the proposed text regarding disposition of inventory. In this commenter's opinion, "a person or company no longer having an FFL (and persons acting on their behalf) may transfer their remaining firearms inventory to another third-party current FFL for liquidation under section 478.78, but may not do so under section 478.11. The result is an arbitrary and confusing conflict . . . ." At least one commenter thought the rule would make it impossible for an FFL who has had their license revoked to keep their inventory while at least one other commenter thought the impact of the rule would mean they could never sell their inventory if a former licensee then needed a license to liquidate the inventory. Another commenter believed this portion of the rule should have more detail and be clearer because without it there is an increased chance of non-compliance and confusion among FFLs. At least one commenter objected to the 30-day time frame the rule would add to §§ 478.57 and 478.78, stating that no such timeline is required by the GCA.

One commenter noted that, if a former FFL transferring their business inventory to another FFL is not considered "engaged in the business," then there would be no reason for ATF to limit the time period for when such transactions can take place. In other words, they indicated that for such a transaction, the former FFL still seems to be "engaged in the business"; otherwise, there would not be a time limit on when they could act. If that is the case, the commenter stated, the rule does not make clear the effect of a

former licensee transferring their firearms to another licensee and questioned whether an FFL could face revocation for facilitating others "engaging in the business" without a license.

Finally, another commenter stated that the rule fails to adequately address the potential for exploitation of inventory liquidation by former licensees. "While it is important to outline lawful ways for former licensees to dispose of their inventory upon license revocation or termination, the rule does not establish sufficient safeguards to prevent the diversion of firearms into the illegal market," they wrote. The commenter added that this oversight leaves room for abuse.

Department Response

A license may be terminated for a number of reasons, whether it is a voluntary surrender of license or an involuntary termination due to license revocation or denial upon renewal. The regulations in the past have not clearly addressed lawful methods for disposing of business inventory before or after license termination. In the case of a licensee who does not dispose of its business inventory prior to license termination, both the former licensee and law enforcement are placed in a difficult situation. Because this inventory consists of firearms repetitively purchased for resale with predominant intent to profit, it was clearly purchased as part of a regular course of business or trade. If the former licensee now sells the firearms after termination of the license to dispose of inventory, the former licensee could be engaging in the business of dealing in firearms without a license and violating the law. Particularly in the case of former licensees whose licenses were revoked or denied due to willful violations, such persons would unjustly profit from their illegal actions. Further, allowing such sales would mean that a

significant number of firearms would be sold without background checks or the ability to trace them if later used in crimes. This is an outcome the BSCA was intended to reduce by amending the definition of "engaged in the business" to increase licensure of persons engaged in the business with a predominant intent to earn a profit. *See* Section II.D of this preamble.

The Department disagrees that licensees face financial ruin if their license is terminated and they cannot sell their inventory. As an initial matter, licensees who voluntarily terminate their firearms license have the option of waiting to surrender their license until after they have liquidated their inventory. The final rule allows former licensees that did not have the opportunity to properly dispose of their business inventory before license termination to do so after termination by either selling their remaining "former licensee inventory" to an active licensee within 30 days after license termination, or transferring the former licensee inventory to a responsible person who may lawfully possess those firearms. *See* §§ 478.11 (definition of "former licensee inventory"); 478.57(b), 478.78(b). The new term "former licensee inventory" is necessary to clarify that business inventory transferred to a responsible person after license termination is not a "personal collection" within the meaning of 18 U.S.C. 921(a)(21)(C), and accordingly, former licensees or responsible persons who devote time, attention, and labor to selling "former licensee inventory" as a regular course of trade or business to predominantly earn a profit will be presumed to be engaged in the business of dealing in firearms. *See* 18 U.S.C. 922(a)(1)(A), 923(a). If a former licensee needs more time in which to sell their business inventory to an active licensee, the Director may authorize an additional period of time for good cause.

The Department acknowledges that some commenters were confused about the relationship between the presumption based on liquidation of business inventory in the definition of "engaged in the business," now in § 478.13(c)(4) of the final rule, and provisions about the discontinuance of business and operations by licensees after notice in §§ 478.57 and 478.78. Those proposed provisions were meant to be read together. Like the two discontinuance provisions at §§ 478.57 and 478.78, the two liquidation-of-business inventory presumptions distinguish between pre-termination and post-termination disposal of business inventory.

If the former licensee disposes of the business inventory properly before license termination, they will have several options for disposing of the firearms, one of which is to transfer firearms from the business inventory to their personal collection or otherwise as a personal firearm so long as they meet two conditions, *i.e.*, that they retain the firearms for at least one year from the date or transfer and they do not transfer the firearms to willfully evade the restrictions placed on licensees. *See* 18 U.S.C. 923(c). The corresponding presumption related to firearms transferred before license termination aligns with these requirements. *See* § 478.13(c)(5). If the former licensee (or responsible person acting on behalf of the former licensee) sells a firearm: (a) after license termination that was transferred to the former licensee's personal collection or otherwise as a personal firearm, but (b) before one year has passed from the date of that transfer, or (c) the sale is other than as an occasional sale to a licensee, that sale would fall under § 478.13(c)(5) and the person would be presumed to be dealing without a license. However, once the year has passed from the transfer date, they may occasionally sell firearms properly transferred to their personal collection or otherwise as personal

firearms to anyone without falling under this presumption, unless the transfer was made to willfully evade the restrictions placed on licensees.

If the former licensee did not dispose of business inventory before license termination, it becomes "former licensee inventory" (see new definition under § 478.11, below), and the former licensee has two options to dispose of it within 30 days after license termination: liquidate to a licensee, or transfer to a responsible person of the former licensee. Under revised §§ 478.57(c) and 478.78(c), the date, name, and address of this responsible person (which can include a sole proprietor or an individual who is acting on behalf of a business entity) must be recorded as the transferee of such firearms in the licensee's disposition record prior to delivery of the records by the end of the 30 days, in accordance with 18 U.S.C. 923(g)(4) and 27 CFR 478.127.[237] If the recipient responsible person thereafter sells the transferred former licensee inventory, other than as an occasional sale to a licensee, they will fall under § 478.13(c)(4) and be presumed to be dealing without a license.

To make this relationship between the post-termination discontinuance provision and the related presumption more clear, the presumption, which is located in the final rule at § 478.13(c)(4), has been revised to state that it does not apply when the business inventory is being liquidated to a licensee either within 30 days of termination of license, or occasionally thereafter, in accordance with §§ 478.57 or 478.78, as the case may be.

[237] This is consistent with the requirement for licensees to record the personal information of an individual authorized to receive firearms on behalf of a business entity. *See* ATF Form 4473, at 4 (Aug. 2023), https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download ("When the transferee/buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the business must complete Section B of the form with his/her personal information, sign Section B, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity; and (B) the name and address of that business entity.").

The presumption now further states that it does not matter whether such firearms were transferred to a responsible person after the license was terminated under 27 CFR 478.57(b)(2) or 478.78(b)(2); the presumption would apply if those transferred firearms are subsequently resold outside the 30-day window other than as an occasional sale to a licensee. The Department has changed the term "personal inventory" to "former licensee inventory" to make it easier to distinguish between the former licensee's personal collection firearms and other personal firearms, which a former licensee may treat the same way as other non-licensees, and the business inventory transferred to themselves that must be treated differently from personal collection firearms and other personal firearms. *See* §§ 478.57(b)(2), 478.78(b)(2).

The Department disagrees that the limited 30-day period for liquidation to an active licensee is inconsistent with the GCA. While the Department recognizes that such sales may be conducted to predominantly earn a profit, the recipient licensee will be recording them in its business inventory and running NICS background checks when those firearms are further distributed into commerce. The final rule also makes clear that any such transfers of remaining inventory within the 30-day period must appropriately be recorded as dispositions in the licensee's records prior to delivering the records after discontinuing business consistent with 27 CFR 478.127. *See* §§ 478.57(c), 478.78(c). This will ensure that any liquidated/transferred firearms may be traced if they are later used in a crime. The rule is therefore necessary to prevent former licensees from selling off numerous business inventory firearms at retail without abiding by these important requirements of the GCA. It also provides a reasonable "winding down" period that is fully consistent with the relinquishment of licensee records requirement under the GCA.

See 18 U.S.C. 923(g)(4) ("Where a firearms or ammunition business is discontinued and succeeded by a new licensee, the records required to be kept by this chapter shall appropriately reflect such facts and shall be delivered to the successor. Where discontinuance of the business is absolute, [the licensee's] records shall be delivered within thirty days after the business discontinuance to the Attorney General.").[238] Licensees who are terminating their license should begin the winding-down process well before the license is terminated. Otherwise, they run the risk of having unsold inventory they cannot easily sell without either engaging in the unlicensed business of dealing in firearms after they terminate their license, or being able to sell only on occasion to a licensee. Selling before license termination also ensures that background checks are run on purchasers, and dispositions are appropriately recorded.

The Department disagrees with the comment that the rule fails to address the potential for exploitation of inventory liquidation by former licensees. The rule addresses the potential for diversion in several ways. Consistent with 18 U.S.C. 923(c), it limits the ability of former licensees to liquidate business inventory firearms by establishing two rebuttable presumptions that a person is engaged in the business when those firearms are sold—§ 478.13(c)(4) and (5). With regard to firearms transferred by a licensee to a personal collection prior to license termination, the presumption still applies even if one year has passed from the transfer if the transfer or any other acquisition was made for the purposes of willfully evading the restrictions placed upon licensees. 18 U.S.C. 923(c). Moreover, as provided by amended §§ 478.57 and 478.78, after license termination,

[238] This provision is also consistent with the 30-day winding down period for licensees who incur firearms disabilities under the GCA during the term of their current license. *See* 27 CFR 478.144(i)(1).

former licensees have limited sales options that would avoid the presumption in § 478.13(c)(4), such as sales to an active licensee where the risk of diversion is limited.

23. Concerns with the Procedure to Transfer of Firearms between FFLs

Comments Received

Some commenters remarked on the requirement that FFLs follow verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of part 478 instead of using ATF Form 4473 for transfers between licensees. At least one commenter thought this provision should be made clearer to avoid interruptions in the transfer of firearms, while another thought the proposed changes were unnecessarily complex and increased the risk for administrative errors. This commenter stated that "[l]icensees should be allowed to use the existing streamlined form, which is already widely used and understood by both licensees and the ATF." At least one commenter stated that a phrase in the proposed amendment to § 478.124—"for the sole purpose of repair or customizing"—should be deleted because it is not part of 18 U.S.C. 922(a)(2)(A). That statutory provision only provides, in relevant part, that "this paragraph [prohibiting transfer in interstate commerce to a non-licensee] and subsection (b)(3) shall not be held to preclude [an FFL] from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received."

Department Response

The Department disagrees that the changes proposed to be made to 27 CFR 478.124(a) are unnecessarily complex and increase the chance for administrative errors. To the contrary, licensees know that ATF Form 4473 documents the transfer of a firearm from a licensee to an unlicensed person. It is not intended to be used by a licensee to

purchase personal firearms. If a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record asserting it is a "personal firearm," then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime. The well-established procedure for licensees to purchase firearms is through the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of 27 CFR part 478.

Regarding the comment that the phrase "for the sole purpose of repair or customizing" should be stricken from § 478.124(a), that provision allowing a limited exception to the requirement to complete an ATF Form 4473 has long been found in the regulations and this rule does not change that proviso in any manner. Allowing licensees to sell or otherwise dispose of firearms without completion of this form or recording NICS checks on the form would undermine the purposes of the GCA and BSCA. Crime gun traces would not be able to be completed, and there would be no way to verify that the identity of firearms purchasers had been checked, or that background checks had been properly run. The Department therefore disagrees with the comment seeking to remove this phrase.

D. Concerns with the Economic Analysis

1. Need for Rule

Comments Received

One commenter stated that the Department's need for this rulemaking was contrived without the Department providing any facts or persuasive arguments. The commenter specifically challenged the statement in the preamble that "ATF has observed a significant level of noncompliance with the GCA's licensing requirements even prior to

the BSCA," and asked for the number of incidents of noncompliance and by what standard that level of noncompliance was determined to be "significant" enough to justify rulemaking. The commenter also stated that a rulemaking should not be justified by a presidential executive order, "which is not now nor has it ever been a reason for rulemaking sufficient for APA purposes." The same commenter also stated that the agency has not identified any market failure demonstrating that, in the absence of the rule, the free market will fail to reach the optimal number of gun sales outside of current FFL dealers.

Department Response

The Department disagrees that the need for this regulation was "contrived without any facts or persuasive arguments." The Department has explained the public safety need for this rule and has extensively laid out and discussed the facts and arguments supporting that need in both the NPRM and in this final rule. For reference, those discussions are included in the Background discussion in Section II.D of this preamble, in the Benefits section of the Executive Order 12866 economic analysis in Section VI.A.7 of this preamble, throughout Section III of this preamble (which includes the Department's discussion of proposed revisions from the NPRM), elsewhere in the Department's responses to comments under Section IV of this preamble, and in other portions of this preamble. This rulemaking implements certain statutory changes enacted by Congress in the BSCA, which Congress passed in the interest of public safety after at least one mass shooting in which the perpetrator purchased a firearm from an unlicensed dealer. In addition, this final rule implements the Department's response to Executive

Order 14092, which was also issued to implement and enforce the BSCA's statutory changes and public safety goals.

The public safety justifications referenced above include the accounts and analysis of ATF agents and investigators with years of experience enforcing the relevant provisions of the GCA, who reported significant levels of firearms dealing that was not in compliance with pre-BSCA statutory licensing requirements. More specific data or statistics regarding such noncompliance, as requested by the commenter, are not readily available and not needed in light of the Department's experience and the other public safety justifications underlying this rule.

Finally, the Department is not required to identify any market failure demonstrating that, "in the absence of the rule, the free market will fail to reach the optimal number of gun sales outside of current FFL dealers." For example, OMB Circular A-4 (2003) specifically recognizes that "[c]orrecting market failure" is "not the only reason" for regulation, and allows regulations based on other social purposes.[239] In addition, Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993), permits agencies to promulgate rules that are necessary to interpret the law or are necessary due to compelling need, which includes when private markets are not protecting or improving public health and safety. This rule is necessary on both grounds.

[239] Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-4, at 5 (2003) ("OMB Circular A-4"), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf. Because the NPRM was published in September 2023, prior to the November publication of the 2023 version of OMB Circular A-4, the Department based its Executive Order 12866 economic analysis in the NPRM on the 2003 guidance. Although the November 2023 version of OMB Circular A-4 supersedes the version from 2003, OMB allowed agencies to continue following the 2003 version in final rules published prior to January 1, 2025, if their NPRM relied on the 2003 version and was published prior to February 29, 2024. *See* Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-4, at 93 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf. Accordingly, the Department is continuing to follow the 2003 version of OMB Circular A-4 in this final rule.

As explained throughout this preamble, there is a public safety need for this rulemaking. This position on public safety is supported by the facts and arguments laid out by the Department and affirmed by the hundreds of thousands of public comments ATF received in support of this rulemaking that specifically explained that the rule is needed for public safety (in many cases emphasizing that the rule is the minimum action needed to address public safety). *See* Sections IV.A.1–2, 4–7 of this preamble.

2. Population Accuracy

Comments Received

Various commenters objected to the Department's calculation of the population impacted by this rulemaking. Some of these commenters argued that the Department's high population estimate (328,296, which was derived from the Russell Sage Foundation ("RSF") survey) should be used as the primary cost estimate, including one commenter who opined that the RSF-derived estimate was more accurate because, they stated, the Department's subject matter expert ("SME")-derived estimate uses a single, private party firearm sales website as the primary source of unlicensed firearms seller numbers. This same commenter added that the RSF survey considered multiple mediums of firearm sales.

In addition, various commenters opined that the Department's population estimates were not accurate or requested more "accurate" numbers. A couple of commenters provided critiques of the methodology used to generate population estimates. These commenters opined that the Department should use standards accepted by scientific, peer-reviewed journals as the basis for estimating the relevant population. Furthermore, they opined that the Department's population estimates should have used

statistical calculations such as "[c]onfidence intervals, [p]-[v]alues, and K-values." Primarily, these commenters objected to the Department's SME estimate that Armslist may constitute 50 percent of the market share for online non-FFL sales, contending that this estimate is not supported by data and that using an SME-derived estimate is biased and unsupported. One commenter stated that Gunbroker.com is the largest online marketplace where people perform private firearms transactions and suggested that the impacted population would be higher if the Department included individuals conducting private sales on that website. Another commenter went further, stating that "the number put forth by ATF, an estimation of 24,540 to 328,926 unlicensed persons who could be considered 'engaged in the business' of dealing firearms, is at worst a shot in the dark, and at best, an educated guess." This commenter noted that there are "numerous other venues in which firearms are sold, including GunBroker.com, as well as social media platforms such as Facebook, where clever sellers can get around the Facebook Marketplace rules against selling firearms."

Finally, one commenter opined that this rule will affect all persons who own firearms in the United States and even some portions of the population that have never owned a firearm. None of these commenters provided data recommendations or alternate sources of relevant data except as noted above.

Department Response

The Department does not agree that the SME/online sample and the SME-derived primary estimate it put forth in the NPRM are less viable than the RSF survey-derived estimate it also included for comparison. Each estimate is necessarily imperfect due to the paucity of data on how many unlicensed persons currently sell firearms and how

many such persons would need to be licensed under this rule. The estimates from each source the Department used have different limitations, which is why the Department included them both as potential alternatives. The SME-derived estimate is based on historical data and experience with unlicensed sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. The Department thus considers its SME-derived estimate to be a more reliable data source for this purpose than the RSF survey. The RSF survey was not limited to capturing sales by unlicensed persons, which is the population potentially impacted by this rule. Rather, the authors sought to establish the total number of citizens who sold their firearms over a given period, not the current number of unlicensed sellers who are engaged in the business of firearms dealing or who are making sales on publicly accessible marketplaces and platforms. As a result, the population set derived from the RSF results is significantly higher and includes people who would not be covered by the rule. The Department thus considers the SME-derived estimate to be more realistic.

It is because the RSF survey used a larger sample that the Department provided the RSF population estimates in the NPRM analysis as an alternative unlicensed seller population set (and continues to do so in this final rule). However, in order to be able to meaningfully compare results from the two starting sets of unlicensed seller population estimates (SME-derived and RSF-derived), the Department applied the same treatment regarding the rule's potential impact to both numbers. This included applying the same SME estimates to both starting populations to determine, for each group, the proportion of unlicensed sellers affected by various provisions of the rule. For example, the Department applied the same SME estimate of the proportion of unlicensed sellers

estimated to be engaged in the business without a license under the rulemaking (approximately 25 percent) to each starting population, as well as the same estimate of the proportion of those sellers who are likely to be either unwilling or unable to become licensed as an FFL as a result of the rule (10 percent). Because there is no other source of data on the size of these groups of currently unlicensed dealers likely to be impacted by this rule, the Department used the best estimates from SMEs as the percentages for each, and then applied those estimates to both starting population sets for consistent treatment and comparable outcomes. In the NPRM, the Department explained these estimates, solicited public comment on them, requested alternative data sources and models, and welcomed more accurate data on the number of unlicensed persons selling firearms. However, the Department did not receive any specific information—including any alternative data sources or models—or more accurate numbers in response.

At this time, the Department does not consider any peer-reviewed statistical sample to be possible, much less perfectly accurate. Typically, peer-reviewed journal articles use research data they gather themselves or a database, such as for the U.S. Census, from which to extrapolate a number, such as a covered population. The Department noted, and continues to note, that it is currently not possible for the Department to base population estimates in this rule on a peer-reviewed statistical sample because there is no database that could be used to extrapolate a population as specific as unlicensed individuals who may be selling firearms, let alone one that includes data on factors from which to determine the population of such individuals who may be engaged in the business as a dealer under the definitions included in this rule. The very limited options for source data make it impossible to arrive at a more precise number than is

currently reflected in this rule. The Department reiterates, however, that this rule will not impact all individuals who own a firearm, nor will it require everyone who sells a firearm to become a licensed dealer.

While the journal and news articles cited by the commenters may estimate the population of individuals who own a firearm, these numbers are still estimates and are not any more accurate than the Department's estimates (as requested or suggested by these commenters), nor do they pertain more specifically to the situation covered by this rule. Based on the little information available, the Department used a related literature review, and combined professional expertise and an online site sample to provide two estimates on population. OMB Circular A-4 encourages agencies to use the "best reasonably obtainable scientific, technical, and economic information available," including peer-reviewed literature "where available."[240] The Department did so using the two estimates described above: one (the RSF survey) gleaned from a peer-reviewed journal article about survey results that correlated with the data set relevant to this rule more than any other article the Department was able to find; and another gleaned from SME knowledge and experience, and sampling from a website (Armslist) that identifies which sellers are licensed and is recognized as being a popular online site used by the potentially affected population to sell firearms.

As for the comments suggesting that ATF incorporate another online site, GunBroker, into the analysis, the Department concurs that a subset of non-FFL sellers on GunBroker may also be considered "engaged in the business" despite already transferring firearms advertised online through an FFL intermediary. However, the Department

[240] OMB Circular A-4, at 17, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

already accounted for the existence of online platforms other than the one it sampled (Armslist) by assigning a 50 percent share of the market to all other platforms, including GunBroker. Nonetheless, in response to the comments, ATF requested further SME estimates of the relative proportions of Armslist and GunBroker sales as part of the total, as well as social media. Website traffic data for GunBroker and Armslist and additional and more specialized SME opinions were incorporated into the model and informed the Department's assumptions. As a result, the Department has revised its estimate of the portion of unlicensed population making sales through Armslist from the initial 50 percent of the online marketplace to 30 percent, adjusting the estimate of total unlicensed sellers that use non-traditional mediums accordingly. These changes are reflected in Section VI.A.2 of this preamble.

3. Sample Size and Confidence Interval

Comments Received

One commenter stated that the Department did not specify the methodology used to determine and collect the sample size included in the NPRM. In particular, they stated the Department did not specify whether the sampling obtained on Armslist was collected "randomly, stratified random, [or] non-random." Furthermore, this commenter stated that the Department did not include the results of the sampling for public inspection and that the commenter was thus unable to verify the Department's claim that the sample size has a 95 percent confidence interval. Another commenter recognized that the Department used a sample size generator to estimate a sample size but stated that the confidence interval cannot be calculated without knowing the standard deviation of a sample. One commenter questioned how the Department derived its estimate of individuals "engaged

in the business" from the sample collected from Armslist when Armslist does not indicate whether sellers meet the statutory definition of being "engaged in the business." This commenter stated that not providing the methodology through which the Department made this calculation was a violation of the APA and the Small Business Regulatory Enforcement Fairness Act ("SBREFA").

Department Response

The Department decided to take a random sample from among the firearms listings on Armslist to use in its survey. A sample-size calculator was then used to determine the statistically valid sample size from those listings, as explained in more detail in both the NPRM and this final rule under the methodology section (Section VI.A.2) of this preamble. A standard deviation was not separately calculated because the Department assumed a normal distribution, which is in accordance with usual practice when there is no reason to anticipate that the data may skew in one direction or another and the sample is used to calculate a population rather than a regression or other statistically driven analysis. Therefore, in accordance with standard practice, to estimate the sample size, the Department assumed the largest standard deviation (0.5 or 50 percent) to obtain the most conservative (largest) sample size. While the sample is one unit of measurement at a single point in time over a several-day period, the Department verified its viability by taking another sample after the comment period closed, to determine that the overall population remained stable over time.

The Department acknowledges that there are inherent limitations to the lower estimate. However, the Department's prior experience helped inform its estimate as well. As explained in the NPRM's Benefits section, the Department previously provided

guidance in 2016 to sellers, clarifying the circumstances in which they would need to obtain a license as a dealer under the previous statutory definition, which focused on similar factors to those included in this rule. Thereafter, the Department encountered an increase of only 567 new FFL applications. This and similar historical data support the SME estimates arising from the combined information and Armslist sampling. Furthermore, regardless of the sales or transaction volume of firearms, the number of FFLs has been relatively stable over time.

The Department derived its estimate of unlicensed individuals by extrapolating from Armslist listings. Armslist uses the categories of "private party" "and "premium vendors." When the Department reviewed the entries, it found that the premium vendors were all listed as FFLs. Therefore, the sample did not include entries categorized as premium vendors. Although the "private party" sales did not indicate whether they were FFLs or unlicensed sellers, other information included in the listings indicated that "private party" sellers were likely to be home-based individuals rather than FFLs with funds to advertise on the website. Nonetheless, the Department could not be certain, so the sample from Armslist (and thus the estimated population of unlicensed sellers) might be larger than the actual number of unlicensed sellers. Because the population estimate was being used to estimate impact and potential cost for purposes of this rulemaking, the Department erred on the side of overinclusiveness (thus generating a potentially larger overall population of unlicensed sellers, higher cost estimates, and potentially more impacted persons) rather than underinclusiveness (by instead trying to remove some of the private party sellers that could potentially be FFLs).

Generally, the Department incorporated a model where the relative size of the total online marketplace was derived from the estimated size and characteristics of Armslist. From there, the Department made estimates regarding the total unlicensed market both online and offline, before filtering for intention and incentives. Again, as there is no definitive source of accurate data from which to generate these numbers and resulting estimates, the Department was forced to use available data, public comments, and internal surveys of SMEs who have specialized, often decade-long experience with the industry to meet its standard of best available information.

4. Russell Sage Foundation Model Calculation

Comments Received

One commenter argued that the population derived from the Russell Sage Foundation ("RSF") survey data (the NPRM's high estimate) was overcalculated, including transactions that the commenter did not believe required a license, such as "family, friends, gifts, inheritance, trades, and other." This commenter further suggested that the portion of the total unlicensed seller population considered to be engaged in the business in both the RSF and SME-derived models should be less than 10 percent, not the 25 percent estimated by the SMEs. Furthermore, they stated the Department incorrectly used the overall percentage of RSF survey dispositions over the course of five years rather than "annualizing" that survey result over the course of five years.

One commenter could not recalculate how the Department used the RSF survey to calculate percentages. Another commenter estimated that the affected population of individuals is 478,000 and that the methodology used by the Department over-estimated the population by a minimum of 45 percent. Overall, this commenter estimated that this

rule will have a marginal increase of 150,000 new FFLs. The commenter, however, did not point to or provide a data source for their numbers. One commenter challenged the RSF data, claiming the model is based on a "small sample size of just 2,072 gun-owning respondents, providing questionable representativeness." Moreover, by analyzing "outdated 2015 survey data," the commenter suggested that the study fails to account for increases in the rates of American gun ownership in recent years, and that the Department therefore undercounted the number of sellers this rule would affect. The commenter cited a 2020 Gallup study[241] that estimated that what the commenter described as a "whopping 32 percent" of adults own firearms, not 22 percent as estimated in the 2015 RSF survey data.

Department Response

The Department partially agrees with the commenter's suggestion that firearms transfers listed in the RSF survey that involve "family, friends, gifts, inheritance, trades, and other" should not be included in the Department's estimate. The RSF survey did not include sufficient information about private transactions between friends and families, as gifts, inheritances, or other similar transfers, from which the Department could assess whether any of those transferors might have been engaged in the business as a dealer. However, the rule specifically excludes these categories of transactions—e.g., transactions between family, as gifts, or due to inheriting firearms—when they are not made repetitively with predominant intent to profit. In the Department's experience, most such transactions have not involved a dealer engaged in the business of dealing in

[241] *What Percentage of Americans Own Guns?,* Gallup: The Short Answer (Nov. 13, 2020) (summarizing Gallup's crime poll for September 30 to October 15, 2020), https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx.

firearms as defined in this rule. Therefore, the Department did not include RSF survey results involving private transactions between friends and families in the NPRM. However, transactions such as trading or bartering, or sales conducted through FFLs, such as wholesale and retail dealers, are more likely to include transactions involving qualifying "engaged in the business" dealers, so the Department included them to calculate the RSF survey-generated population estimate it used in the NPRM. The Department explained this in the NPRM and does so again in this final rule under Section VI.A of this preamble.

Although a commenter suggested that ATF's SME-derived estimate that 25 percent of the population of unlicensed sellers would be engaged in the business under this rule was too high, they did not provide a basis for their recommended estimate of 10 percent. The commenter suggested that ATF's estimate of the unlicensed seller population was too high, but even if that were true, it would not affect what percentage of such unlicensed sellers would be determined to be engaged in the business under this rule. In addition, the commenter suggested that the estimate of those engaged in the business under this rule should not include unlicensed sellers who solicit background checks from FFLs, but the Department disagrees with this, as discussed in detail in Section IV.D.10 of this preamble. As a result, the Department continues to use the SME-derived estimate of 25 percent for the population of currently unlicensed sellers who would be deemed engaged in the business under this rule.

The Department concurs with the commenter's understanding that, in the RSF survey, the sales rate of personal firearms was 5 percent over the course of five years rather than 5 percent over one year as initially interpreted by the Department.

Accordingly, the Department recalculated its estimate, using a personal sales rate of 5 percent over the course of five years, or 1 percent annually.

The RSF survey contained many percentages and descriptions of different types of firearms transactions. As explained in response to comments under Section IV.D.1–2 of this preamble, the RSF survey and resulting journal article were not designed to capture or address information specifically relevant to this rule. As a result, the data the Department could glean from the RSF survey, while useful in some respects, were not directly on point for purposes of making estimates related to the area affected by this rule. In addition, the RSF survey results are compiled in a way that does not provide accurate data on, or align with, issues related to whether a seller or transaction might be among the total potentially affected population base or might be among the portion that could qualify as engaged in the business under this rule. This is not a flaw in RSF's data but is a result of different focuses between RSF's article and this rule.

Because this rule is focused on dispositions (or "sales") of firearms, the Department used only survey results and percentages outlined in the Dispositions portion of the RSF survey journal article on page 51 and made its best effort to include categories that were potentially likely to contain relevant kinds of transactions, while excluding categories that were less likely to contain such transactions. The Department therefore continues to use those NPRM percentages as derived from the RSF survey to determine the high population estimate in this final rule.

The Department acknowledges that the estimated populations are estimates using the best available information and are not perfect. However, the Department disagrees that there will now be 478,000 individuals who must be licensed. The commenter who

made that assertion did not provide a source or data to support this estimate. As explained above, there is no definitive source of accurate data from which to generate these numbers and resulting estimates. As a result, the Department used available data combined with public comments and internal surveys of SMEs with specialized, often decades-long experience with the industry, to meet its standard of best available information. Nonetheless, as discussed elsewhere in this preamble and based on comments pointing out calculation errors from using the RSF survey, the Department has reduced the overall high estimated population of the estimated affected individuals. For more information, please see the discussion under Section VI.A.2 (Population) of this preamble.

Finally, the Department concurs that the percentage of individuals owning a firearm in the United States may have changed since 2015 and, as a result, now uses the 32 percent estimate from the more recent Gallup study the commenter cited. Nonetheless, the Department disagrees that the sample size of gun owners in the RSF survey is, as the commenter suggested, "too small," with "just 2,072 gun-owning respondents." The RSF study surveyed 3,949 persons; of that number, 2,072 respondents stated they owned firearms. The RSF sample size of 3,949 is larger than the sample size in the Gallup study of 1,049 survey respondents cited by the commenter. However, while both samples are statistically viable sample sizes, the Department has elected to use the commenter's suggestion of the more recent Gallup study.

5. Inability to Comply

Comments Received

One commenter suggested that the Department did not account for individuals who wish to become an FFL but are not otherwise able to obtain a license due to State or local zoning ordinances, or even restrictions from a Homeowner's Association ("HOA"). This commenter further suggested that the Department should calculate a loss of social welfare due to the indirect reduction of firearm sales resulting from this rule and indirect requirements stemming from local restrictions. One commenter suggested that there may be individuals who, after publication of this final rule, will choose to leave the market of selling firearms altogether so as to avoid coming under scrutiny under this new definition.

Department Response

The Department concurs that there may be individuals who are restricted from engaging in commercial activity from their homes or other spaces by State, county, and local laws or ordinances, or by residential HOAs. Individuals who fall under this category may apply for a zoning permit or variance through their local jurisdictions, or may arrange to conduct sales from a rented business premises or other space that permits commercial activity instead. But some may nonetheless choose not to continue making supplemental income through firearm sales activity from residential spaces. However, the Department notes that these persons, if making commercial sales from such locations, were most likely already prohibited from such sales before this rule was issued, unless they had requested a permit, variance, or other appropriate exception. Zoning ordinances and HOA restrictions on commercial activity often include limitations on foot traffic, number of employees, or the amount of interference with neighbors.[242] Most of these

[242] *See* Van Thompson, *Zoning Laws for Home Businesses,* Hous. Chron.: Small Business, https://smallbusiness.chron.com/zoning-laws-home-businesses-61585.html (last visited Mar. 7, 2024); A.J. Sidransky, *Home-Based Businesses: Challenges for Today's Co-ops, Condos and HOAs*, New Eng. Condominium (Oct. 2016), https://newenglandcondo.com/article/home-based-businesses.

zoning restrictions are not predicated on whether a resident is formally established as a business, whether they sell firearms versus some other product (although there may also be additional ordinances specifically addressing firearms), or whether they are determined by Federal law to be engaged in the business as a firearms dealer. But the Department has no source (and no commenter provided any) from which to gather data on the number of people who might have been permitted to sell firearms under their zoning or HOA requirements before this rule and would now be unable to continue selling firearms for this reason.

However, there may also be other subsets of individuals who are affected by this rule and may choose to leave the firearm sales market for personal reasons. For example, some people may not want to go through the process of getting a license or some may not agree with it on principle and would rather forego firearms sales than comply. The Department acknowledges that there may be individuals who leave the market for a variety of reasons, including zoning ordinances, licensing requirements, or personal philosophy. Although the Department does not have data from which to extrapolate an estimated percentage for each such group, based on past experience with parallel requirements and SME expertise, the Department has combined these groups into a single estimate for individuals who may leave the firearm sales market for personal reasons, which is now accounted for in the economic analyses in Section VI.A of this preamble.

6. Costs of the Rule

a. Accuracy of Costs

Comments Received

Other commenters stated that it was unclear how accurate the costs and time burdens were that ATF calculated for the rule asserted that ATF underestimated costs, or alleged that ATF's estimates were "random" or had no "data to support them." Another commenter asked how many of the 30,806 Armslist listings were, for example, selling inherited firearms, whether any of the listings were misclassified as "private" when they actually involved a licensed dealer, or whether the 30,806 listings were representative of the typical number of listings at any given time. This commenter also asked whether the average of 2.51 listings per seller was skewed by a minority of extreme outliers. One commenter suggested that the population characteristics derived from Armslist could not be used to generalize the potentially affected population that use non-traditional mediums (such as other online platforms) outside Armslist.

One commenter stated that, based on their calculations, the rule would "cost private citizens about $338 to obtain a new license, and $35 to $194 annually to maintain the license." Additionally, in the commenter's opinion, this new rule would cost the government "$116 million to process new licenses." Another commenter provided their own cost estimate of the rule and estimated that the 10-year annualized cost would be $18,813,987.17 or 14.7 times more expensive than ATF's primary estimate. Another commenter noted that the Department rounded cost estimates, including rounding wages from $16.23 to $16, which they stated could result in a 6 percent difference in total amounts. This commenter argued that costs considered in rulemakings should not be rounded (or should be rounded to the penny) to avoid the rounding errors that, they stated, were present in the Department's analysis.

A few commenters stated that the Department did not include compliance costs such as alarms, cameras, gun safes, secure record storage, and secure doors. One of these commenters further estimated that such security items cost them $1,000, plus monthly monitoring charges of $40. An additional and separate gun safe can range from $1,000 to $3,000, they stated, and a security door would cost between $800 and $1,000. Furthermore, this commenter stated that the Department did not include liability insurance, much less labeling costs. Another commenter suggested that the Department did not include business start-up costs such as attorney drafting of articles of incorporation or other legal advice. One commenter suggested that the rule would increase litigation costs. Another commenter suggested that the Department's estimate of the costs should include the costs of obtaining a State dealer's license and local and State business licenses, because, they said, people who now get licensed at the Federal level to engage in the business of dealing firearms will also have to be licensed as a business and as a dealer at the State level.

Department Response

The Department disagrees that ATF's estimated costs are "random" or are not supported by data. They are, however, estimates. Wherever possible, the Department used publicly available information to calculate costs and time burdens. Where relevant, the Department included footnotes and explanations regarding the calculations. Where applicable, the Department provided (and continues to provide) sources and methodologies demonstrating its means of determining the overall cost of the rule. Sources of data included, but were not limited to, fees required by ATF to apply for a license, costs for having photographs or fingerprints commercially taken (as posted by

private companies), and similar costs of obtaining a license. However, despite best efforts, the Department acknowledges that not all licensing costs, like time burdens, could be substantiated in the same manner by third-party or publicly available data. In these cases, ATF made estimates based on its experience, such as the time needed to obtain fingerprints or passport photographs.

In the NPRM, the Department welcomed comments as to any assumptions made, and in particular solicited input about any countervailing costs or time estimates that commenters felt the Department could not or did not consider. In this final rule, the Department considered the suggestions it received in response and, where appropriate, updated the overall costs of the rule, including by incorporating new data or updating to a more appropriate source. For example, the final rule uses wage inflation per the Bureau of Labor Statistics ("BLS") rather than BLS's Consumer Product Index to update household income, based on a commenter's suggestion and further Department assessment.

The Department acknowledges that estimates that round to the penny might differ from estimates that do not. However, the Department disagrees that rounding to the penny provides the public a more accurate total cost of the rule in this context because, as discussed above, there is an inherent lack of precise numbers that arises from estimating a total population or total cost without a comprehensive database, registry, survey, or other source of accurate data. OMB Circular A-4 allows agencies to make predictions and estimates during the rulemaking process and provides guidance for accuracy in making such estimates. It instructs agencies to make their estimates based on the precision of the underlying analysis. For example, OMB Circular A-4, section G (Precision of Estimates)

suggests that an estimate of $220 million implies rounding to the nearest $10 million.[243] In accordance with this guidance and to avoid misrepresenting the Department's estimates as a more precise cost value than they are (as rounding to the penny would indicate), the Department continues to choose to round estimates to the dollar.

In response to comments on the Armslist sampling, the agency acknowledges that Armslist does not label vendors based on whether they are engaged in the business of firearms dealing or not. Armslist uses the categories of "private party" and "premium vendors." When the Department reviewed the entries, it found that the premium vendors were all listed as FFLs. Therefore, the sample did not include entries categorized as premium vendors. Although the "private party" sales did not indicate whether they were by FFLs or unlicensed sellers, other information included in the listings indicated that "private party" sellers were likely to be unlicensed individuals rather than FFLs with funds to advertise on the website.

Nonetheless, the Department cannot be certain, so the sample size from Armslist (and thus the estimated population of unlicensed sellers) might be larger than the actual number of unlicensed sellers. However, even if we assume all the private party sellers on Armslist are unlicensed (which we cannot conclusively ascertain), not all unlicensed sellers of firearms will qualify as being "engaged in the business" under this rule. Some portion of them will be persons selling without the requisite intent to profit and only occasionally, selling inherited firearms, selling to upgrade a personal collection, selling to exchange for a curio or relic they prefer, selling to acquire a firearm for hobbies like hunting, or other similar situations. Many persons fitting into various of these categories

[243] *See* OMB Circular A-4, at 46, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

will be unaffected by this rule to the extent that they would potentially not meet the requirements to be engaged in the business as a dealer, depending on the specifics of their operation.

Because of the known existence of such sellers in potentially large numbers, and to account for the uncertainty of the number of individuals sampled who might simply be engaging in activities not affected by this rulemaking, the Department estimated that, of all private sellers of firearms, 25 percent might be deemed to be "engaged in the business" and the other 75 percent will not be affected.

In response to the comment asking whether the average of 2.51 listings per seller was skewed by a minority of extreme outliers, the Department used this number as an average per seller in order to estimate the number of sellers in the sample set of listings from Armslist. The number of firearms per seller was otherwise not relevant to the Department's calculations. The sampled sellers on Armslist in the private sales category varied in the number of firearms they had listed for sale, skewed to mostly selling one firearm or to a few selling multiple firearms. This partially informed the Department's estimate that approximately 75 percent of the population of currently unlicensed sellers would not be deemed engaged in the business under this rule and accordingly would not need to obtain a license.

With respect to the comment about whether Armslist could be used as a proxy for other sellers on other online platforms, the Department is unclear how sellers of firearms on Armslist might have significantly different characteristics than those of firearms sellers on other online platforms. Generally, there are two types of sellers on online platforms, licensed (FFLs) and unlicensed persons. While there may be differences in

certain terms and conditions on given websites—for example, GunBroker requires that firearm transactions be mediated through a local FFL while Armslist does not—those aspects of online sales are not relevant to determining the affected population or calculating the costs of this rule. The terms and conditions that online platforms offer are also not impacted by this rule and will continue to be set at the discretion of the entities operating such platforms. Sellers on online platforms such as Armslist may continue to perform in-person transactions simply by making a phone call to perform a NICS background check for a buyer and will not be required to use a local FFL to complete a firearms transaction like sellers on GunBroker. These characteristics that may differentiate between online platforms do not affect the costs or the impacts to sellers due to the requirements of this rule.

The Department disagrees that items such as alarms, cameras, gun safes, or other security measures are costs under this rule. Although it recommends FFLs consider purchasing such items for security purposes and theft avoidance, the Department does not require—in this rule or anywhere else—that they purchase such items. Therefore, the Department is not including these costs in this rule. The Department also did not include litigation costs because possible future lawsuits are speculative.

The Department disagrees that the costs of the rule should include costs for all persons who are dealing in firearms to also obtain State dealer's licenses and State and local business licenses. Persons who are purchasing and reselling firearms in a State have always been required to follow State and local laws regarding licensing and business operations. The fact that the statute is now further defining the circumstances in which such individuals will be required to be licensed at the Federal level does not

change State licensing requirements.[244] This regulation does not change the GCA statutory definition, as amended by the BSCA, and it does not require any State to adopt any presumptions or other clarifying provisions under Federal law into their State requirements. So, in general, State licensing requirements or costs are not affected by this rule. However, ten States and the District of Columbia tie their dealer licensing requirements to the definition of dealer at 18 U.S.C. 921 or the dealer licensing requirements at 18 U.S.C. 923 (though not to any ATF regulations) or require that a person with a Federal firearms license for dealing must also get a State dealer's license. As a result, in those 11 jurisdictions, firearms sellers who must get a Federal firearms license for dealing due to the changes in the BSCA and, therefore, this rule, will likely also need to obtain State dealer licenses for the same reason. The Department has added those costs in the economic analysis under Section VI.A.3 of this preamble.

b. Derivation of Leisure Wage Rate

Comments Received

Some commenters had questions or concerns about the leisure wage rate. One commenter asked why ATF referred to the Department of Transportation ("DOT") guidance as a method of determining a leisure wage rate. A few commenters opined that the calculated leisure wage rate was too low. One of these commenters estimated that a $16 leisure wage would not result in a livable household income. Another commenter suggested that an average occupational wage rate of $34 per hour was more realistic since

[244] *See* 27 CFR 478.58 ("A license issued under this part confers no right or privilege to conduct business or activity contrary to State or other law. The holder of such a license is not by reason of the rights and privileges granted by that license immune from punishment for operating a firearm or ammunition business or activity in violation of the provisions of any State or other law. Similarly, compliance with the provisions of any State or other law affords no immunity under Federal law or regulations.").

individuals would be considered engaged in the business of dealing in firearms and not engaged in leisure time.

Another commenter stated that the Department underestimated the leisure wage rate, which should have been adjusted from $16 to $19.48 to account for wage inflation between April 2020 and the present (which this commenter calculated to September 2023). This commenter used the BLS's Consumer Price Index ("CPI") as a means of calculating wage increases over time to $19.48.

Department Response

The Department assumes that currently unlicensed persons who may be affected by this rule are not already engaged in a full-time occupation of selling firearms for their income because, if they were, they would already either be licensed in compliance with the GCA as it existed before the BSCA or working for such a licensee. The Department therefore also assumes these persons are not paying themselves a specific wage from their monetary gain from selling their firearms as, typically, a sideline. In other words, the changes enacted by this rule are not likely to cause individuals to qualify as being engaged in the business based on having a full-time or part-time job, including a job working for an FFL, where they get paid salaries or hourly wages as part of an occupation. Instead, the firearms sales activities that would require unlicensed individuals to obtain a license as a result of this rule likely constitute a supplemental source of income or a side business. Such activities are not correlated to an actual wage because they are typically done on the side and this rule does not require FFLs to pay themselves an occupational wage. The affected dealers typically have another job that generates an occupational wage, receive retirement pay, or receive similar primary

income. As a result, ATF used a leisure wage to calculate the cost of their non-work time spent on dealing, rather than an occupational wage.

As such, the BLS does not track or assign a specific wage in this context, as there is no wage involved. Nonetheless, the Department recognizes that the rule imposes an opportunity cost of time on persons who will now need to apply for and maintain a license in order to continue dealing in firearms. In the NPRM, the Department therefore assigned a monetary value to that unpaid, hourly burden, as a comparison in "cost," even though these persons are not likely paying themselves an hourly wage for such duties. As a result, the Department opted to use a "leisure" wage rather than a retail wage and continues to do so in this final rule. The Department used DOT's guidance on the value of travel time to calculate a leisure wage rate in the NPRM. During the final rulemaking process, however, the Department determined that the methodology used by the Department of Health and Human Services ("HHS") to calculate the cost of time that persons use to perform actions that are not part of an official occupation is a more accurate measure of the relevant leisure wage rate than the DOT methodology used in the NPRM. As a result, the Department has used HHS's methodology to derive the leisure wage it used for this final rule. Because HHS's methodology relies on BLS data that is updated on a monthly basis, the Department does not need to use an inflation-adjusted wage rate as suggested by the commenter.

Using this methodology, the Department raised the leisure wage rate to $23 an hour, which is higher than the $19 suggested by the commenter. For more discussion on how the new wage of $23 per hour was derived, see Section VI.A.3 of this preamble.

c. Hourly Burden

Comments Received

One commenter suggested that the Department underestimated the hourly burdens to complete a Form 7 application and to undergo a licensing inspection. This commenter estimated that it would take more than one hour to read, understand, and complete a Form 7. In addition, they said, the estimated hourly burdens should include the time needed to closely read and understand hundreds of pages of Federal laws and regulations, which they estimated would take at least 22 hours (100,000 words at 75 words per minute). They also estimated that it would take an additional 5.5 hours to read Form 7 and acknowledge it via signature prior to the license being issued, and 4.5 hours to do a renewal Form. Therefore, this commenter estimated that the per FFL cost should be $1,165, to account for 27.5 hours of work, at an average hourly occupational wage rate of $34 per hour, in addition to the $230 cost of items such as the Form 7 application fee, fingerprints, and photographs.

Department Response

The Department concurs with the commenter that the estimated time for inspections was underestimated and has revised the amount of time needed to perform an inspection. From additional research it conducted based on the comment, ATF found that ATF Industry Operations Investigators ("IOIs") report an average of 15 hours for an initial inspection and 34 hours for a compliance inspection, as opposed to the three hours for each inspection estimated under the NPRM. These averages account for all sizes of licensee operations, some of which may take far less time to inspect and others of which may take far more time, depending on various factors about the licensee's operations.

Accordingly, the Department has revised and updated the hourly burdens for initial and compliance inspections in Section VI.A of this preamble.

However, the Department disagrees with the commenter regarding the hourly burden to complete a Form 7. First, the Form 7 application itself is only four pages long and the questions for the person establishing the license are on only pages 1 and 2. They also primarily pertain to the individual's personal demographics and what type of license the individual is requesting.[245] For ease of access, pages 3 and 4 include the responsible person questionnaire that an applicant can fill out about another person if the applicant is applying for an FFL license to include more than one person. Form 7 also includes instructions and definitions of terms, to make filling out the form easier and faster. They are for reference, as needed, and do not necessitate reading and studying in such a way that would require significant additional time. In addition, the Department's hourly burden calculation does not need to account for a person taking any time to read regulations and laws. Most persons who need to fill out Form 7 are unlikely to need to read regulations or laws in order to do so. Moreover, the Department prepares guidance documents that summarize the relevant regulations, and those guidance documents are freely available online and do not necessitate any reading and studying that would require significant additional time. In addition, if a person did wish to read the regulation, the relevant regulatory text is about five pages long at 12-point font and does not require significant additional time to read. Nonetheless, the Department has added familiarization costs to the costs outlined in Section VI.A.3 of this preamble.

[245] *Application for Federal Firearms License*, ATF Form 7 (5300.12) / 7CR (5310.16) (revised Oct. 2020), https://www.atf.gov/file/61506/download.

The Department also notes that Form 7 has undergone public review and OMB review through the required Paperwork Reduction Act process, including detailed explanations for the time burden the Form entails. Those vetted and approved numbers form the basis for estimates included in the NPRM and now in the final rule regarding this Form. Therefore, hourly burdens to complete Form 7 and travel times to obtain items such as forms, fingerprints, and photographs have not been modified because Form 7 can be requested by mail or downloaded via the Internet. Furthermore, fingerprints and photographs are commercially available throughout the United States for employment or passport purposes. The Department has determined that travel times and mileage costs have been appropriately calculated.

d. Office Hours/Business Operational Costs

Comments Received

One commenter suggested that the Department failed to include business operational costs stemming from maintaining at least one hour of operation or availability every week, as they believe Form 7 requires. This commenter estimated that, based on a wage rate of $34 an hour, maintaining business operations for one hour a week for 52 weeks would cost an individual 52 hours, or $1,768 in wages. They also suggested that the cost of becoming a licensee and maintaining a license to deal in firearms should include hourly burdens of 40 hours a week for 50 weeks, allowing for two weeks of vacation.

Another commenter suggested that this rule did not include expenses or time burden associated with selling a firearm. This commenter further suggested that these expenses should be subtracted from any "profit" from a sale. A third commenter

suggested that ATF should include the time factor to run a business operation, and another commenter suggested including insurance and retirement as costs to comply with the rule.

Department Response

The Department disagrees with the commenter's analysis regarding operational costs. Neither this rule, nor any existing Federal firearms regulation, requires that a licensed dealer maintain full-time business hours, much less hire staff or provide benefits. As discussed in more detail under Section IV.D.6.b of this preamble, unlicensed sellers who would be affected by this rule would not have been engaging in the business as their full-time occupation; full-time firearms sellers were clearly already covered by the GCA licensing requirements before the BSCA and this rule and are thus not counted in the affected population. Therefore, the unlicensed sellers who would be affected by this rule would not have been earning a wage from such activities or paying staff. This rule does not change that, nor does it require that such sellers begin engaging in such activities as part of obtaining a license to deal in firearms. As a result, the Department is not requiring or anticipating that these individuals will, as a result of this rule, begin paying themselves an occupational wage with benefits. In addition, the Department acknowledges that Form 7 requires that an applicant list at least one business hour per week during which they are available and may be contacted for information or scheduling purposes in the event the newly licensed individual needs to be inspected. But there is no requirement that the affected individual engage in or maintain actual business operations or otherwise actively sell firearms during this time (or during any other specified time or frequency); that individual would be able to maintain the operational hours and frequency

that they had prior to being licensed. Therefore, no additional operational opportunity costs were assessed in this final rule.

The time burden associated with the sale of a firearm or to run a business operation is not included because these actions are not required by this rule and are otherwise considered to be "sunk" costs. The same is true for other operational costs, including insurance and retirement benefits. Because the rule does not require that a business operator incur any such costs, it is reasonable to presume that, to the extent such costs are incurred, the business operator was already incurring them before the rule, or will only incur them thereafter on a voluntary basis. This rule only requires individuals that are engaged in the business of dealing in firearms to apply for and maintain a license to be a dealer in firearms. The only costs this rule requires to be incurred are costs to become a licensed dealer and costs to maintain that license. While the Department agrees that an individual may have expenses and time burdens with respect to the actual sale of a firearm or to operate a business, these actions are not required by the Department, are voluntary, and are not considered costs of this rule.

e. Costs to the Government

Comments Received

One commenter calculated the annual Governmentt cost as derived from the RSF survey—the "high" population estimate—and estimated that, using the upper population estimate, the Government cost is about 14.7 times higher than the Department's estimated Government cost.

Department Response

The Department agrees that using the population estimates derived from the RSF survey would result in a higher government cost estimate. However, for reasons discussed in Section IV.D.2 of this preamble, the Department included the RSF estimate for comparative purposes so people could see the possible options but believes that the more accurate estimate is the lower SME-based estimate. As mentioned above, the SME-derived estimate is based on real historical data and experience with relevant sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. The Department thus considers it to be a more reliable data source for this purpose than the RSF survey and therefore uses the SME-derived estimate as the primary estimate for this rulemaking.

7. Impact on Jobs and Economy

Comments Received

One commenter suggested that requiring additional firearms sellers to become licensed will increase the prices of firearms sold in the marketplace. This commenter further estimated that the total U.S. firearms market was $32.1 billion as of 2022 and that this rule, based on their own estimates, would cause a 0.099 percent increase in firearm prices across the overall firearms market. The commenter used an internal model to compare the cost of the rule to their estimated increase in prices; from that, they estimated that the increased prices they assessed would result in 0.89 percent fewer firearm sales, which would in turn result in fewer jobs, including jobs represented by newly licensing these sellers as FFLs. Based on their internal modeling, this commenter estimated that this rule will indirectly result in a loss of 350 direct retail jobs. The

commenter went on to estimate that, including supplier jobs, the rule will indirectly result in over 550 fewer jobs and a total of $26.5 million in lost wages and benefits. Finally, this commenter estimated that the American economy would be $70 million smaller.

Department Response

The Department disagrees with the commenter's assessment of the effect this rule will have on the price of firearms and the effect on the U.S. firearms market and overall economy. The Department has reviewed the literature provided by the commenter and determined that the estimated impacts on the economy, retail jobs, wages, and subsequent taxes detailed by the commenter's internal literature are largely not connected to the market impacted by this rule. The literature cited by this commenter primarily focused on existing licensees, their retail jobs, and their firearms market. The literature does not cover unregulated persons who sell firearms on the secondary market. While there may be some effects due to an increase in the number of licensed FFLs, the new licensees that would be generated by this rule have already been selling, and would continue to sell, firearms on the secondary market, and thus would not impact the primary market. Based on the totality of public comments and the Department's experience and analysis, the Department has no basis to believe that persons obtaining new licenses under the clarifications in this rule would enter the primary firearms market industries of manufacturing firearms, becoming intermediaries, or engaging in retail sales of new firearms. Instead, the majority of the unlicensed sellers who would need to obtain a license pursuant to this rule already obtain firearms through existing retail FFLs and subsequently resell them on the secondary market. Some also acquire firearms through estate sales or other secondary sources. Since this buying and further reselling secondary

market has been and will continue to operate, the Department does not estimate a significant impact on the firearms industry as suggested by this commenter.

8. Impact on Existing FFLs

Comments Received

Some commenters suggested that the rule would cause windfall gains to current FFLs under the belief that the rule would require all firearm transactions to be done through an existing FFL. Other commenters claimed that the rule would make it harder to lawfully transfer firearms due to the costs of obtaining and maintaining an FFL. Several individuals claimed that the rule would cause more so-called "mom-and-pop" businesses to go out of business.

Department Response

The Department acknowledges that this rule will create more FFLs, which will result in an increase in the amount of licensed competition. However, competition from these new licensees does not equate to an increase in sales competition, nor is the competition new, because those same people who will be required to obtain licenses under the rule are currently selling as unlicensed dealers. And they are operating at an unfair advantage. As one set of commenters pointed out, "[a]s recognized in the Proposed Rule, these requirements would come at modest cost to most people falling under the clarified definition. Furthermore, requiring regulatory compliance by dealers operating on the margin of the current scheme would have the equitable effect of subjecting them to the same requirements as current FFLs engaged in substantially similar business activities." These sellers would have already existed in the marketplace under the baseline prior to this rule, but they have been operating and competing with

FFLs in a largely unregulated state—without being subject to the laws and regulations under which FFLs are required to operate. Rather than adding competition to existing FFLs, clarifying when sellers are likely to be engaged in the business under this rule and would need to become licensed would increase equity in the marketplace by extending costs and obligations incumbent upon all existing FFLs to include currently unlicensed sellers that are acting as dealers in firearms.

There may be additional positive market effects on FFLs as a result of their serving as an intermediary for private party firearm transactions at a greater rate, but the Department finds this effect difficult to estimate based on the lack of existing data sources and subject matter expertise. However, the Department disagrees that this rule will cause more "mom-and-pop" businesses to go out of business. The majority of existing licensees are considered to be small businesses and will continue to operate as small businesses. Furthermore, as other commenters have pointed out and as discussed in Sections IV.D.10.c and IV.D.12 of this preamble, many States already require background checks for all private party transactions and any costs associated with such background checks are not due to this rule. Finally, a newly licensed seller who might newly need to undertake background checks may do so under FBI processes by making a simple phone call for free. The Department included these qualitative effects of the rule.

9. License Revocation Costs

Comments Received

One commenter questioned ATF's assumption that, upon revocation of a license, the underlying market value of the revoked FFL's existing inventory of firearms would be unchanged when sold or transferred to another FFL's inventory. This commenter

suggested that during a comprehensive sale or transfer of an existing FFL's inventory to another FFL, the selling FFL would need to liquidate their existing inventory at a loss to the purchasing FFL. In other words, the commenter suggested the selling FFL would experience an adverse price when liquidating their existing inventory.

Another commenter suggested that the adverse price response described above would be large. The same commenter also suggested that those who choose to surrender their FFLs must still liquidate their business-owned firearm assets within 30 days, with the same adverse price response of those who have had their license revoked, rather than engage in an "orderly, lawful liquidation" as ATF estimates.

Department Response

The Department estimated that the rule would likely have a qualitative impact on FFLs that fail to comply with existing regulations and requirements, mainly due to the rule's clarification of what must occur with their existing inventory when their license is terminated. FFLs that have had their licenses terminated before this rule were already not permitted to engage in unlawful means of disposing of their remaining inventory, but the rule makes the lawful options clearer. However, ATF revokes or denies renewal of FFL licenses very rarely, with a *de minimis* 0.093 percent of all active FFLs being revoked annually as described below in Section VI.A.4 of this preamble. Furthermore, the economic impact of transferring inventory to another FFL is unclear, given the range in volume and value of firearm inventories. Public comment was specifically sought on these topics, but the Department did not receive any data. In addition, the disposal requirements are not expected to have an adverse cost impact on FFLs that choose to cancel or not renew their licenses. Because such FFLs do so voluntarily, they know in

advance that they will need to dispose of their inventory and thus do not have the same disruption and urgency that disposition due to a license revocation would potentially carry.

10. Benefits of the Rule

a. Costs Outweigh the Benefits

Comments Received

A couple of commenters opined that the costs of this rule outweigh the benefits. Of those two commenters, one calculated a 188 percent increase in Form 7 applications but stated there would be less than a 0.2 percent increase in background checks resulting from that increase in FFLs. Further, this commenter suggested that the "actual number of firearm transactions at licensed dealers is likely a good bit higher" because "[m]ultiple guns can transfer based off of one background check."

One commenter asserted that ATF incorrectly included individuals who sell firearms through existing licensees and, therefore, no benefit should accrue from such individuals because these firearm transactions are already subject to the background check process. The commenter further stated that the Department failed to account for sellers that currently undergo background checks for all private transactions, as required by certain States. This commenter estimated that 50 percent of the population lives in States that already require background checks and thus implied that any benefits derived from the rule are not as abundant as stated by the Department.

Department Response

The Department disagrees that the benefits of the rule are outweighed by the costs, as outlined in the economic analysis in Section VI.A.6 of this preamble. The value

society places on the qualitative social benefits of the rule cannot be quantitatively represented in a way that would allow them to be compared to the quantitative costs of licensing more people, so the comment's comparison of the two is not accurate or appropriate. People know that society has placed a high positive value on increasing the licensure of sellers who engage in the business of dealing, in aid of public safety, because Congress passed a law to change the definition for that purpose. In addition, hundreds of thousands of commenters on this rule have also expressed that they place a high positive value on increasing licensure for public safety needs. But people cannot place a numerical value on the qualitative benefits flowing from those statutory changes and thus from this rule. However, there are quantitative benefits that relate to the subject indirectly. The Department does not have sufficient data from which to assess these indirect benefits and has thus not included or relied on them as quantitative benefits resulting from this rule. However, the Department is including some quantitative illustrative considerations in response to this comment as they shed some light on the indirect benefits. For example, there are studies that have examined the economic costs of gun violence. Those studies have demonstrated that the annual healthcare and medical costs of firearms violence alone run into the billions.[246] Therefore, even a marginal

[246] *See, e.g.,* Everytown for Gun Safety, *The Economic Cost of Gun Violence* (July 19, 2022), https://everytownresearch.org/report/the-economic-cost-of-gun-violence/ (estimating $1.57 billion in directly measurable medical costs to taxpayers due to firearms violence, including immediate and long-term medical care, mental health care, and ambulance and patient transport (not including costs to families, survivors, and employers); Nathaniel J. Glasser et al., *Economics and Public Health: Two Perspectives on Firearm Injury Prevention*, 704 Annals Am. Acad. Pol. & Soc. Sci. 44 ("The direct and associated medical care costs of firearm injury are high. In 2019, medical costs associated with firearm fatalities totaled an estimated $233million (CDC 2022). For nonfatal firearm injuries in 2019, the estimated 12-month attributable medical care cost was $24,859 per patient (Peterson et al. 2019; Peterson, Xu, and Florence 2021). While further research is needed to estimate long-term-care costs, the annual direct medical cost of firearm injuries has been conservatively estimated to exceed $2.8 billion (CDC 2022)."); Government Accountability Office, *Firearm Injuries: Health Care Service Needs and Costs* (2021), https://www.gao.gov/assets/gao-21-515.pdf (finding that initial inpatient costs from firearms violence in

decrease in firearms violence as a result of this rule would constitute a large enough quantitative benefit from the rule to offset the estimated costs of the rule.

The Department further disagrees that there is a marginal decrease in returns with respect to the costs attributed to this rule. This rule is primarily intended to implement the BSCA and to accordingly reduce the means by which a prohibited person can obtain firearms, including those subsequently used in a crime. The ratio between the number of Form 7 applications versus the number of background checks versus how many firearms a buyer can purchase under one background check is not relevant in determining benefits. In other words, benefits stem from having more firearms sellers be licensed, for multiple public safety reasons (as discussed in this section and Section IV.D.10 of this preamble)). These benefits are not solely the result of increasing background checks, so the perceived increase in the number of background checks does not offset the rule's benefits. In addition, even comparing the number of background checks with and without the rule would not be accurate because there are other factors involved. For example, although some prohibited persons do attempt to purchase firearms from FFLs, many currently buy from unlicensed dealers. Imposing a requirement that those dealers now be licensed would likely deter more prohibited persons from trying to purchase firearms, which would decrease the number of background checks. The number of firearms that are being purchased and resold per transaction is also not relevant. Multiple transactions already occur pursuant to a single background check and neither the BSCA nor this rule are directed at reducing firearm transactions. The commenter's comparison of the number of

2016 and 2017 were more than $1 billion, plus another 20 percent for physician costs, and additional first-year costs of $8,000 to 11,000 each for 16 percent of such patients, and stating that there are additional costs thereafter).

firearms that are purchased and resold per transaction therefore also does not result in an offset of the rule's benefits.

An increase in background checks is not the only benefit accrued from requiring that persons engaged in the business as dealers obtain a license. Increasing the number of licensed dealers also results in an increase in sellers who maintain firearms transaction records, submit multiple sales reports, report theft and losses of firearms, and respond to crime gun trace requests. These activities are directly correlated with an increase in the number of prohibited persons who are denied firearm purchases, law enforcement's ability to investigate and retrieve lost or stolen firearms before they can be used in crimes or trafficked, and law enforcement's ability to trace firearms that have been used in crimes and use them to find the perpetrators, among other benefits. This is particularly beneficial for States that have higher rates of straw purchasing or are otherwise larger sources of firearms trafficking, but it benefits society as a whole because each of these actions help law enforcement reduce criminal activities and opportunities. Furthermore, the Department believes that this rule will increase background checks, primarily in States that have less stringent background check requirements, which reduces the potential sources of firearms trafficking.

The Department concurs with the statement that the economic analysis model failed to account for sellers that currently undergo background checks for all private transactions, as required by certain States, but disagrees that the fact that some States currently require background checks for private firearm transfers reduces the benefits accrued from this rule. While the Department acknowledges that certain States already require background checks, States that currently do not require background checks pose a

greater risk to public safety. These States tend to have higher rates of straw purchasing or otherwise are sources of firearms trafficking. Although State requirements that all sales undergo background checks could be relevant in general terms, they do not reduce the benefits accrued from this rule because relatively few States have universal background check requirements, because State background checks differ with respect to their thoroughness and which databases are utilized, and because the benefits of increasing licensees are not solely due to an increase in background checks. Please see Section VI.A.7 of this preamble for more information about States and firearms trafficking.

The Department further disagrees that the benefits derived from the rule should be reduced to account for unlicensed persons who sell firearms or obtain background checks through existing FFLs (either voluntarily or due to State requirements).

As a result of the comments on this topic, the Department has added a discussion of State background checks, tracing, and firearms trafficking to the Benefits discussion in Section VI.A.6 of this preamble to supplement the Department's position that the benefits of this rule outweigh the costs.

b. Lack of Benefits from Licenses

Comments Received

One commenter argued that benefits attributed to this rule "do not flow from licenses"; rather, the rule's benefits are derived from the act of undergoing background checks and maintaining records. This commenter also stated that the Department failed to use denied background checks and responsiveness to traces as a benefit to the rule,

suggesting, according to the commenter, that this rule does not address public safety as stated by the Department.

Department Response

The Department disagrees that the act of obtaining and maintaining a license does not directly contribute to the safety and welfare of the public. Congress chose to make the dealer the "principal agent of federal enforcement" in "restricting [criminals'] access to firearms." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). As the Supreme Court explained in a later case, *Abramski*, 573 U.S. at 172–73:

> The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's "business premises" by prohibiting, except in limited circumstances, the sale of a firearm "to a person who does not appear in person" at that location. Other provisions then require the dealer to check and make use of certain identifying information received from the buyer. Before completing any sale, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" bearing a photograph. §922(t)(1)(C). In addition, the dealer must procure the buyer's "name, age, and place of residence." §922(b)(5). And finally, the dealer must (with limited exceptions not at issue here) submit that information to the National Instant Background Check System (NICS) to determine whether the potential purchaser is for any reason disqualified from owning a firearm. See §§922(t)(1)(A)–(B).

The benefits of this rule therefore stem from bringing potential purchasers onto a licensed business premises to prevent prohibited persons from obtaining firearms, channeling the commerce in firearms through licensed dealers so that State and local law enforcement can regulate firearms commerce in their borders, and allowing the tracing of crime guns. Making it harder for prohibited persons to obtain firearms makes it less likely that such persons will use a firearm in a crime. To the extent that a firearm purchased through an FFL is used in a crime, that firearm can then be traced by law enforcement. Furthermore, should firearms be stolen from an FFL, there are

requirements that thefts be reported so that ATF and local law enforcement can analyze theft patterns for future reduction purposes. This approach helps to ensure that regulated firearms continue to be used for legal purposes and not criminal activities.

c. Lack of Empirical Data

Comments Received

Some commenters asserted that the proposed rule would not improve public safety, and cited statistics to support their view. One commenter stated that the proposed rule would not hinder criminals or save lives. In support of that view, the commenter stated that the State of Washington's per capita gun murder rate increased by more than 26 percent following its 2014 passage of universal background checks ("UBCs") versus an unnamed neighboring State that the commenter stated had no such increase and no UBC requirement. Another commentator stated that numerous studies, including in peer-reviewed journals, found that the correlation between gun control measures and reduction in gun violence is negligible. *See* Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 Am. J. Pub. Health 2098 (2013) (cited by the commenter as in the *Journal of the American Medical Association* instead). Another commenter stated that the Bureau of Justice Statistics shows that less than 1 percent of individuals obtain firearms at gun shows. Finally, some commenters believed the proposed rule itself is reactive or lacks supporting evidence, analysis, or well-considered evidence to show that it will have a meaningful impact on crime reduction or improve public safety.

Similar to the comments on the population estimates, one commenter stated that the benefits lacked empirical data that would demonstrate the effects on public safety.

The commenter referenced a peer-reviewed study that stated that each percentage point increase in gun ownership increased the homicide rate by 0.9 percent. One commenter questioned the lack of quantifiable benefits, including the lack of tracing data.

Many commenters who supported the proposed rule referenced research showing that one in five firearms are sold without a background check[247] and further stated that allowing firearms to be purchased without a background check is a significant threat to public safety. One commenter reinforced this sentiment by citing an article from *Bloomberg*.[248] Some commenters stated that firearms that are purchased without a background check cannot be later be traced. Many public commenters agreed with the rule and suggested that requiring background checks for sales of firearms increases public safety.

Department Response

The Department disagrees that there is no quantitative data to support the analysis in the NPRM and the public safety justification for the provisions of this rule; on the contrary, there is much data in support. Such data include the National Firearms Commerce and Trafficking Assessment ("NFCTA") referenced by one commenter and released by ATF as a two-volume report in May 2022 and January 2023.[249] That report revealed, for example, that even though only 3 percent (41,810) of crime guns traced

[247] German Lopez, *Study: 1 in 5 gun purchases reportedly go through without a background check,* Vox (Jan. 4, 2017), https://www.vox.com/policy-and-politics/2017/1/4/14153594/gun-background-check-study (discussing a study published in the *Annals of Internal Medicine*).
[248] Brentin Mock, *Mapping How Guns Get Around Despite Background Check Laws*, Bloomberg (Oct. 22, 2015), https://www.bloomberg.com/news/articles/2015-10-22/40-percent-of-gun-owners-got-them-without-background-checks.
[249] ATF, *National Firearms Commerce and Trafficking Assessment: Firearms in Commerce* (May 5, 2022), https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download; ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two* (Jan. 11, 2023), https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two.

between 2017 and 2021 were acquired from licensees at a gun show, the percentage of those traces increased year-over-year by 19 percent. And as ATF noted in the report, "[i]t is important to recognize that this figure does not represent the total percentage of recovered crime guns that were sold at a gun show during the study period as private citizens and unlicensed dealers sell firearms at gun show venues. National data, however, are not available on unregulated firearm transfers at gun shows."[250]

Furthermore, the Department disagrees with the commenter's interpretation of the article in the *American Journal of Public Health*. The commenter argued that the article found that any correlation between gun control measures and reduction in gun violence is negligible. But the article states, "[g]un ownership was a significant predictor of firearm homicide rates (incidence rate ratio = 1.009; 95% confidence interval = 1.004, 1.014). This model indicated that for each percentage point increase in gun ownership, the firearm homicide rate increased by 0.9%." Siegel, Ross, & King, *supra*, at 2098. The Department interprets this article to suggest that for every percent increase in gun ownership, there is almost a comparable (almost 1:1 ratio) increase in firearm homicide, which is not negligible. In other words, for every percent increase in firearms ownership, there was an almost equal percentage increase in firearm homicide.

However, the Department concurs with many of the statistics provided by the commenters and has incorporated those statistics into the economic analysis in Section VI.A of this preamble. Additionally, the Department used information provided by the commenters to illustrate the effectiveness of tracing data to help determine firearms

[250]ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 14 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

trafficking or straw purchasing patterns. Finally, the Department compared commenters' statistics on States that require background checks for all private firearms transactions to States that have the highest and lowest time-to-crime statistics and determined that States with the least restrictive background check requirements may be larger sources of firearms trafficking and straw purchases. For more details, *see* Section VI.A.7 of this preamble, which discusses the benefits of the rule.

11. Federalism Impact

Comments Received

One commenter estimated that this rule will increase the number of FFL dealers nationwide by 903 percent. Many States will have a subsequent "massive burden" due to this increase, the commenter concluded. This commenter also suggested that due to the burden this rule will have on States, the Department should have included a federalism summary impact statement as to how these new licensees will affect State regulatory agencies. This commenter suggested that this rule will have a significant impact on States because many States license FFLs themselves, separately from the Federal licensing scheme. In addition, another commenter stated that the proposed rule presented a potential conflict in which an individual might be engaged in a business operation requiring a license under Federal law but might not be required to obtain a license under State law. The commenter added that this would create potential problems for people who are legally required to hold an FFL, but then are prohibited from operating or possessing such a license under local ordinances. They also stated that ATF is seeking to broadly regulate a field that states have already addressed in different ways.

Another commenter challenged the NPRM's statement that "[t]his rulemaking would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments." They claimed that ATF failed to consider the impact of its expansion of mandatory background checks for firearm transactions on State, local, and Tribal government budgets, as those political entities may have to expand their staffing and infrastructure to respond to a greater number of declined background checks.

Department Response

The Department disagrees that a federalism impact statement is needed for this rulemaking under Executive Order 13132. Nothing in this rule changes how State and local authorities conduct background checks or otherwise regulate persons engaged in a firearms business. This rule, which implements the GCA, and the changes made to it by the BSCA, does not preempt State laws or impose a substantive compliance cost on States. Under 18 U.S.C. 927, no provision of the GCA "shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the statute so that the two cannot be reconciled or consistently stand together." State and local jurisdictions are therefore free to create their own definitions of terms such as "engaged in the business" to be applied for purposes of State or local law within their respective jurisdictions. They are free to mandate their own requirements concerning the licensing of firearms dealers.

State licensing schemes for retail dealers in firearms (or merchandise that includes firearms) stand on their own and are not dependent on Federal law. If persons have been engaged in a firearms business requiring a State or local business license, then they should have acquired the State or local business license regardless of the new rule. In fact, as set forth below, the new rule looks to whether a person "[s]ecures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms" to help determine whether a person is engaged in the business requiring a license under Federal law, 18 U.S.C. 922(a)(1) and 923(a). *See* 27 CFR 478.13(d)(2)(vii) (definition of "predominantly earn a profit") (final rule).

The Department disagrees with the estimate that the rule will significantly or uniquely affect small governments due to increased background checks by local authorities since 22 States already require background checks for private party sales. Of the States that do not currently require background checks for all private sales, only three States (Florida, Tennessee, and Utah)[251] do not rely on Federal law enforcement for their background checks and are "point of contact" States in which designated State agencies conduct NICS checks.

12. Regulatory Flexibility Act

Comments Received

Various commenters stated that this rule, by increasing operational and administrative costs, will have a significant and disproportionate impact on, or otherwise destroy, small businesses (some of which have operated for decades) or even destroy a sector of business. One commenter stated that the proposed rule inappropriately did not

[251] FBI, *How We Can Help You: NICS Participation Map* (Feb. 1, 2024), https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics.

contain an analysis under the Regulatory Flexibility Act ("RFA"). The same commenter opined that small businesses may not have the resources or infrastructure to comply with enhanced recordkeeping requirements. Another commenter opined that with more people applying for a license, existing FFLs that operate a brick-and-mortar store will go out of business.

One commenter requested various data regarding the analysis performed under the RFA. This commenter stated that ATF may not have properly considered small entities and further asked a series of questions:

1. ATF did not list a cost per business. . . . What is the average additional cost a small business would incur as a result of this rule?
2. Why did the ATF not include [the additional cost] in the published rule?
3. What alternatives [for small businesses] did ATF consider?
    a. What would have been [the alternatives'] impact on small entities?
    b. Why were these alternatives deemed insufficient?
    c. Why did the ATF not explain the alternatives in its original RFA analysis?
4. ATF anticipates that nearly 25,000 new individuals or entities must register as a firearm dealer. Of these entities, how many does the ATF anticipate will stop selling firearms?
5. What impact will this rule have on existing FFL dealers, many of whom are small businesses and how did ATF assess the costs of this rule on large entities, compared to the 25,000 new small businesses it created?

6. What impact does the ATF believe adding 25,000 new FFL dealers will have on the price of firearms?

7. Why did ATF not explain this rule's impact on the 25,000 businesses?

Department Response

The Department disagrees that this rule will destroy a whole sector of business (*i.e.*, the firearms industry). FFL dealers are a subsector of the firearms industry, and the impact on some dealers will not destroy that subsector or the entire firearms industry. The firearms industry is significantly large and robust, and the impact of this rule affects only a small portion of one subsector of it. In any event, as stated above in Section IV.D.8 of this preamble, the Department believes that, rather than adding competition to existing FFLs, requiring sellers engaged in the business under this rule to become licensed adds equity to the marketplace by spreading costs and obligations incumbent upon all existing FFLs to include currently unlicensed sellers that are acting as dealers in firearms. There may be additional positive market effects on FFLs as a result of them serving as an intermediary for private party firearm transactions at a greater rate, but the Department finds this effect difficult to estimate based on the lack of existing data sources and subject matter expertise. Finally, the Department does not believe the congressionally mandated recordkeeping requirements constitute a significant burden for a small business. Many existing FFLs are small businesses and already comply with the recordkeeping requirements.

Regarding the first and second questions on small business impacts, the Department did not distinguish between the cost of individuals complying with this rule versus small businesses complying with this rule. For the purposes of this rule and Final

Regulatory Flexibility Act analysis, the Department assumed individuals becoming licensed will become small businesses and the cost per person (or small business) is outlined in Section VI.A.3 of this preamble, discussing "Costs for Unlicensed Persons Becoming FFLs." The Department did not determine that there were additional costs beyond those individuals (or newly formed businesses) complying with this rule; therefore, no other costs were attributed to small businesses that were not already outlined in Section VI.A.3 of this preamble.

Regarding the third question on consideration of alternatives, the Department considered alternatives in the NPRM (88 FR 62016 and 62017) and discusses them in the final rule in Section VI.A.8 of this preamble. No separate alternative was considered for small business specifically because it was assumed that all individuals complying with this rule will become small businesses. Other alternatives suggested during the comment period and the Department's response to such suggestions are discussed in Section IV.D.13 of this preamble. All alternatives (including the proposed alternative) were considered alternatives for small business compliance. All impacts considered in the alternatives and all impacts under this rule were considered to be alternatives and regulations for small business compliance. Alternatives such as lower fees or guidance were deemed insufficient for various reasons, including that fees are imposed by statutory requirement and guidance alone would result in insufficient compliance. These alternative discussions are outlined below in Section VI.A.8 of this preamble ("Alternatives") and above in the Department's response to comments received on alternatives in Section IV.D.13 of this preamble. The Department did not discuss

alternatives targeted at small businesses separately from alternatives aimed at all affected parties because they were deemed to be one and the same.

Regarding the fourth question, on the estimated number of individuals leaving the market: of the individual or new entities affected by this rule, the Department estimates in this final analysis that 10 percent of affected individuals (or potential entities) may opt to stop selling firearms. Discussions on that are located in Sections IV.D.2 ("Population Accuracy"), IV.D.4 ("Russell Sage Foundation Model Calculation"), and VI.A.2 ("Population") of this preamble.

Regarding the fifth question, as responded to in Section IV.D.8 ("Impact on Existing FFLs") of this preamble, there may be some impact on existing FFLs as there will now be more licensed dealers. However, these newly licensed dealers have been selling firearms prior to this rule, and most of them will continue to sell firearms regardless of this rule, so the impact on existing FFLs will not be significant since the overall number of firearm transactions are unlikely to be significantly affected. For a more detailed discussion, please see Section IV.D.8 of this preamble.

Regarding the sixth question, the Department does not anticipate a significant impact on the prices of firearms. The firearm transactions affected by this rule are primarily firearms sold on the secondary market (*i.e.*, previously purchased firearms for resale). Furthermore, sales of these firearms have been and will continue to occur regardless of the implementation of this rule; therefore, no impact on the prices was considered. The Department further notes that this rule is not affecting the manufacture or importation of firearms, so supply is considered to be stable.

Regarding the seventh question, the Department considered the impact of this rule on all unlicensed sellers (or newly created businesses) and addressed cost under Section VI of this preamble. As mentioned above, no distinction was made between small businesses because it was assumed that all unlicensed sellers (or businesses) affected by this rule are small.

13. Alternatives

Comments Received

One commenter opined that only retailers of firearms who own brick-and-mortar stores should be required to have a license. Another commenter suggested using a minimum threshold number and accounting for inflation to define a dealer. One commenter suggested a stricter background check for all firearms transactions. Another suggested that ATF charge a $10 per application fee for a dealer's license, not $200. Two commenters suggested a plethora of alternatives, including education for individuals and local law enforcement. One of those two commenters also suggested revisions to the NFA and GCA for items such as increasing the fees of NFA weapons, and the other commenter suggested that the Department track and report on citizens using firearms to prevent a crime or protect themselves. One commenter suggested that, rather than expanding the Federal licensing requirements, ATF should institute a permitting system where purchasers could use a firearms ID or demarcation on their license to provide proof of ability to purchase firearms.

A commenter recommended leaving the regulations as they are but suggested adding straw purchases because "ATF has estimated that 50 percent of the illegal firearms market is conducted through straw purchases." Another commenter agreed and said that

rather than implementing universal background checks, ATF should focus on cracking down on illegal straw purchases.

Department Response

The Department disagrees that only retailers who operate out of brick-and-mortar stores should be required to have licenses. Currently, a portion of ATF's existing FFLs include high-volume sellers of firearms who do not operate in brick-and-mortar store locations; they should not be excluded from licensing requirements simply because they sell from other locations or through other mediums. There are unlicensed sellers who operate out of brick-and-mortar locations and others who do not; the law requires any such sellers who qualify as engaged in the business as a dealer to be licensed. The BSCA does not distinguish on the basis of where the sales occur—and the rule provides details to aid people in understanding that approach. The BSCA was enacted with the intent to increase, not reduce, the population of regulated dealers. Therefore, this alternative has not been included in the analysis.

As explained in detail in the NPRM, the Department considered, but did not propose, a specific number of firearms sales as a threshold for being engaged in the business as a dealer. Although some commenters suggested this alternative again, they did not provide any information or reasons to overcome or refute the explanations and evidence cited in the NPRM discussion on this topic. As those reasons still hold true, the Department continues to decline to adopt this alternative.

The Department understands that some commenters consider the license fee of $200 and other costs related to obtaining a license too costly for some people transacting in firearms as part of a hobby or to enhance a personal collection. However, the

Department does not set the application fee or the costs of obtaining photographs or fingerprints. The application fee is set by statute and the Department cannot change it.[252] The other costs (such as for photographs or fingerprints) are set by private companies and similarly cannot be changed by the Department. Nonetheless, the rule does not require occasional sellers of firearms as part of a hobby or to enhance personal collections to obtain a license, so the costs of complying with this rule would not present a burden to them. Instead, the rule impacts persons who have been engaging in certain repetitive firearms dealing that demonstrates they are engaged in the business as a firearms dealer and should be licensed. For these reasons, the Department declines to pursue alternatives to licensing fees.

The Department previously considered and rejected guidance as an alternative means of implementing the statutory changes to the definition of "engaged in the business." The Department does not believe guidance would be an effective method, based partly on prior experience with guidance on this topic. ATF's 2016 guidance, for example, outlined the general factors and examples of being engaged in the business under the statutory definition of that term in effect at the time,[253] but compliance with that guidance document was voluntary and it was not included in the Code of Federal Regulations for broader distribution to the public. Therefore, the guidance resulted in only a brief increase in the number of persons engaged in the business becoming licensed dealers. Although this increase of 567 additional dealers illustrated that people would try

[252] Application fees for firearms regulated under the GCA are set by 18 U.S.C. 923(a). Rates for the NFA special (occupational) tax (SOT) are established by 26 U.S.C. 5801(a).
[253] *See* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?* (2016), https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.

to comply with the licensing requirement when they better understood the requirement, this approach was not effective enough, by itself, to address the problem of unlicensed dealing.

A regulation is much more effective at achieving compliance with the GCA, as amended by the BSCA, than guidance that is both voluntary and distributed by ATF at gun shows or other venues when the agency is present (or found online if people search for it). People recognize that a regulation sets the requirements they must follow and affects all those participating in the topic area; they also know where to look for a regulation. Now that the BSCA has redefined "engaged in the business," there is even more of a need to ensure that unlicensed people who meet the definition of that term understand that they are violating the law if they do not obtain a license. And if the Department does not update its regulations, they would not accurately reflect the statutory text and would thus create confusion.

As a result, the Department did not select the alternative to publish only guidance documents in lieu of this regulation because guidance alone would be insufficient as a means to inform the public in general, rather than solely the currently regulated community. Guidance would not have the same reach and attention as a regulation, and it would not be able to change existing regulatory provisions on the subject of "engaged in the business" or impact intersecting regulatory provisions. The Department considers it necessary to use a regulatory means of putting sellers who continuously or repetitively engage in firearm sales on notice regarding the impacts the statute will have on them, and to clarify the parameters of the new definition. For more detail, please refer to Section VI.A.8 of this preamble.

The Department did not consider the remaining alternatives proposed by commenters, such as creating and including educational training, cracking down on straw purchases, or adopting a buyer permitting system, because they are outside the scope of this rulemaking and the Department's NPRM. ATF will provide training and outreach as it routinely does, but such activities are not included in a regulation.

V. Final Rule

Subsections in Section V

A. Definition of "Dealer"

B. Definition of Engaged in the Business — "Purchase," "Sale," and "Something of value"

C. Definition of "Engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker"

D. Definition of "Engaged in the business" as applied to auctioneers

E. Presumptions that a person is engaged in the business

F. Definition of "Personal collection (or personal collection of firearms, or personal firearms collection)"

G. Definition of "Responsible person"

H. Definition of "Predominantly earn a profit"

I. Disposition of business inventory after termination of license

J. Transfer of firearms between FFLs and Form 4473

K. Effect on prior ATF rulings

L. Severability

A. Definition of "Dealer"

The rule finalizes, with minor edits, the amendments proposed in the NPRM to the definition of "dealer" in 27 CFR part 478, which clarify that this term includes such activities wherever, or through whatever medium, they are conducted. In this regard, the Department replaced the words "may be conducted" with "are conducted" to help ensure that the definition is not interpreted as authorizing a firearms business to operate at unqualified gun shows, events, or other locations, where such activities could not serve as a proper business premises at which a license could be issued under the GCA.

B. Definition of Engaged in the Business —"Purchase," "Sale," and "Something of value"

The rule finalizes the definitions of "Purchase," "Sale," and "Something of value" with minor amendments. First, for consistency across those who deal in firearms, the definitions were moved in the definition of "engaged in the business" to a new section (g), to apply, not only to the definition of "dealer in firearms other than a gunsmith or pawnbroker," but generally to all persons engaged in the business of dealing in firearms. This includes importers and manufacturers who are authorized by 27 CFR 478.41(b) to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured. Second, in the definitions of "purchase" and "sale," the words "an agreed" were inserted before "exchange for something of value" to clarify that the transaction must be intentional. Such transactions include indirect exchanges of something of value. Third, the Department revised the term "sale" to change "providing to" to "disposing of" to be more consistent with the statutory language, and for further clarity, to define the term "resale" as "selling a firearm, including a stolen firearm, after it was previously sold by the original

manufacturer or any other person." Finally, the phrase "legal or illegal" was added at the end of the definition of "something of value" to make clear that the item or service exchanged for a firearm could be one that is unlawful to possess or transfer (e.g., a controlled substance).

C. Definition of "Engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker"

The rule finalizes the definition of "engaged in the business" of wholesale or retail dealing in a new section of the regulation at § 478.13, instead of keeping the definition under the overall definitions section at § 478.11, due to its length. In conjunction with this change, the final rule has also moved the definition of "predominantly earn a profit" to § 478.13 because it is an element of the definition of "engaged in the business as a dealer." As a result of consolidating the two definitions into one integrated section, the rule also eliminated duplication of identical paragraphs on rebuttal evidence, the non-exhaustive nature of the listed rebuttal evidence, and applicability to criminal proceedings, which were previously located in each definition.

D. Definition of Engaged in the Business as Applied to Auctioneers

The rule finalizes the definition of "engaged in the business" of wholesale or retail dealing with minor edits to make clear that estate-type auctioneers may assist in liquidating all firearms as a service on commission without a license, not merely those in a personal collection (as that term is defined in this rule). Additionally, the final rule addresses the concerns of estate-type auctioneers by limiting the caveat for possession of the firearms prior to the auction of the firearms to those that are "for sale on consignment."

E. Presumptions that a Person is Engaged in the Business

The rule finalizes the presumptions that a person is "engaged in the business" of dealing in firearms at wholesale or retail by making the following changes: (1) in the introductory paragraph (a), separating the definition of "engaged in the business" in that paragraph from a new paragraph (b), "fact-specific inquiry," which sets forth the factual analysis courts have historically applied to determine whether a person falls within the definition in (a); including in (b) the example to compare a single firearm transaction, or offer to engage a transaction, in which a person represents to others "a willingness and ability" to purchase more firearms for resale, which may require a license, with "a single isolated firearm transaction without such evidence" that would not require a license; and adding the following at the end of the same paragraph (b): "At all times, the determination of whether a person is engaged in the business of dealing in firearms is based on the totality of the circumstances"; (2) revising the sentence at the beginning of the presumptions to move the phrase "[i]n civil or administrative proceedings" to the beginning of the sentence, and adding "it is shown that" before "the person—"; (3) adding the prefix "re" before "sell" and "sale" in the various presumptions to more closely track the statutory definition of "engaged in the business" in 18 U.S.C. 921(a)(21)(C); (4) adding to the EIB presumption on willingness and ability to purchase and sell more firearms the parenthetical "(*i.e.*, to be a source of additional firearms for resale)" to clarify what it means to represent to potential buyers or otherwise demonstrate a willingness and ability to purchase and resell additional firearms; (5) removing the EIB presumption relating to gross taxable income to address concerns raised by commenters about how it would apply in certain low-income situations; (6) revising the EIB

presumption on certain types of repetitive transactions to add the word "repetitively" before "resells or offers for resale" to more closely track the statutory language in 18 U.S.C. 921(a)(21)(C); (7) revising the same EIB presumption to make it applicable to firearms that cannot lawfully be purchased, received, or possessed under Federal, State, local, and Tribal law, not merely under Federal law (as the citations made it appear to commenters), and to explain that firearms not identified as required under 26 U.S.C. 5842 are among the types of firearms that cannot lawfully be possessed; (8) revising the EIB presumption on repetitively selling firearms in a short period of time to include a time limitation of one year with respect to repetitive resales or offers for resale of firearms that are new or like new, and those that are the same make and model; in addition, revising and limiting the presumption for firearms that were the "same or similar kind" to those firearms that are of the "same make and model, or variants thereof"; (9) revising the EIB presumption on liquidation of business-inventory firearms by a former licensee that were not transferred to a personal collection prior to license termination, to reference the rules pertaining to liquidation of former licensee inventory in §§ 478.57 and 478.78 to ensure that they are read consistently with each other; (10) revising the EIB presumption on liquidation of firearms transferred to a personal collection or otherwise as a personal firearm prior to license termination, to reference the rules pertaining to the sale of such firearms in 18 U.S.C. 923(c) and 27 CFR 478.125a(a) to ensure that they are read consistently with each other; (11) adding explanatory headers for the paragraphs in the regulatory text; (12) clarifying, in a new paragraph, that the list of conduct not supporting a presumption that a person is "engaged in the business" is also evidence that may be used to rebut any presumption should an enforcement proceeding be initiated; and (13)

expanding the list of conduct that does not support a presumption to not only include firearms resold or otherwise transferred as bona fide gifts and those sold occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection, but also those sold "[o]ccasionally to a licensee or to a family member for lawful purposes"; "[t]o liquidate (without restocking) all or part of the person's personal collection"; "[t]o liquidate firearms that are inherited" or "[p]ursuant to a court order; or "[t]o assist in liquidating firearms as an auctioneer when providing auction services on commission at an estate-type auction."

F. Definition of "Personal collection (or personal collection of firearms, or personal firearms collection)"

The rule finalizes the definition of "Personal collection (or personal collection of firearms or personal firearms collection)" with some additional clarifying edits. First, headers were added to each main paragraph for clarity. Second, a parenthetical was added to clarify that "collecting curios or relics" and "collecting unique firearms to exhibit at gun club events" are examples of firearms accumulated "for study, comparison, exhibition," and that "historical re-enactment" and "noncommercial firearms safety instruction" are examples of firearms accumulated "for a hobby." Third, to clarify the nature of the firearms not included in the definition of "personal collection" due to the fact that they were purchased for the purpose of resale with the predominant intent to earn a profit, the following was added to examples in the parenthetical: "primarily for a commercial purpose or financial gain, as distinguished from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, but which the person may also intend to increase in value)." Fourth, to clarify that firearms accumulated primarily

for self-protection are not included in the definition of "personal collection," but can be purchased for personal use, the following was added: "In addition, the term shall not include firearms accumulated primarily for personal protection: *Provided*, that nothing in this section shall be construed as precluding a person from lawfully acquiring a firearm for self-protection or other lawful personal use." Finally, minor edits were made to the definition of personal collection as it pertains to licensees, to explain that licensees may transfer firearms to a personal collection "or otherwise as a personal firearm," and that the separation requirement for personal firearms applies "[w]hen stored or displayed on the business premises," as distinguished from those personal firearms that are being carried by the licensee for self-protection.

G. Definition of "Responsible person"

The rule finalizes, with minor changes, the amendments proposed in the NPRM to the definition of "responsible person" in 27 CFR part 478. The proposed definition was revised to remove the term "business practices," which term was considered confusing and overbroad to some commenters. It was also changed to explain that sole proprietorships and companies are included in the list of businesses that have responsible persons and to indicate that both the individual sole proprietor and their authorized employees are responsible persons. This change ensures that individual sole proprietors (who are always responsible for the management and policies of their firearms businesses), companies, and their authorized employees will be identified as responsible persons when submitting an Application for License, Form 7/7CR, and undergo the required background check.

H. Definition of "Predominantly earn a profit"

The rule moves the definition of "predominantly earn a profit" into a stand-alone section with the definition of "engaged in the business" at § 478.13. The rule also breaks down the definition of "predominantly earn a profit" into subparagraphs for ease of reference and finalizes that definition with minor edits to the last sentence in the first paragraph. Specifically, the final rule adds the word "intended" before "pecuniary gain," consistent with the statutory language. The rule also finalizes the introductory paragraph to the "Presumptions" subsection with minor edits. Specifically, the sentence at the beginning of the paragraph was revised to move the phrase "[i]n civil or administrative proceedings" to the beginning of the sentence; the phrase "from the sale or disposition" of firearms was changed to "the repetitive purchase and resale" of firearms, to more closely track the statutory language; and "it is shown that" was added before "the person." Additionally, the following clarifying edits were made to the set of presumptions in the definition of "predominantly earn a profit": (1) the term "repetitively" was added into various presumptions to better focus them on persons who are reselling firearms with the requisite intent under the statute; (2) in the PEP presumption on marketing, the words "or continuously" were inserted at the beginning to include advertising that is perpetual, and the phrase "on any website" was revised to "through the Internet or other digital means"; (3) the PEP presumption on purchasing or renting space was revised by adding "repetitively or continuously" to the beginning to better demonstrate the requisite intent, and by removing the phrases "or otherwise secures or sets aside" and "or store," and replacing those phrases with "or otherwise exchanges (directly or indirectly) something of value to secure," to focus the presumption on firearms that are displayed for resale by a person who has paid for that service, and to

make clear that the item or service exchanged for a firearm could be either a direct or an indirect form of payment (e.g., payment of cash or an indirect membership or admission fee); (4) the PEP presumption on maintaining records was revised to make clear that "repetitive" firearms purchases for resale are being tracked; (5) the PEP presumption on purchasing or otherwise securing merchant services was limited to those through which a person intends to repetitively accept payments for firearms transactions, to focus on the seller as opposed to the purchaser or end user of firearms who makes or offers to make payments for firearms transactions, and to add the word "repetitive" before "firearms transactions" to further support the intent element of the statute; (6) the PEP presumption on securing business security services was limited to those services intended "to protect firearms assets and firearms transactions," to focus on businesses that conduct transactions involving firearms rather than those that may purchase security services solely to protect or store their business inventory for company use; and (7) the PEP presumption on business insurance policies was removed to address commenter concerns and because information indicated it was not commonly found in ATF cases.

I. Disposition of Business Inventory after Termination of License

Several changes were made to the liquidation provisions on the disposition of business inventory by a former licensee after termination of license, 27 CFR 478.57 and 478.78. Specifically, with respect to business inventory that remains after license termination, the term "personal inventory" was replaced with the term "former licensee inventory" to better explain the business nature of this inventory. A definition of "[f]ormer licensee inventory" was added to 27 CFR 478.11, which includes a sentence to explain that "[s]uch firearms differ from a personal collection and other personal firearms

in that they were purchased repetitively before the license was terminated as part of a licensee's business inventory with the predominant intent to earn a profit." The liquidation provisions at 27 CFR 478.57(c) and 478.78(c) now expressly require that transfers of firearms in a former licensee inventory must be appropriately recorded as dispositions in accordance with 27 CFR 478.122(b) (importers), 478.123(b) (manufacturers), or 478.125(e) (dealers) prior to delivering the records after discontinuing business consistent with 27 CFR 478.127. This will allow former licensee inventory to be traced if later used in crime and is consistent with the existing delivery of records requirement in 18 U.S.C. 923(g)(4) and 27 CFR 478.127. The liquidation provisions also expressly state, in §§ 478.57(b)(2) and 478.78(b)(2), that transferring former licensee inventory to a responsible person of the former licensee within 30 days after license termination does not negate the fact that the firearms were repetitively purchased, and were purchased with the predominant intent to earn a profit. Finally, the liquidation provisions now expressly recognize that a responsible person of a former licensee may occasionally sell a firearm even after the 30-day liquidation period to a licensee without being presumed to be engaged in a firearms business. *See* §§ 478.57(c), 478.78(c).

J. Transfer of Firearms between FFLs and Form 4473

The rule finalizes the provision on the proper procedure for licensee transfers of firearms to other licensees, 27 CFR 478.124(a), with a minor edit to add the phrase "or otherwise as a personal firearm" after "personal collection." The rule makes it clear that Form 4473 may not be used by sole proprietors when they transfer to themselves other

personal firearms that are not in a "personal collection" as defined in this rule. § 478.124(a).

K. Effect on Prior ATF Rulings

ATF publishes formal rulings and procedures to promote uniform understanding and application of the laws and regulations it administers, and to provide uniform methods for performing operations in compliance with the requirements of the law and regulations. ATF Rulings represent ATF's guidance as to the application of the law and regulations to the entire state of facts involved, and apply retroactively unless otherwise indicated. The following ruling is hereby superseded: ATF Ruling 96-2, *Engaging in the Business of Dealing in Firearms (Auctioneers)* (Sept. 1996), https://www.atf.gov/file/55456/download.

L. Severability

Based on the comments received in opposition to this rule, there is a reasonable possibility that this rule will be subject to litigation challenges. The Department has determined that this rule implements and is fully consistent with governing law. However, in the event any provision of this rule, an amendment or revision made by this rule, or the application of such provision or amendment or revision to any person or circumstance, is held to be invalid or unenforceable by its terms, the remainder of this rule, the amendments or revisions made by this rule, and the application of the provisions of such rule to any person or circumstance shall not be affected and shall be construed so as to give them the maximum effect permitted by law. The Supreme Court has explained that where specific provisions of a rule are unlawful, severance is preferred when doing so "will not impair the function of the [rule] as a whole, and there is no indication that the

regulation would not have been passed but for its inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988); *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only challenged portions of a rule). It is the intent of the Department that each and every provision of this regulation be severable from each other provision to the maximum extent allowed by law.

For example, if a court invalidates a particular subpart of § 478.78 of the final rule concerning the liquidation or transfer procedure of former licensees, that invalidation would have no effect on other subparts of § 478.78 or the rest of the final rule and its provisions, which should remain in effect. The Department's intent that sections and provisions of the final rule can function independently similarly applies to the other portions of the rule.

VI. Statutory and Executive Order Review

Subsections in Section VI

A. Executive Orders 12866, 13563, and 14094

B. Executive Order 13132 (Federalism)

C. Executive Order 12988 (Civil Justice Reform)

D. Regulatory Flexibility Act

E. Small Business Regulatory Enforcement Fairness Act of 1996

F. Congressional Review Act

G. Unfunded Mandates Reform Act of 1995

H. Paperwork Reduction Act of 1995

A. Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094 (Modernizing Regulatory Review) amends section 3(f) of Executive Order 12866.

OMB has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866, as amended by Executive Order 14094, though it is not a significant action under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB. While portions of this rule merely incorporate the BSCA's statutory definitions into ATF's regulations, this rule will likely result in additional unlicensed persons becoming FFLs to the extent that currently unlicensed persons intend to regularly purchase and resell firearms to predominantly earn a profit.

1. Need for Federal Regulation

This final rule implements the BSCA by incorporating statutory definitions into ATF's regulations and clarifying the criteria for determining when a person is "engaged in the business" requiring a license to deal in firearms. The rulemaking is necessary to implement a new statutory provision that alters the definition of being engaged in the business as a wholesale or retail firearms dealer; to clarify prior regulatory provisions that relate to that topic; and to establish by regulation practices and policies on that issue. In addition to establishing specific, easy-to-follow standards regarding when buying and

selling firearms presumptively crosses the threshold into being "engaged in the business," the rule also recognizes that individuals are allowed by law to occasionally buy and sell firearms for the enhancement of a personal collection or a legitimate hobby without the need to obtain a license. As discussed in detail under this rule's Background discussion (Section II.D of this preamble), in the Benefits section of this economic analysis (Section VI.A.7 of this preamble), throughout Section III discussing each revision as it was originally proposed, in the Department's responses to comments under Section IV of this preamble, and in other portions of this rule, the changes in this rule—like the statutory provisions they implement—were designed to address public safety needs. Specifically, this rulemaking implements the statutory changes enacted by Congress in the BSCA, which Congress passed in the interest of public safety after at least one mass shooting in which the perpetrator purchased a firearm from an unlicensed dealer. Congress was also concerned with prohibited persons receiving firearms without background checks and significant increases in straw purchasing and firearms trafficking, all of which increase public risk of gun violence and occur more frequently when persons dealing in firearms are unlicensed. Unlicensed dealers also hinder law enforcement efforts to track and curb these prohibited and endangering activities. Congress deemed those public safety needs compelling enough, and the private market response insufficient, such that it was necessary to pass a law to address them. This rule is necessary to further address those same public safety needs and implement Congress's statutory response. Executive Order 12866[254] permits agencies to promulgate rules that are necessary to interpret the law or are necessary due to compelling need, which includes when private markets are not

[254] *See also* OMB Circular A-4 at 5, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

protecting or improving public health and safety. This rule is necessary on both grounds. The Department considered other alternatives to rulemaking and determined they would be insufficient to meet its articulated public safety needs or to fully interpret and implement the law.

2. Population

This rule implements a statutory requirement that affects persons who repetitively purchase and resell firearms, including by bartering, and are required to be, but are not currently, licensed. As described in the preamble of this final rule, these may be persons who purchase, sell, or transfer firearms from places other than traditional brick-and-mortar stores, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order, or over the Internet (e.g., an online broker, online auction); through the use of other electronic means (e.g., text messaging service or social media raffle); or at any other domestic or international public or private marketplace or premises. A person may be required to have a license to deal in firearms regardless of where, or the medium through which, they purchase or sell (or barter) firearms, including locations other than a traditional brick-and-mortar store.

Furthermore, because those willfully engaged in the business of dealing in firearms without a license are violating Federal law, these individuals often take steps to avoid detection by law enforcement, making it additionally difficult for the Department to precisely estimate the population. Therefore, for purposes of this analysis, the Department used information gleaned from Armslist, an online broker website that facilitates the sales or bartering of firearms, as a means of estimating a population of

unlicensed persons selling firearms using online resources.[255] The Department focused its efforts on estimating an affected population using Armslist since that website is considered to be the largest source for unlicensed persons to sell firearms on the Internet.[256]

Out of a total listing of 30,806 entries in the "private party" category (unlicensed users) on Armslist, the Department viewed a random sample[257] of 379 listings, and found that a given seller on Armslist had an average of three listings per seller.[258] Based on approximately 30,806 "private party" (unlicensed) sales listings on Armslist, the Department estimates that there are approximately 12,270 unlicensed persons who sell on that website alone, selling an average of approximately three firearms per user.[259] The Department estimates that Armslist may hold approximately 30 percent of the market share among websites that unlicensed sellers may frequent. This means the 12,270 estimated unlicensed persons on Armslist would be about 30 percent of all such online sellers, and that the estimated number of unlicensed sellers on all such websites would therefore be approximately 40,900 nationwide. The estimate of Armslist's market share

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[255] *See* www.armslist.com.

[256] Colin Lecher & Sean Campbell, *The Craigslist of Guns: Inside Armslist, the online 'gun show that never ends,'* The Verge (Jan. 16, 2020). https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation ("Over the years, [Armslist] has become a major destination for firearm buyers and sellers."); Tasneem Raja, *Semi-Automatic Weapons Without a Background Check Can Be Just A Click Away,* National Public Radio (June 17, 2016), https://www.npr.org/sections/alltechconsidered/2016/06/17/482483537/semi-automatic-weapons-without-*a-background-check-can-be-just-a-click-away* ("Armslist isn't the only site of its kind, though it is considered to be the biggest and most popular.").

[257] In accordance with standard practice, to estimate the sample size, the Department assumed the largest standard deviation (0.5 or 50 percent) to obtain the most conservative (largest) sample size.

[258] Using an online sample size calculator, the Department determined that a statistical sample for a universe of 30,806 listings would require a sample size of 379, using a 95 percent confidence level and a confidence interval of five. A random sample of 379 was gathered between March 1 and 2, 2023. *Sample Size Calculator*, Calculator.net (last accessed April 8, 2024), https://www.calculator.net/sample-size-calculator.html.

[259] 12,270 unlicensed individuals = 30,806 "private party" unlicensed listings on Armslist / 2.51 average listings per user.

is based on ATF Firearms Industry Programs Branch ("FIPB") expert opinion, news reports,[260] and public web traffic lists.[261] This estimate of the online market share proportion held by Armslist has been revised downward from the initial estimate of 50 percent used in the NPRM, based on public comment and additional data sources that supported attributing a larger share of the unlicensed firearm market to GunBroker than had originally been estimated. GunBroker had been originally included with other smaller platforms within the remaining (non-Armslist) 50 percent of the online market. However, due to the new estimates of GunBroker's proportion of the online market share, the Department has increased its estimated total market share for the non-Armslist platforms (inclusive of GunBroker) to 70 percent of the online marketplace.

To better estimate both online and offline sales, the Department assumes, based on best professional judgment of FIPB SMEs[262] and with limited available information, that the national online marketplace estimate above might represent 40 percent of the total national firearms market, which would also include in-person, local, or other offline transactions like flea markets, State-wide exchanges, or consignments to local FFLs within each of the 50 States. This estimate of the online marketplace has been revised upwards from the 25 percent estimate that was published in the NPRM to 40 percent in the final rule, based on more in-depth SME questioning in the course of reviewing each aspect of the models due to public comments about other parts of the models. Given the lack of data on the question of online avenues for unlicensed firearm sales, and the illicit

[260] *See* footnote 256, *supra*.
[261] Such lists are available at https://www.similarweb.com/website/armslist.com/#overview.
[262] Experts were identified within ATF and interviewed in a group setting to reach a consensus. These conclusions were validated based on best professional estimates by additional ATF personnel, who are familiar with the field and with the industry, until a reasonable estimate was accepted by all of them. *See* OMB Circular A-4 at 41.

nature of firearms trafficking, the limited empirical inputs that exist must be contextualized using qualitative and subjective assessments by industry experts. ATF also solicited additional opinions from the public and incorporated those that were found to be credible into the Department's population model.

While the above analysis would bring the total estimated market of unlicensed sellers to approximately 102,250 persons,[263] this figure must be reduced by the estimated subset of this population of persons who occasionally sell their firearms without needing to obtain a license (e.g., as part of their hobby or enhancement of their personal collection). The Department assumes this subset of unlicensed sellers constitutes the majority of the unlicensed seller market, based on estimates from FIPB SMEs. Based on limited available information, the best assessment from FIPB SMEs is that, based on their long-time experience with the firearms industry, at least 25 percent of the estimated total number of unlicensed sellers may be considered "engaged in the business" under this rule and would subsequently need to become an FFL in order to continue repetitively selling firearms. The actual number may be higher or lower, and the Department does not have data to support a higher number, but FIPB SMEs do expect their estimate to be conservative and closer to the lower end of a possible range. Using the information gleaned from Armslist and multiplying it according to these estimated percentages, the Department estimates that 25,563 unlicensed persons may be classified as engaged in the business of firearms dealing and thus affected by this rule, an upward revision from the 24,540 estimate included in the NPRM.

[263] The Department's online estimate of 40,900 individuals is equal to at least 40 percent of the national firearms market. Thus, 100 percent of that estimated firearms market would be 40,900/.4 = 102,250.

Finally, the Department has introduced an additional assumption into its revised model: the proportion of unlicensed persons who would be considered "engaged in the business" under this rule but who are unwilling or unable to become FFLs and will instead choose to cease their dealing in firearms altogether. These persons may choose this option due to the new requirements, other disincentives such as costs or discomfort with inspections, prohibitions or restrictions in their respective State or local laws, ordinances or HOA rules, or other reasons. Based on the public's responses to previously published firearms rules and regulations, Department SMEs estimate that this group constitutes approximately 10 percent of all currently unlicensed sellers who would be required to obtain a license under this rule. Removing this segment from the total population of 25,563 persons affected by this rule results in an estimated 23,006 unlicensed persons engaged in the business of firearms dealing who would, under the rule, apply for licenses in order to continue repetitively selling firearms.

Because there is no definitive data on this topic, the actual number of unlicensed sellers may be higher. Therefore, the Department also calculated a second possible estimate using information published by RSF based on a survey it conducted regarding a similar, but differently sourced, estimated population of private sellers of firearms.[264] This survey showed that 22 percent of the U.S. adult population owned at least one firearm (56.84 million adults).[265] In the NPRM, the Department used this 22 percent figure, applied to the U.S. Census as a basis for the population, to calculate this second population estimate of individuals owning firearms. However, one public commenter

[264] Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). *The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey*. The Russell Sage Foundation Journal of the Social Sciences *3*(5), 38-57 (pp. 39 and 51). https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02.
[265] *Id*. at 39.

suggested the Department use a more recent survey (Gallup Survey, published in 2020), which showed that the number of U.S. adults owning firearms was 32 percent.[266] The Department concurred and has updated the estimated population of individuals owning a firearm from 22 to 32 percent (82.7 million individuals) in this second model.[267] However, the Department continues to use the RSF survey data for the remaining estimates, such as number of transactions, because the Department still considers that survey to provide the best available data, and no other sources were provided by public commenters.

The RSF survey found that 5 percent of the total population transferred firearms in some manner over the course of five years, or an annualized total of 1 percent of owners (826,699 individuals).[268] Of the owners that transferred a firearm, 71 percent did so by selling (586,956 individuals). Of those that sold a firearm, 51 percent (299,348 individuals) sold through various mediums (e.g., online, pawnshop, gun shop) other than through or to a family member or friend (which likely would not be affected by this rule).[269] Of the owners that transferred a firearm, an additional 10 percent (82,670) did

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[266] *What percentage of Americans own guns?*, Gallup: The Short Answer (Nov. 13, 2020), https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx.

[267] 82,699,849.92 (rounded to 82,699,950, or 82.7 million) owners of firearms = 258,343,281individuals living in the United States multiplied by 32 percent.

[268] 826,699 individuals transferring a firearm = 82,699,850 individuals owning a firearm multiplied by 1 percent.

[269] The RSF survey did not distinguish individuals who sold to family or friends on a recurring basis from those who made an occasional sale; nor did it distinguish between those who did so with intent to earn a profit from those who did not. As noted earlier in the preamble, a person who makes only occasional firearms transfers, such as gifts, to immediate family (without the intent to earn a profit or circumvent requirements placed on licensees), generally does not qualify as a dealer engaged in the business. Although it is possible that some portion of the RSF set of family and friend transferors might qualify as dealers if they engage in actions such as recurring transfers, transfers to others in addition to immediate family, or transfers with intent to profit, the survey did not provide enough information for the Department to make that determination. Therefore, the Department erred on the side of caution by assuming, for the purpose of this analysis, that the persons identified on the RSF survey as engaging in transfers to family and friends would likely not be affected by this rule, since, in general, such transfers are less likely to be recurring or for profit.

so by trading or bartering rather than selling. Thus, taking the 299,348 that sold and the 82,670 that traded or bartered according to these survey results, the total number of unlicensed persons that might transfer a firearm through a manner that could be affected by this rule is 382,018. Of the 382,018 unlicensed persons selling, trading, or bartering firearms under this RSF-derived estimate, the Department continues to estimate (as it did in the SME-derived estimate described above) that 25 percent (or 95,505 unlicensed individuals) may be engaged in the business of firearms dealing with an intent to profit and thus potentially affected by this rule. Consistent with the modification introduced in the SME-derived model, the Department also reduced this estimate by 10 percent to account for the proportion of unlicensed persons unwilling or unable to become FFLs as required by this rule. This brings the estimated population of unlicensed persons "engaged in the business" who would obtain licenses in order to continue selling under this rule to 85,954 using this RSF/Gallup-derived model.

In sum, based on the limited available sources of information, the Department estimates that either 23,006 or 85,954 could represent the number of currently unlicensed persons who might be engaged in the business as defined in this rule, and who would obtain a license to continue engaging in the business of dealing in firearms in compliance with the rule. The SME-derived estimate of 23,006 is based on real historical data and experience with relevant sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. Because of this, the Department considers the SME-derived estimate to be a more reliable data source than the RSF/Gallup estimate and uses it as the primary estimate. Nevertheless, for purposes

of this final analysis, the Department provides the estimated costs under both population estimates.

The first cost that may apply to both estimated populations is the cost of initial familiarization with the final rule. Given the widespread attention, awareness, and publicly available discourse on these and other firearm regulations, and the nature of the firearms community, existing firearms owners would not need to spend a greater amount of time researching regulations and becoming updated on these topics than they already do as a regular course of activity. The Department therefore assumed familiarization costs would be minimal for existing firearm owners and particularly for the affected population of sellers. Nevertheless, because of widespread attention and ATF outreach, among other efforts, the Department has costed a familiarization burden of approximately 12 minutes on all unlicensed sellers to account for the time they might spend gleaning guidance or accessing online blogs to determine whether the rule applies to them. Based on HHS's methodology for leisure time, the Department attributes a rounded value of $23 per hour for the estimated 12 minutes spent gaining familiarization with the rule, which amounts to an individual burden of $5 per unlicensed seller. Under the SME model, this cost would fall on all 102,250 sellers, while under the RSF model it would fall on all 382,018 sellers. Familiarization costs would amount to $470,350 in the first year of implementation under the primary SME model, and $1,757,283 in the first year under the alternative RSF model.

3. Costs for Unlicensed Persons Becoming FFLs

As stated earlier, consistent with the statutory changes in the BSCA, this rule implements a new statutory provision that requires individuals to become licensed dealers

if they devote time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. Costs to become an FFL include an initial application on Form 7, along with fingerprints, photographs, and a qualification inspection. This application requires fingerprints and photographs from the person applying and, in the case of a corporation, partnership, or association, from any other individual who is a responsible person of that business entity.

For purposes of this analysis, the Department assumes that most, if not all, unlicensed persons may be operating as sole proprietors because this new requirement would likely affect persons who have other sources of income and currently view dealing in firearms as a supplemental source of income not subject to a licensing requirement. Besides the initial cost of becoming an FFL, there are recurring costs to maintaining a license. These costs include renewing the license on a Federal Firearms License Renewal Application, ATF Form 8 (5310.11) ("Form 8") every three years, maintaining acquisition and disposition ("A&D") records, maintaining ATF Forms 4473, and undergoing periodic compliance inspections.

This rule, which further implements the statutory changes in the BSCA, would affect certain currently unlicensed persons who purchase and resell firearms with the intent to predominantly earn a profit (as defined), not those who are already licensed. Because affected unlicensed persons will need a license to continue to purchase and resell firearms, the Department estimates that the opportunity costs of acquiring a license would be based on their free time or "leisure time." For this final rule, the Department has updated its estimate of the cost for leisure time below, relying on a new HHS

methodology for calculating that cost, rather than the DOT methodology it used in the NPRM.[270] The Department considers the HHS methodology to more accurately measure the value of "leisure time," for the purposes of this rule, than the DOT methodology used in the NPRM. Accordingly, consistent with HHS's methodology, the Department used the BLS median weekly income for full-time employees as the base for calculating the pre-tax hourly wage. The Department then used the proportion between Census publications on median household income and median household income after taxes to estimate the percent of State and Federal taxes (14 percent). This percent was deducted from the hourly pre-tax wage to derive the post-tax hourly wage, which becomes the leisure wage under the HHS methodology. Table 1 outlines the leisure wage.

Table 1. Leisure Wage Rate for Individuals

Inputs for Leisure Wage Rate	Numerical Inputs	Source
Median Weekly Wage	$1,085	News Release, BLS, *Usual Weekly Earnings for Wage and Salary Workers – Fourth Quarter 2022* (Jan. 19, 2023), https://www.bls.gov/news.release/archives/wkyeng_01192023.pdf
Median Hourly Wage	$27	Median Weekly Wage / 40 hours per week
Real Median Household Income Pre-Tax	$74,580	U.S. Census Bureau, *Median Household Income After Taxes Fell 8.8% in 2022* (Sept. 12, 2023), https://www.census.gov/library/stories/2023/09/median-household-income.html
Real Median Household Income Post-Tax	$64,240	U.S. Census Bureau, *Median Household Income After Taxes Fell 8.8% in 2022* (Sept. 12, 2023), https://www.census.gov/library/stories

[270] U.S. Dep't of Health and Human Servs., *Valuing Time in the U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices* 40–41 (June 2017), https://aspe.hhs.gov/sites/default/files/private/pdf/257746/VOT.pdf.

Inputs for Leisure Wage Rate	Numerical Inputs	Source
		/2023/09/median-household-income.html
State and Federal Taxation	14 percent	$64,240 post-tax median income / $74,580 pre-tax median income = 86 percent; 14 percent State and Federal Taxes = 100 percent - 86 percent
Leisure Wage	$23.36	$23.36 Post-tax median wage = $27 Median hourly wage * (100 percent - 14 percent State and Federal Taxes)
Rounded Leisure Wage Rate	$23.00	

Based in part on HHS's methodology for leisure time, the Department attributes a rounded value of $23 per hour for time spent buying and reselling (including bartering) firearms on a repetitive basis. The same hourly cost applies to persons who will become licensed as a firearms dealer who would not have become licensed without the clarifications provided by this rule. This could include persons who begin selling firearms after the final rule's effective date and understand from the rule that they qualify as firearms dealers (as defined by the statute and regulations), or persons who were previously selling without a license and now realize they must acquire one to continue selling because their firearms transactions qualify them as dealers.

In addition to the cost of time, there are other costs associated with applying to become an FFL. To become an FFL, persons need to apply on a Form 7 and submit payment to ATF for fees associated with the Form 7 application. Furthermore, these unlicensed persons will need to obtain documentation, including fingerprints and photographs, undergo a background investigation, and submit all paperwork via mail. While not a cost attributed towards their first-year application to become an FFL, an FFL

will need to reapply to renew their license every three years on a Form 8 renewal application to ensure that that they can continue to sell firearms thereafter. Table 2 outlines the costs to become an FFL and the costs to maintain a license.

Table 2. Cost Inputs to Become an FFL and Maintain a License

Cost Input	Cost	Source
Form 7 Application Cost	$200	Application for Federal Firearms License, ATF (Oct. 2020), https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download
Fingerprint Cards	$0	Distribution Center Order Form, ATF (Jan. 25, 2024), https://www.atf.gov/distribution-center-order-form
Fingerprint Cards (Commercial)	$24	Various
Average Cost for Fingerprint Cards	$12	See Above
Postage	$1	Mailing and Shipping Prices, USPS, https://www.usps.com/business/prices.htm (last visited Mar. 30, 2024)
Photograph	$17	Passport Photos, CVS, https://www.cvs.com/photo/passport-photos (last visited April 5, 2024)
	$17	Passport Photos, Walgreens, https://photo.walgreens.com/store/passport-photos (last visited April 5, 2024)
FFL Renewal Cost (Form 8)	$90	FFLC

For purposes of this rule, the Department assumes that unlicensed persons applying for a license as a result of this rule are likely to file for a Type 01 Dealer license.[271] This license costs $200 and requires the submission of a Form 7 application; every three years thereafter, the licensee must pay $90 to renew the license using Form 8. Applicants also need to obtain and submit fingerprints in paper format. The unlicensed

[271] A Type 01 Dealer license is used to purchase and resell firearms at wholesale or retail.

person can obtain fingerprint cards for free from the Department and travel to select law enforcement offices that perform fingerprinting services (usually also for free). Or the unlicensed person may pay a fee to various market entities that offer fingerprinting services in paper format. The average cost found for market services for fingerprinting on paper cards is $24 (rounded).

Because it is not clear whether an unlicensed person would choose to obtain fingerprint cards from the Department and go to a local law enforcement office that provides fingerprinting services or use commercial services to obtain cards and fingerprinting services, an average cost of $12 was used. In addition to paper fingerprint cards, the unlicensed person must also submit a photograph appropriate for obtaining a passport. The average cost for a passport photo is $17 (rounded). Once they complete the application and gather the documentation, unlicensed persons must submit the Form 7 package by mail. The Department rounds the first-class stamp rate of $0.63 to $1 for calculating the estimated mailing cost.

In addition to the direct costs associated with compiling documentation for a Form 7 application, the Department estimates the time burdens related to obtaining and maintaining a Federal firearms license. Table 3 outlines the hourly burdens to apply, obtain, and maintain a license.

Table 3. Hourly Burdens to Apply, Obtain, and Maintain a License

Activity Type	Hourly Burden	Source
Form 7 Application	1	Application for Federal Firearms License (atf.gov)
Form 8 Application	0.5	OMB 1140-0019 Justification
Time to Travel to and obtain Fingerprints	1	N/A

Activity Type	Hourly Burden	Source
Time to Travel to and obtain Photograph	0.5	N/A
A&D Records	0.05	OMB 1140-0032 Justification
Form 4473	0.5	OMB 1140-0020
Qualification Inspection Time	15	Department internal case management system
Compliance Inspection Time	34	Department internal case management system

As stated above, hourly burdens include one hour to complete a Form 7 license application and the time spent to obtain the required documentation. For purposes of this analysis, the Department assumes that vendors that offer passport photograph services are more readily available than places that provide fingerprinting services; therefore, the Department estimates that it may take 30 minutes (0.5 hours) to travel to a vendor and obtain a passport photograph, and up to one hour to travel to and obtain fingerprinting services. Other time burdens may include 0.05 hours (three minutes) to enter and maintain A&D records for each firearm transaction (0.3 hours for 6 transactions); 0.5 hours for maintaining a Form 4473 for each firearm sale (1.5 hours for 3 firearms); and 15 to 34 hours for an inspection (qualification or compliance, respectively).[272]

The Department then multiplied each of these hourly burdens by the $23 hourly leisure wage rate to account for the value of time spent applying for and obtaining a license using a Form 7 (including any other actions related to obtaining a license), then added the cost per item to determine a cost per action taken. Table 4 outlines the first-year costs to apply for an FFL.

[272] These inspection times are an average of all currently regulated FFLs, including small and large dealers and manufacturers, and are not necessarily representative of the time involved in inspecting small dealers.

Table 4. First-Year Costs to Obtain a Type 01 FFL

Cost Item	Hourly Burden	Hourly Wage Rate	Hourly Cost per Activity	Cost Item	Rounded Cost for Each Activity
Form 7	1	$23	$23	$200	$223
Fingerprints	1	$23	$23	$12	$35
Passport Photo	0.5	$23	$12	$17	$29
Postage	N/A	$23	N/A	$1	$1
Form 4473	1.5	$23	$35		$35
A&D Records	0.3	$23	$7		$7
Qualification Inspection	15	$23	$345	$0	$345
First Year Cost					$675

Overall, the Department estimates that it would cost an unlicensed person $675 in terms of time spent and fees paid to apply under a Form 7 to become a Type 01 FFL. The Department considers the $675 to be an unlicensed person's initial cost. In addition to their initial cost, the newly created FFL would need to maintain a Form 4473 and A&D records (two entries per firearm: one entry to purchase and one entry to sell) for every firearms transaction, undergo periodic compliance inspections, and renew their license every three years (ATF Form 8 application). Table 5 outlines the cost per recurring activity to maintain an FFL.

Table 5. Recurring Costs to Maintain an FFL

Cost Item	Number of Entries or Applications	Hourly Burden	Hourly Wage Rate	Hourly Cost	Cost Item	Rounded Cost for Each Activity
Form 8 Renewal Cost	1	0.5	$23	$12	$90	$102
Form 4473	3	0.5	$23	$35		$35
A&D Records	6	0.05	$23	$7		$7

Cost Item	Number of Entries or Applications	Hourly Burden	Hourly Wage Rate	Hourly Cost	Cost Item	Rounded Cost for Each Activity
Inspection Time	1	34	$23	$782		$782
Recurring Costs						Varies by Year

While renewing a license under a Form 8 application occurs every three years, there are additional costs associated with Form 4473 and A&D records that may occur more often. There are also costs from compliance inspections that may occur periodically. The Department notes that an FFL's actual number of firearms sales may range from zero sales to more than three per year. Persons engaged in the business of dealing in firearms can sell anywhere from a few firearms to hundreds per year, depending on the size of their operation and other factors. Information on these factors or on the number of sellers who might be at each level is not available. However, the average number of listings per seller on Armslist was three. So, for purposes of this economic analysis only, the Department uses three firearms (six A&D entries) per year to illustrate the potential costs that a person may incur as a result of this rule. Although a person might not resell a given firearm in the same year they purchase it, for the purposes of these estimates the Department includes both ends of the firearm transaction because the person could buy and sell the same firearm, or buy one and sell a different one in a given year.

As for compliance inspections, based on information gathered from ATF's Office of Field Operations, the frequency of such inspections varies depending on the size of the area of operations and the number of FFLs per area of operations. Overall, the

Department estimates that it inspects approximately 8 percent of all existing FFLs in any given year. In the chart above, ATF has indicated the cost of an inspection, which would normally not occur more than once in a given year per FFL. ATF performs compliance inspections annually, so while every single FFL does not necessarily undergo a compliance inspection every year, this analysis includes an annual cost for inspections to account for a subset of the total number of affected FFLs that may be inspected in any given year (8 percent). The Department estimates that it would cost $782 for the time an individual will spend on a compliance inspection in a given subsequent year. Therefore, this individual would incur annually recurring costs that could range from a low of $42 a year to complete Forms 4473 and maintain A&D records, to a high of $926 to include that $42,Form 8 renewal costs ($102), and compliance inspection time ($782).[273]

In addition to the cost burdens of becoming licensed at the Federal level, persons who are currently engaged in the business as a dealer without a license under the Federal definition may reside in a State that either defines a dealer at the State level by linking it to the Federal statutory definition, or that requires any Federal dealer licensee to also become licensed as a dealer with the State. While this rule does not impose costs on States and does not directly impact whether persons must be licensed under State requirements, in the case where States have tied their dealer licensing requirements to Federal statutory licensing requirements, this rule indirectly causes new Federal licensees in those States to also incur State dealer licensing costs because they are incurred due to

[273] The Department notes that the high $926 estimate may be higher than actual costs because it assumes that an FFL would simultaneously renew their license (which occurs every three years) in the same year that they perform a compliance inspection, which typically occurs only periodically.

BSCA's amendments to the GCA. The Department accounts for such costs for that segment of the affected population in this final rule.

The Department found that State-level licensing linked to or contingent on Federal firearms licensing was required by State and local laws in ten states and the District of Columbia (DC).[274] Five of those States and DC required licensing for dealing in any type of firearms, and the other five States required licensing only for dealing in handguns. For the purposes of this analysis, the Department grouped all such States together as imposing additional licensing costs, so that all 11 jurisdictions were included in the cost analysis where data was available. The respective populations of each of these jurisdictions as a percentage of the total U.S. population were aggregated to a total of 29.08 percent. This total was applied to the populations estimated to be EIB under both the primary SME model and the alternative RSF model to estimate how many sellers affected by this rule at the Federal level would incur the additional State licensure costs as well. The respective State populations were also used as weights to their respective licensure costs, which ranged from 50 cents to $300 a year, in order to determine a weighted average cost per seller, which was $73.37 per year, rounded to $73.00 for calculations. The Department estimated a processing time of one hour of leisure time, since the application forms ranged from one to five pages, while maintaining the same

[274] Giffords Law Center surveyed all 50 States and the District of Columbia to determine which States have laws regulating firearms dealers. They determined that 26 States and DC have such laws. Of those with laws regulating dealers, Giffords Law Center found that 16 States and DC require persons dealing in firearms to obtain a State dealers license. *See* Giffords Law Center to Prevent Gun Violence, *Gun Dealers*, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/gun-dealers/ (last accessed Mar. 30, 2024). The Department researched requirements it could access online for those 16 States and DC and determined that 10 of those 16 States, and DC, either link their definition of a dealer at the State level to the Federal definition of dealer or require a person selling firearms with a Federal firearms license for dealers to also obtain a State dealers license. The Department used the information on those 10 States and DC to calculate the costs in this section.

dollar postage cost as for FFLs. Both photograph and fingerprint costs were assumed to be accounted for when securing both for FFL applications, as they are frequently secured in pairs. These costs are outlined in Table 6.

Table 6. State dealer licensing costs flowing from this rule

State	12-Year Cost[275]	Annualized 12 year	Percent of US Population	Weighted Average: 12–Year annualized
Alabama	$ 6.00	$0.50	1.499	$0.75
California	$1,380.00	$115.00	11.800	$1,357.00
Connecticut	$400.00	$33.33	1.076	$35.87
Delaware	$1,370.00	$114.17	0.295	$33.68
District of Columbia	$3,600.00	$300.00	0.206	$61.80
Illinois	$750.00	$62.50	3.824	$239.00
New Hampshire	$1,200.00	$100.00	0.411	$41.10
Pennsylvania	$120.00	$10.00	3.881	$38.81
Washington	$1,500.00	$125.00	2.300	$287.50
Indiana	$120.00	$10.00	2.025	$20.25
Wisconsin	$120.00	$10.00	1.759	$17.59
Total		**$880.50**	**29.08**	**$2,133.35**
Average				**$73.37**

The $73.37 average State costs, rounded to $73, were combined with the hour burden and postage cost, resulting in a total per-seller cost of $97. This total per-seller cost was applied to 29.08 percent of the EIB population, resulting in an estimated 6,689 sellers under the SME-derived model and 24,992 sellers under the RSF-derived model. This adds a total of $648,862 and $2,424,237 in annual costs for State dealer licenses, respectively.

[275] Several States had 3- or 6-year renewal windows/validity periods rather than annual licensing costs. Using a 10-year horizon underestimates the cost burden in those cases, particularly for the States that had a 6-year validity window. The Department therefore calculated the total for 12 years for each State before annualizing them to find the weighted average.

4. Costs for FFLs after Termination of License

This rule is also designed to enhance compliance by former FFLs who no longer hold their licenses due to license revocation, denial of license renewal, license expiration, or surrender of license but nonetheless engage in the business of dealing in firearms. Under existing standards, such persons sometimes transfer their inventory to their personal collections instead of selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption. This rule clarifies what dispositions of former licensee inventory former FFLs may make after their license is terminated. The former licensee may transfer their business inventory within 30 days, or occasionally thereafter, to another licensee if they meet the requirements set out in the new provisions under 27 CFR 478.57 or 478.78. Another possibility is that the licensee may transfer their business inventory within 30 days to themselves in a personal capacity—called a "former licensee inventory" in the final rule. After that time, the firearms may be sold only occasionally to a licensee or the former dealer risks being presumed to be "engaged in the business" of dealing without a license. In that case, former FFLs who sell such firearms would potentially be in violation of the statutory prohibitions (18 U.S.C. 922(a)(1)(A) and 923(a), (c)) on unlicensed dealers.

The various means by which a license can be terminated—revocation of a license, denial of license renewal, license expiration, or surrender of license—present two categories of affected populations. Group 1, comprising individuals who have their license revoked or are denied license renewals, could be described as former FFLs who have failed to comply with existing regulations and requirements to a degree that resulted in the revocation or denial of their licenses. This rule is likely to have a qualitative

impact on this group because a revocation or denial may not provide ample opportunity for an orderly and planned liquidation or transfer of inventory before losing the license, which may therefore be disruptive. Based on data from the FFLC, such FFL license revocations and non-renewals are rare, with an annual average of 76 licenses revoked or denied renewal over the past five years (with a range between 14 and 180),[276] or a de minimis percentage of 0.093 percent of all active FFLs.[277] Furthermore, the economic impact of transferring inventory to another FFL instead of the former FFL holder retaining the inventory is unclear, as the underlying market value of the inventory is unchanged by this rule's requirements. Additional factors surrounding the potential cost of no longer being able to transfer one's business inventory after the first 30 days post-license termination are also unknown and presumed to be similarly *de minimis*. Therefore, the Department believes there are no quantitative impacts associated with this population. Although ATF requested public comments on the potential impacts on former FFLs with revoked licenses, ATF did not receive any data from which to assess such potential costs.

Group 2, comprising individuals who surrender their license or let it expire, captures those who no longer have a license for discretionary or lawful reasons. This

[276] Data on FFL revocations and denials of renewal has been updated from the NPRM to cover 2018 through 2023.

[277] The Department did not reduce the estimated number of persons affected by this EIB rule to account for this reduction of FFLs that may have their license revoked, denied, expired, or surrendered because historically, the number of FFLs has been stable over time. This means that the increase and decrease of FFLs have been relatively equal to each other. Because the Department is not calculating an increase of population over time, the Department did not calculate a decrease of population over time. Additionally, for the existing number of FFLs, the number of revoked/denied renewals annually is 0.093 percent of all active FFLs. Therefore, applying this percentage to the estimated EIB population above (23,006) will affect a very small number (21) of the estimated EIB FFL population. For both of these reasons, the Department believes that any change in cost would be *de minimis* and would overestimate a decrease in population where the population has been held as constant in this analysis.

group also comprises former FFLs that choose to close or to sell their business to another party. They are similarly excluded from expected impacts attributable to this rule: because the closure is planned, it is likely that the FFL will include reasonable considerations for orderly, lawful liquidation or inventory transfer as part of closing or selling their enterprise. Such considerations are also likely to occur ahead of, rather than subsequent to, the expiration or surrender of their license. As a result, the Department assumes that the options that exist under current standards—transferring business inventory to the licensee's personal collection or selling business inventory to another FFL—would similarly be freely available to Group 2 FFLs under this rule. As a result, we are excluding both groups from the affected population.

5. Government Costs

In addition to the private costs to unlicensed persons, ATF will incur additional work due to the increase in Form 7 and Form 8 applications for unlicensed persons who become FFLs, which would be offset by the fees received with FFL applications ($200) and renewals ($90). Based on information gathered from the FFLC, which processes and collects the fees for FFL applications, various contractors and Federal Government employees process Form 7 and 8 applications, verify and correct applications, and further process them for background checks and approval.

Based on information provided by the FFLC, the average hourly rate for contracting staff, including benefits, is $13.29.[278] To determine the wage rates for Federal employees, the Department used the wage rates set forth in the General Schedule ("GS"). At any level within the GS, step 5 is used as an average wage rate per activity.

[278] The Department notes that because the contracting salary is a loaded wage rate, a base wage rate (not including benefits) was not included in Table 7 below.

Government processing activities range from an entry level Federal employee between a GS-5/7, upwards to a GS-13.[279] To account for fringe benefits such as insurance, the Department estimated a Federal load rate using the methodology outlined in the Congressional Budget Office's report comparing Federal compensation to private sector compensation. It states that total compensation to Federal workers, factoring in both wages and benefits, is 17 percent higher than for similar private sector workers' benefits (or a multiplier factor of 1.17).[280] The Department calculated private sector benefits from the BLS (in 2022) and determined that the overall private sector benefits are 41.9 percent in addition to an hourly wage, or a load rate of 1.419. This makes the Federal load rate 1.66 above the hourly wage rate (after applying the 1.17 multiplier).[281]

Table 7 outlines the Government costs to process a Form 7 application to become an FFL.

Table 7. Hourly Burden and Costs to Process a New Application for an FFL

Government Costs to Process FFL Applications	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Rounded Cost
Average Contracting Time to Prepare and Enter Application	0.5	Contracting Staff	N/A	$13.29	$7
Processing Time for New Applications	1	GS 10	$38.85	$64.49	$64
Processing Time for Fingerprint Cards	2	GS 12	$51.15	$84.91	$170

[279] Off. of Pers. Mgmt, *OPM Salary Table 2023 For the Locality Pay Area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA* (effective Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf.
[280] Cong. Budget Off., *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015* (Apr. 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.
[281] 1.66 Federal load rate = 1.416 private industry load rate * 1.17 multiplier factor. BLS Series ID CMU2010000000000D,CMU2010000000000P (Private Industry Compensation = $37.15) / BLS Series ID CMU2020000000000D,CMU2020000000000P (Private Industry Wages and Salaries = $26.23) = 1.416. BLS average 2021. U.S. Bureau of Labor Statistics (2021), Database for Employee Compensation, https://data.bls.gov/cgi-bin/srgate.

Government Costs to Process FFL Applications	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Rounded Cost
Qualification Inspection Time (Includes Travel)	17	GS 5/7 to GS 13	$37.65	$62.50	$1,062
Subtotal					$1,303
Fees Received from New Application					($200)
Total					$1,103

Based on the hourly burdens and the hourly wage rates for various contract and Federal employees, the Department estimates that it would take on average 20.5 hours to process a Form 7 application, at a cost of $1,303 per application. This would be offset by the new $200 application (Form 7) fee paid to the government, for an overall net cost to the government of $1,103 per application as a result of this rule. Form 8 application renewals are estimated to cost $71 every three years (or $1,303 less the $1,062 inspection time and the $170 fingerprint costs). However, the cost to review a Form 8 application ($71) is offset by the renewal fee of $90 (which is set by statute), making the net cost or overall savings to Government for this rule $19 per FFL renewal (subsequently represented in this analysis as -$19).

In addition to processing Form 7 applications, ATF IOIs will need to perform qualification and compliance inspections. The qualification inspection occurs once during the application process and is accounted for in Table 7 above. But, as discussed above, there is a recurring compliance inspection after the person becomes a licensee. For both the qualification and compliance inspections, the Department notes that the respective 17-hour or 36-hour inspection time estimates for the Government are more than the inspection time for the private sector, as discussed above, because the Department is including travel time for an IOI to travel to the person's location. Based

on the hourly burdens and wage rates of IOIs, the Department anticipates that it costs ATF $2,250 to perform a compliance inspection.

Table 8 outlines the recurring Government costs to inspect an FFL.

Table 8. Recurring Government Costs to Inspect an FFL

Government Annually Recurring Costs	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Rounded Cost
Compliance Inspection Time	36	GS 5/7 to GS 13	$37.65	$62.50	$2,250

To summarize the overall Government costs, Table 9 outlines the Government costs to process Form 7 applications, process Form 8 renewal applications, and conduct FFL compliance inspections.

Table 9. Summary of Government Costs per Action

Government Costs per Unlicensed Individual	Cost
Per Application Cost	$1,103
Per Renewal Cost	-$19
Per Compliance Inspection Cost	$2,250

The Department estimates that the Government costs of this rule include the initial application cost that occurs in the first year (including the qualification inspection), renewal costs that typically occur every three years after the first year, and the cost for the Government to conduct a compliance inspection of an FFL in a given year (the Government currently conducts compliance inspections of approximately 8 percent of FFLs per year).

6. Total Cost

The total costs take into account the familiarization burden, State and Federal private licensing costs, and Government costs to process and support the increase in

licensing of this rule, as described above in Section VI.A.3 and VI.A.5 of this preamble. The Department estimates that the initial application cost (Form 7 and initial inspection) occurs in the first year, that renewal costs (Form 8 renewals) occur every three years after the first year, and that completion and maintenance of Forms 4473 and A&D records and compliance inspection costs (for a subset of FFLs affected by this rule) occur annually. Tables 10 to 13 illustrate the quantitative 10-year familiarization, Federal, and State licensing costs of this final rule. As discussed above, qualitative costs have been identified but were unable to be quantified for the *de minimis* proportion of FFLs that will have their licenses revoked for failure to comply with existing regulations. Qualitative costs have also been identified but not quantified for the estimated 10 percent of unlicensed sellers currently engaged in the business (or between 2,550 and 9,550 individuals) that are assumed to be unwilling or unable to become licensed as required by this rule. These individuals are expected to cease selling firearms altogether by choice or as a result of State or local restrictions acting as obstacles to their becoming FFLs.

Tables 10 and 11 provide the 10-year costs using the SME-derived estimate.

Table 10. Total 10-Year Licensing Costs of Rule Based on SME-Derived Estimate

Year	Familiarization	FFL Costs	State FL	Government Cost	Total
1	$470,350	$15,529,219	$648,862	$25,375,894	$42,024,325
2		$2,405,925	$648,862	$4,142,250	$7,197,037
3		$2,405,925	$648,862	$4,142,250	$7,197,037
4		$4,752,562	$648,862	$3,705,131	$9,106,555
5		$2,405,925	$648,862	$4,142,250	$7,197,037
6		$2,405,925	$648,862	$4,142,250	$7,197,037
7		$4,752,562	$648,862	$3,705,131	$9,106,555
8		$2,405,925	$648,862	$4,142,250	$7,197,037
9		$2,405,925	$648,862	$4,142,250	$7,197,037
10		$4,752,562	$648,862	$3,705,131	$9,106,555

Year	Familiarization	FFL Costs	State FL	Government Cost	Total
Total	**$470,350**	**$44,222,455**	**$6,488,620**	**$61,344,787**	**$112,526,202**

Table 11. Total 10-Year Costs of Rule Based on SME-Derived Estimate[282]

Year	Total Undiscounted	Discount 3%	Discount 7%
1	$42,024,325	$40,800,315	$39,275,070
2	$7,197,037	$6,783,897	$6,286,170
3	$7,197,037	$6,586,308	$5,874,926
4	$9,106,555	$8,091,056	$6,947,347
5	$7,197,037	$6,208,227	$5,131,388
6	$7,197,037	$6,027,405	$4,795,689
7	$9,106,555	$7,404,463	$5,671,105
8	$7,197,037	$5,681,407	$4,188,741
9	$7,197,037	$5,515,929	$3,914,711
10	$9,106,555	$6,776,132	$4,629,311
Total	**$112,526,212**	**$99,875,142**	**$86,714,460**
Annualized		**$11,708,413**	**$12,346,188**

Tables 12 and 13 provide the 10-year licensing costs using the RSF-derived estimate.

Table 12. Total 10-Year Licensing Costs of Rule Based on RSF-Derived Estimate

Year	Familiarization	FFL Costs	State Licensing	Government Cost	Undiscounted
1	$ 1,757,283	$58,019,288	$2,424,237	$94,807,814	$157,008,621
2		$8,987,121	$2,424,237	$4,142,250	$15,553,608
3		$8,987,121	$2,424,237	$4,142,250	$15,553,608
4		$17,754,480	$2,424,237	$2,509,115	$22,687,832
5		$8,987,121	$2,424,237	$4,142,250	$15,553,608
6		$8,987,121	$2,424,237	$4,142,250	$15,553,608
7		$17,754,480	$2,424,237	$2,509,115	$22,687,832
8		$8,987,121	$2,424,237	$4,142,250	$15,553,608
9		$8,987,121	$2,424,237	$4,142,250	$15,553,608
10		$17,754,480	$2,424,237	$2,509,115	$22,687,832
Total	**$1,757,283**	**$165,205,454**	**$24,242,370**	**$127,188,659**	**$318,393,766**

[282] The "Undiscounted" column represents totals from the underlying costs. Consistent with guidance provided by OMB in Circular A-4, the "3 Percent Discount Rate" and "7 Percent Discount Rate" columns result from applying an economic formula to the number in each row of this "Undiscounted" column to show how these future costs over time would be valued today; they do not contain totals from other tables.

Table 13. Total 10-Year Licensing Costs of Rule Based on RSF-Derived Estimate[283]

Year	Total Undiscounted	Discounted 3%	Discounted 7%
1	$157,008,621	$152,435,554	$146,737,029
2	$15,553,608	$14,660,767	$13,585,124
3	$15,553,608	$14,233,755	$12,696,377
4	$22,687,832	$20,157,844	$17,308,438
5	$15,553,608	$13,416,679	$11,089,508
6	$15,553,608	$13,025,902	$10,364,026
7	$22,687,832	$18,447,283	$14,128,841
8	$15,553,608	$12,278,162	$9,052,341
9	$15,553,608	$11,920,545	$8,460,132
10	$22,687,832	$16,881,877	$11,533,343
Total	**$318,393,766**	**$287,458,372**	**$254,955,161**
Annualized		**$33,698,891**	**$36,299,879**

Overall, the total familiarization, Federal, and State licensing costs of this rule are **$112.52 million** over 10 years, which are annualized to **$11.70 million** at three percent discounting and **$12.34 million** at seven percent discounting under the SME-derived estimate. Meanwhile, under the RSF-derived estimate, the total familiarization, Federal, and State licensing costs of the rule are $318.39 million over 10 years, which are annualized to $33.69 million at three percent discounting and $36.29 million at seven percent discounting.

7. Benefits

By ensuring that ATF's regulatory definitions conform to the BSCA's statutory changes and can be relied upon by the public, this final rule will provide significant public safety benefits. The rule clarifies that persons who intend to predominantly earn a

[283] The "Undiscounted" column represents totals from the underlying costs. Consistent with guidance provided by OMB in Circular A-4, the "3 Percent Discount Rate" and "7 Percent Discount Rate" columns result from applying an economic formula to the number in each row of this "Undiscounted" column to show how these future costs over time would be valued today; they do not contain totals from other tables.

profit from the repetitive purchase and resale of firearms are engaged in the business of dealing in firearms. It also clarifies that such sellers must be licensed in order to continue selling firearms, even if they are conducting such transactions on the Internet or through other mediums or forums. As part of the license application, those dealers will undergo a background check, as will those who subsequently purchase a firearm from the licensed dealers.

The background check process for license applicants helps ensure that persons purchasing and selling (including bartering) firearms with the intent to earn a profit are not themselves prohibited from receiving or possessing firearms. It also correspondingly reduces the risk that those sellers engage in selling firearms to persons who are prohibited from receiving or possessing such firearms under Federal, State, local, or Tribal law—including violent criminals—because those prospective purchasers will also be subject to a background check. The NFCTA, a study conducted by ATF and a team of academic and other subject matter experts, concluded that "[i]ndividuals who are prohibited due to their criminal records or other conditions are unlikely to purchase directly from a licensed federal firearms dealer. Instead, prohibited persons determined to get crime guns acquire them through underground crime gun markets that involve unregulated transactions with acquaintances and illicit 'street' sources."[284] By clarifying when a person is engaged in the business of dealing in firearms, the rule helps ensure such persons obtain licenses and comply with the safeguards in the GCA. This thereby promotes public safety by reducing the number of firearms transferred to violent criminals and others whom

[284] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 41 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

Congress has determined are prohibited from receiving or possessing firearms. In particular, these safeguards reduce the danger to public safety that results when firearms are trafficked to criminals who are likely to use them to commit violent crimes. Finally, beyond reducing unlicensed dealing of firearms to violent criminals, the safeguards applicable to licensees also help prevent the acquisition of firearms by those who may use a firearm to harm themselves,[285] or who allow children to access them because they cannot make proper decisions concerning the acquisition, use, storage, and disposition of firearms and ammunition.[286]

The rule will also benefit public safety by enhancing ATF's ability to trace firearms recovered in criminal investigations. The GCA requires licensees to maintain records when they transfer a firearm to an unlicensed purchaser, commonly referred to as both the "first retail purchaser" and, if they are the only known sale, the "last known purchaser" (the tracing process may also identify additional unlicensed purchasers beyond this first retail purchaser, in which case one of these unlicensed purchasers would become the last known purchaser instead). When a firearm is recovered in a criminal investigation and submitted for tracing, ATF is often able to identify the last known purchaser through records maintained by the licensee, providing crucial leads in the underlying criminal investigation. When a firearm is transferred by an unlicensed person, however, such records rarely exist and, if such records do exist, they are not accessible to

[285] For example, in 2021, there were an average of 127.2 suicides per day among U.S. adults, including 17.5 per day among veterans and 109.6 per day among non-veteran adults. Firearms were involved in 73.4% of deaths among veteran men, and 51.7% of veteran women. *See* U.S. Dep't of Veterans Affairs, *2023 National Veteran Suicide Prevention Annual Report* 15, 27 (Nov. 2023).

[286] In *Huddleston*, the Supreme Court examined the legislative history of the GCA and determined that "[t]he principal purposes of the federal gun control legislation . . . was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them, because of age, criminal background, or incompetency." 415 U.S. at 824.

ATF through the tracing system. By helping increase compliance with the GCA's licensing and recordkeeping requirements, the rule will enhance ATF's capacity to complete crime-gun traces, thereby expanding the evidentiary leads ATF provides to law enforcement investigating crimes involving firearms, particularly violent offenses such as homicide, aggravated assault, armed robbery, and armed drug trafficking.

Moreover, because unlicensed dealers who are engaged in the business of selling firearms often deal in used firearms, the rule will also enhance the tracing of crime guns that have been recovered after an initial retail sale by an FFL. By facilitating licensure of those who engage in the business of dealing firearms through purchasing and reselling used firearms, the rule will enhance the tracing system's capacity to identify "secondary purchasers" of crime guns. This capacity will be enhanced because new licensees will be required by the GCA to maintain records on sales of used firearms that are accessible to the Department when conducting a trace on a crime gun. When a used "firearm re-enters regulated commerce, the tracing process may identify additional unlicensed purchasers beyond the first retail purchaser."[287]

Crime-gun tracing is one of the most valuable and effective services ATF provides to law enforcement agencies—nationally and internationally—in investigating crimes involving firearms. As one public commenter noted, law enforcement agencies submitted a total of "1,922,577 crime guns for the Department to trace between 2017 and 2021." Largely as a result of the records the GCA requires licensees to maintain, "ATF

[287] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 23 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

was able to determine the purchaser in 77 percent (1,482,861)" of those trace requests.[288] By clarifying when a federal firearms license is required, the rule will promote compliance by increasing licensure of those engaged in the business of dealing in firearms, and correspondingly increase the availability of GCA-required records from those newly licensed dealers. As a result, the rule will enhance the capacity of the Department to successfully complete crime-gun traces for law enforcement partners globally.

The benefits to public safety of crime-gun tracing are substantial. For example, in fiscal year 2022, the Department performed over 623,000 crime-gun traces.[289] Of these, 27,156 were deemed "urgent," which included firearms used in criminal activities such as mass shootings, homicides, bank robberies, and other immediate threats to officer and public safety.[290] Tracing also allows ATF to determine if there are straw purchasing patterns or individuals operating as straw purchasers. Straw purchasers—individuals without a criminal record who purchase firearms for drug dealers, violent criminals, or persons who are prohibited by law from receiving firearms—are the lynchpin of most firearms trafficking operations.[291] Straw purchasers, often acquiring a relatively small number of firearms in each transaction, make it possible for firearms traffickers to effectively circumvent the background check and recordkeeping requirements of Federal law to get guns into the hands of criminals. Straw purchasers may acquire firearms

[288] *Id*. at 2.
[289] ATF, *Fact Sheet - eTrace: Internet-Based Firearms Tracing and Analysis* (Apr. 2023), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-etrace-internet-based-firearms-tracing-and-analysis.
[290] *Id*. at 1.
[291] The BSCA amended the GCA to expressly prohibit straw purchasing of firearms. *See* 18 U.S.C. 932.

directly for prohibited persons or purchase them for other middlemen on behalf of violent criminals.

After a trace is conducted on a recovered crime gun, ATF is able to determine whether the purchaser was also the possessor of the firearm when it was used in a crime, or whether the purchaser is different from the possessor. Traces where the purchaser and possessor are different provide leads to help determine whether the possessor or others in a trafficking distribution network utilized one or more straw purchasers to acquire firearms. Table 14 shows the share of traced guns attributed to these potential purchaser and possessor relationships.

Table 14. Percentage of Traced Crime Guns by Purchaser and Possessor Relationships, 2017 – 2021[292]

Purchaser and Possessor are the same	12.20%
Purchaser and Possessor are different	58.40%
Purchaser known, Possessor unknown	29.40%

In Table 14 above, in most traces, the purchaser of the traced crime gun was different from the possessor or the purchaser of the traced crime gun is known but the possessor is unknown. These two categories amount to a total of 87.8 percent of successfully traced crime guns.

Finally, the Department notes that, when a firearm is recovered in a criminal investigation and submitted for tracing, transactions in which the purchaser of the firearm was subject to a background check tend to have a longer time-to-crime. As stated in the

[292] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 26 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

NFCTA, "a short [time-to-crime] can be an indicator of illegal firearms trafficking."[293] A time-to-crime recovery of three years or less is generally considered a "short" time-to-crime,[294] indicating that at time the firearm was purchased, the purchase was more likely to be associated with firearm trafficking, straw-purchasing, or other intended criminal use. Again, by clarifying when a federal firearms license is required, the rule will facilitate increased licensure of those engaged in the business of dealing in firearms. This, in turn, will result in those newly licensed dealers conducting more purchaser background checks, which, the longer time-to-crime data indicates, will deter violent felons, traffickers, and other prohibited persons from obtaining firearms from those dealers.[295] FFLs who have a large number of traced firearms with short time-to-crime statistics may undergo more inspections, because certain FFL practices might be making them more susceptible to straw purchasing activities.

The longer time-to-crime for recovered crime guns in which the purchaser was subject to a background check is demonstrated by a review of state laws and geographic recovery data by city. Table 15 provides time-to-crime statistics by State.

Table 15. Shortest Time-to-Crime States versus Longest Time-to-Crime States

State	Median TTC (Years)	State	Median TTC (Years)
Virginia	1.6	Hawaii	7.5
Michigan	2	Connecticut	5.9
Arizona	2.1	New York	5.7
Missouri	2.2	New Jersey	5.3

[293] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 23 (Mar. 27, 2024), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.
[294] *See generally id*. at 35 (A "[s]hort TTC suggests that traced crime guns were rapidly diverted from lawful firearms commerce into criminal hands and represents a key indicator of firearm trafficking. Between 2017 and 2021, half of traced crime guns were purchased and recovered within three years of the last known sale.").
[295] *See id*. at 41.

State	Median TTC (Years)	State	Median TTC (Years)
Mississippi	2.2	Maryland	5

Table 16 provides time-to-crime statistics by city of recovery.

Table 16. Shortest Time-to-Crime Cities versus Longest Time-to-Crime Cities

City	Median TTC (Years)	City	Median TTC (Years)
Richmond, VA	1.5	New York, NY	6.3
Detroit, MI	1.6	Baltimore, MD	5.3
Columbia, SC	1.7	San Jose, CA	4.6
Phoenix, AZ	1.8	San Bernardino, CA	4.2
Memphis, TN	1.9	San Diego, CA	4.2
Saint Louis, MO	1.9	Los Angeles, CA	4.2

As explained by one public commenter, of the States and cities that have shorter time-to-crime statistics, only Virginia and Michigan also currently require background checks for all private party transactions.[296] The commenter further stated that all of the States and cities with longer time-to-crime statistics already require background checks for private party transactions. Consistent with the findings of the NFCTA, this data suggests that background checks tend to inhibit or otherwise deter prohibited persons from purchasing firearms and then subsequently using them in crime. In addition to making more records of transactions occurring on the secondary market readily available for tracing purposes, this rule—by increasing the number of properly licensed dealers who conduct background checks before selling a firearm—also helps ensure that prohibited persons are denied access to firearms, as suggested above. Based on FBI

[296] According to the commenter, which provided information current as of 2022, the following States require background checks for all private party firearms transactions: CA, CO, CT, DC, DE, HI, IL, MA, MD, MI, MN, NE, NJ, NM, NV, NY, OR, PA, RI, VA, VT, WA. *See* https://www.regulations.gov/comment/ATF-2023-0002-354412.

information, there were 131,865 prohibited persons in 2022 and 153,565 prohibited persons in 2021 who were denied the ability to purchase a firearm after a NICS background check.[297] The Department notes that these numbers are under-reported since there are a number of States that do not rely on the FBI to perform their background checks. Nonetheless, this data suggests that requiring firearms to be sold on the regulated market has a preventative effect, as the process to obtain a firearm sold on the regulated market can deter or prevent prohibited persons from acquiring and possessing firearms.

The U.S. Sentencing Commission has reported that "88.8 percent of firearm offenders sentenced under § 2K2.1[298] [of the November 2021 United States Sentencing Commission *Guidelines Manual*] were [already] prohibited from possessing a firearm" under 18 U.S.C. 922(g). These individuals would thus have been flagged in a background check, and therefore would have been prohibited from buying a firearm from a licensed dealer after their first offense. As a result, they would not have been able to commit the subsequent firearms offense(s) with those firearms if the seller had been licensed. In addition, the U.S. Sentencing Commission reported that firearms offenders sentenced under § 2K2.1 "have criminal histories that are more extensive and more serious than other offenders," and that they are "more than twice as likely to have a prior conviction for a violent offense compared to all other offenders."[299]

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[297] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 32 (Nov. 2022), https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.

[298] Section 2K2.1 provides sentencing guidelines for "Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition."

[299] U.S. Sent'g Comm'n, *What Do Federal Firearms Offenses Really Look Like?* 2 (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

In another report on "armed career criminals" (those who, at the time of sentencing, have three or more prior convictions for violent offenses, serious drug offenses, or both), the Commission found that a substantial share of such "armed career criminals" (83 percent in fiscal year 2019) had prior convictions for at least one violent offense, as opposed to solely serious drug offense convictions. This included "57.7 percent who had three or more [prior violent] convictions."[300] In other words, many persons who are prohibited by law from possessing firearms, including the more serious "armed career criminals," were able to obtain guns and continued to commit more violent offenses after they would have been flagged by a background check and denied a firearm if purchasing from a licensed dealer.

Such violence has a significant adverse effect on public safety. By increasing the number of licensed dealers who are required to conduct background checks on unlicensed transferees, this rule helps prevent firearms from being sold to felons or other prohibited persons, who may then use those firearms to commit crimes and acts of violence, or themselves become sources of firearms trafficking. Furthermore, these licensed dealers must also maintain firearms transaction records, which will help with criminal investigations and tracing firearms subsequently used in crimes.

In 2016, ATF distributed and discussed the above-mentioned "engaged in the business" guidance at gun shows to ensure that unlicensed dealers operating at gun shows became licensed, and portions of that previous guidance are incorporated in this rule. The 2016 guidance was particularly directed at encouraging unlicensed persons who sell

[300] U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 9 (Mar. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

firearms for a supplemental source of income to continue selling firearms, but as licensed dealers. Based on data from the FFLC, ATF found that, within one year after releasing the guidance, there was an increase of approximately 567 Form 7 applications to account for unlicensed persons selling at gun shows. This previous experience demonstrates that, when ATF clarified the licensing requirements, some unlicensed market participants immediately recognized the need to obtain a license to avoid enforcement action. Although the guidance alone did not achieve the full effects that would result from having these requirements in a regulation, the response illustrated that persons engaged in the business of dealing in firearms will comply with Federal licensing requirements and that there will be an increase in dealers as awareness of those licensing requirements increases. This both enhances public safety by increasing sellers' ability to identify prohibited persons and keep them from purchasing firearms and increases the likelihood that more prohibited persons will be deterred from attempting to purchase firearms.

Finally, providing a clear option for FFLs to transfer their business inventory to another FFL when their license is terminated helps to ensure that these business inventories of firearms are traceable and do not become sources of trafficked firearms.

8. Alternatives

In addition to the requirements outlined in this rule, the Department considered the following alternative approaches:

Alternative 1. *A rulemaking that focuses on a bright-line numerical threshold of what constitutes being engaged in the business as a dealer in firearms.* As discussed above, in the past, it has been proposed to the Department that a rulemaking should set a specific threshold or number of sales per year to define "engaged in the business." The

Department considered this alternative in the past and again as part of developing this rulemaking. However, the Department chose not to adopt this alternative for a number of reasons stated in detail above.[301] In summary: courts have held even before the passage of the BSCA that the sale or attempted sale of even one firearm is sufficient to show that a person is "engaged in the business" if that person represents to others that they are willing and able to purchase more firearms for resale; a person could structure their transactions to avoid the minimum threshold by spreading out sales over time; and firearms could be sold by unlicensed persons below the threshold number without records, making those firearms unable to be traced when they are subsequently used in a crime. Finally, at this time, the Department does not believe there is a sufficient evidentiary basis to support setting a specific minimum number of firearms bought or sold that, without consideration of additional factors, would establish that a person is "engaged in the business."

The Department believes replacing this rule with a simple numerical threshold would not appropriately address the statutory language regarding the requisite intent predominantly to earn a profit and would have unintended effects, such as those summarized in the previous paragraph, which would impact personal firearms transactions and decrease public safety and law enforcement's ability to trace firearms used in crimes.

Alternative 2. *Publishing guidance instead of revising the regulations*. Under this alternative, rather than publishing regulations further defining "engaged in the

[301] The relevant discussion is set forth in Section II.A, "Advance Notice of Proposed Rulemaking (1979)," and in more detail in Section III.D, "Presumptions that a Person is 'Engaged in the Business,'" of this preamble.

business," the Department would publish only guidance documents to clarify the topics included in this rule. Although the Department has determined that it will also update existing guidance documents to answer any questions that the firearms industry may have, the Department has also determined that issuing only guidance would be insufficient to address the issues discussed above. A regulation is much more effective at achieving compliance with the GCA, as amended by the BSCA, than guidance, which is both voluntary and distributed by ATF at gun shows or other venues when the agency is present, or found online if people search for it. People recognize that a regulation sets the requirements they must follow and affects all those participating in the topic area, and they also know where to look for a regulation. Now that the BSCA has redefined the term "engaged in the business," there is even more of a need to ensure that unlicensed people who meet the definition of that term understand that they are violating the law if they do not obtain a license. And if the Department does not update its regulations, they would not accurately reflect the statutory text and would thus create confusion.

As a result, the Department did not select the alternative to publish only guidance documents in lieu of regulations. Guidance alone would be insufficient as a means to inform the public in general, rather than solely the currently regulated community; it would not have the same reach and attention as a regulation; it would not benefit from the input of public review and comment to aid in accounting for possible unintended impacts or interpretations; and it would not be able to change existing regulatory provisions on the subject of "engaged in the business" or impact intersecting regulatory provisions. In addition, the Department can incorporate existing guidance in a rule based on its experience or in response to comments. When an agency establishes or revises

requirements that were previously established pursuant to a rulemaking process, it must do so through a regulation issued in compliance with the requirements of the Administrative Procedure Act and certain executive orders. Guidance does not meet these requirements. Therefore, although the Department considered this alternative, it determined it was not in the best interest of the public.

Alternative 3. *No action*. Rather than promulgating a regulation, the Department could instead take no action to further clarify the BSCA's amendments to the GCA. However, the Department considered this alternative and decided against it for a number of reasons. First, Congress, through the BSCA, determined that there was a need to revise the definition of "engaged in the business" for the first time in almost 40 years. While that by itself does not preclude the Department from using its discretion not to promulgate a formal rule, it indicates an important change to the landscape of who must have a license to deal in firearms and warrants consideration of what that means to persons who have been operating under the previous definition. It has potential effects on those who have not considered themselves to fall under the definition before but now would need to obtain a license. The change to the definition removed any consideration of an individual's intent to obtain "livelihood" from the "engaged in the business" analysis, and it is reasonable to expect that those who transact in firearms have questions about how to interpret and apply this change. This includes how it affects other aspects of existing laws and regulatory provisions that govern such transactions, as well as how other BSCA amendments, such as the new international trafficking provisions, might apply to the dealer requirements. For these reasons, the Department determined that taking no action was not a viable alternative.

Second, as the various enforcement actions and court decisions cited above demonstrate, ATF observed a significant level of noncompliance with the GCA's licensing requirements even prior to the BSCA. And third, on March 14, 2023, President Biden issued Executive Order 14092, requiring the Attorney General to report on agency efforts to implement the BSCA, develop and implement a plan to clarify the definition of who is engaged in the business of dealing in firearms, "including by considering a rulemaking," and prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.[302]

The alternative of taking no action would not generate direct monetary costs because it would leave the regulatory situation as it is. Because the costs and benefits of this alternative arise from the statute itself, the Department did not include an assessment of them in this rulemaking.

B. Executive Order 13132 (Federalism)

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988 (Civil Justice Reform)

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

[302] 88 FR at 16528.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." Pub. L. 96–354, section 2(b), 94 Stat. 1164 (1980).

Under the RFA, the agency is required to consider whether this rule will have a significant economic impact on a substantial number of small entities. Agencies must perform a review to determine whether a rule will have such an impact. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

Pursuant to 5 U.S.C. 604(a), the final regulatory flexibility analysis must contain:

- A statement of the need for, and objectives of, the rule;
- A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The RFA covers a wide range of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). The Department determined that the rule affects a variety of currently unlicensed persons engaged in the business of selling firearms, and assumed that all of these sellers would become small businesses upon the licensure required by this rule (see the section below titled "A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available"). Based on the requirements above, the Department prepared the following regulatory flexibility analysis assessing the impact on small entities from the rule.

A statement of the need for, and objectives of, the rule.

See Section VI.A.1 of this preamble for discussion on the need for this regulation and the objectives of this rule.

A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

See Section IV.D.13 of this preamble for public comments regarding the RFA. Responses to those public comments are included with each topic.

The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

There were no comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule. Therefore, no changes were made in the final rule as a result of such comments.

A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

Persons affected by this rule are not currently considered small businesses or small entities but will become small businesses upon implementation of this rule if they obtain licenses and continue selling firearms as dealers. However, the Department assumes that, should an individual be considered "engaged in the business" due to factors related to their sale of firearms and not simply to enhance their personal collection, there may be an impact on their revenue. Due to limitations on data, the Department is unable

to determine the extent to which the licensing costs will impact their firearms sales revenue. As discussed in the primary analysis (Section VI.A.2 of this preamble), the Department estimated 10 percent of those affected by this rule would cease dealing in firearms for various reasons. To the extent such individuals are currently functioning as small businesses, even though not licensed, this could be deemed to represent an adverse regulatory impact on small businesses and their ability to operate as dealers.

A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

Persons affected by this rule will need to apply for a license using Form 7, undergo an initial inspection, undergo background checks, maintain Form 4473 records of firearms transactions, and periodically undergo a compliance inspection. No professional skills are required to fulfill these tasks.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

See Section IV.D.13 and in Section VI.A.8 of this preamble. No separate distinction was made in alternatives for small businesses, specifically, because the

Department determined that all unlicensed sellers affected by this rule will become small businesses once they are licensed.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is likely to have a significant economic impact on a substantial number of small entities under SBREFA, 5 U.S.C. 601 *et seq*. Accordingly, the Department prepared an initial regulatory flexibility analysis for the proposed rule and prepared an FRFA for the final rule. 5 U.S.C. 603–04. Furthermore, a small business compliance guide will be published as required by SBREFA.

F. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801 et seq., OMB's Office of Information and Regulatory Affairs has determined this rule does not meet the criteria in 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. While there may be impacts on employment, investment, productivity, or innovation, these impacts will not have a significant impact on the overall economy.

G. Unfunded Mandates Reform Act of 1995

This rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Twenty-two States already require background checks for private party sales, and of the 28 States that

do not, only three states (Florida, Tennessee, and Utah) do not rely on Federal law enforcement for their background checks. While these three States may be affected by this rule to the extent they have to conduct increased background checks, the Department did not determine that this rule will have an impact of $100 million or more in any year to any of these States. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

H. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501–21, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The collections of information contained in this rule are collections of information which have been reviewed and approved by OMB in accordance with the requirements of the PRA and have been assigned an OMB Control Number.

As defined in 5 CFR 1320.3(c), "collection of information" comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar requirements. The collections of information in this rule are mandatory. The title and description of each information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: Application for a Federal Firearms License -- ATF Form 7(5310.12)/ 7CR (5310.16)

OMB Control Number: OMB 1140-0018

Summary of the Collection of Information: 18 U.S.C. 922 specifies a number of unlawful activities involving firearms in interstate and foreign commerce. Some of these activities are not unlawful if the persons taking the actions are licensed under the provisions of section 923. Some examples of activities that are not unlawful if a person has a license include: engaging in the business of dealing, shipping, receiving, and transporting firearms in interstate or foreign commerce, including the acquisition of curio or relic firearms acquired by collectors from out-of-State for personal collections. This collection of information is necessary to ensure that anyone who wishes to be licensed as required by section 923 meets the requirements to obtain the desired license.

Need for Information: Less frequent collection of this information would pose a threat to public safety. Without this information collection, ATF would not be able to issue licenses to persons required by law to have a license to engage in the business of dealing in firearms or shipping or transporting firearms in interstate or foreign commerce in support of that business, or acquire curio and relic firearms from out of State.

Proposed Use of Information: ATF personnel will analyze the submitted application to determine the applicant's eligibility to receive the requested license.

Description of the Respondents: Individuals or entities wishing to engage in the business of dealing, shipping, receiving, and transporting firearms in interstate or foreign commerce, as well as acquiring firearms classified as curios and relics for personal collections.

Number of Respondents: 13,000 existing. New respondents due to the rule: 24,540

Frequency of Response: one time

Burden of Response: one hour

Estimate of Total Annual Burden: 24,540 hours (incremental change)

Title: Application for a Federal Firearms License -- Renewal Application ATF Form 8 (5310.11)

OMB Control Number: OMB 1140-0019

Summary of the Collection of Information: 18 U.S.C. chapter 44 provides that no person may engage in the business of importing, manufacturing, or dealing in either firearms, or ammunition, without first obtaining a license to do so. These activities are licensed for a specific period. The benefit of a collector's license is also provided for in the statute. In order to continue to engage in the aforementioned firearms activities without interruption, licensees must renew their FFL by filing Federal Firearms License ("FFL") RENEWAL Application-ATF F 8 (5310.11) Part II, prior to its expiration.

Need for Information: Less frequent use of this information collection would pose a threat to public safety, since the collected information helps ATF to ensure that the applicants remain eligible to renew their licenses.

Proposed Use of Information: ATF F 8 (5310.11) Part II, is used to identify the applicant and determine their eligibility to retain the license.

Description of the Respondents: Respondents desiring to update the responsible person (RP) information on an existing license must submit a letter in this regard, along with the completed FFL renewal application to ATF.

Number of Respondents: 34,000 existing. New respondents due to the rule: 24,540

Frequency of Response: every three years and periodically

Burden of Response: 0.5 hours

Estimate of Total Annual Burden: 12,270 hours (incremental change)

Title: Firearms Transaction Record -- ATF Form 4473 (5300.9) and Firearms Transaction Record Continuation Sheet

OMB Control Number: OMB 1140-0020

Summary of the Collection of Information: The subject form is required under the authority of 18 U.S.C. 922 and 923 and 27 CFR 478.124. These sections of the GCA prohibit certain persons from shipping, transporting, receiving, or possessing firearms. All persons, including FFLs, are prohibited from transferring firearms to such persons. FFLs are also subject to additional restrictions regarding the disposition of a firearm to an unlicensed person under the GCA. For example, age and State of residence also determine whether a person may lawfully receive a firearm. The information and certification on the Form 4473 are designed so that a person licensed under 18 U.S.C. 923 may determine if the licensee may lawfully sell or deliver a firearm to the person identified in Section B, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The Form 4473 should only be used for sales or transfers of firearms where the seller is licensed under 18 U.S.C. 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction.

Need for Information: The consequences of not conducting this collection of information, or conducting it less frequently, are that the licensee might transfer a firearm to a person who is prohibited from possessing firearms under Federal law. The collection of this information is necessary for compliance with the statutory requirements to verify the eligibility of a person receiving or possessing firearms under the GCA. There is no discretionary authority on the part of ATF to waive these requirements. Respondents are

required to supply this information as often as necessary to comply with statutory provisions. The form is critical to the prevention of criminal diversion of firearms and enhances law enforcement's ability to trace firearms that are recovered in crimes.

Proposed Use of Information: A person purchasing a firearm from an FFL must complete Section B of the Form 4473. The buyer's answers to the questions determine if the potential transferee is eligible to receive the firearm. If those answers indicate that the buyer is not prohibited from receiving a firearm, the licensee completes Section C of the Form 4473 and contacts the NICS or the State point of contact to determine if the firearm can legally be transferred to the purchaser.

Description of the Respondents: Unlicensed persons wishing to purchase a firearm.

Number of Respondents: 17,189,101 existing. New respondents due to the rule: 24,540

Frequency of Response: periodically

Burden of Response: 0.5 hours

Estimate of Total Annual Burden: 12,270 hours (incremental change)

Title: Records of Acquisition and Disposition, Dealers of Type 01/02 Firearms, and Collectors of Type 03 Firearms [Records of Acquisition and Disposition, Collectors of Firearms]

OMB Control Number: OMB 1140-0032

Summary of the Collection of Information: The recordkeeping requirements as authorized by the GCA, 18 U.S.C. 923, are for the purpose of allowing ATF to inquire into the disposition of any firearm received by a licensee in the course of a criminal investigation.

Need for Information: Less frequent collection of this information would pose a threat to public safety as the information is routinely used to assist law enforcement by allowing them to trace firearms in criminal investigations.

Proposed Use of Information: This collection of information grants ATF officers the authority to examine a collector's records for firearms traces or compliance inspections, per 27 CFR 478.23(c)(1), (2).

Description of the Respondents: Federal Firearms Licensees

Number of Respondents: 60,790 existing. New respondents due to the rule: 24,540.

Frequency of Response: annually recurring

Burden of Response: three minutes to maintain A&D records and one hour to perform an inspection

Estimate of Total Annual Burden: 24,540 hours in inspection time (incremental change) and 3,681 hours maintaining A&D records (incremental change)

ATF asks for public comment on the proposed collection of information to help determine how useful the information is; whether the public can help perform ATF's functions better; whether the information is readily available elsewhere; how accurate ATF's estimate of the burden of collection is; how valid the methods for determining burden are; how to improve the quality, usefulness, and clarity of the information; and how to minimize the burden of collection.

If you submit comments on the collection of information, submit them following the "Public Participation" section under the SUPPLEMENTARY INFORMATION heading. You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information

become effective, ATF will publish a notice in the Federal Register of OMB's decision to approve, modify, or disapprove the proposed collection.

Disclosure

Copies of the proposed rule, the comments received in response to it, and this final rule are available through the Federal eRulemaking portal, at *www.regulations.gov* (search for RIN 1140-58), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E-063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648-8740.

List of Subjects

27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, the Department amends 27 CFR part 478 as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921-931; 44 U.S.C. 3504(h).

2. Amend § 478.11 by:

a. Revising the definition of "Dealer";

b. Revising paragraph (c) and adding a new paragraph (g) in the definition of "Engaged in the business";

c. Adding definitions of "Personal collection (or personal collection of firearms, or personal firearms collection)", "Former licensee inventory", and "Predominantly earn a profit" in alphabetical order;

d. Revising the definition of "Principal objective of livelihood and profit"; and

e. Adding definitions of "Responsible person" and "Terrorism" in alphabetical order.

The revisions and additions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Dealer. Any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term shall include any person who engages in such business or occupation on a part-time basis. The term shall include such activities wherever, or through whatever medium, they are conducted, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order; over the Internet (*e.g.,* online broker or auction); through the use of other electronic means (*e.g.,* text messaging service, social media raffle, or website); or at any other domestic or international public or private marketplace or premises.

* * * * *

Engaged in the business—

* * * * *

(c) *Dealer in firearms other than a gunsmith or a pawnbroker.* The term "engaged in the business as a dealer in firearms other than a gunsmith or a pawnbroker" shall have the same meaning as in § 478.13.

* * * * *

(g) *Related definitions*. For purposes of this definition—

(1) The term "purchase" (and derivative terms thereof) means the act of obtaining a firearm in an agreed exchange for something of value;

(2) The term "sale" (and derivative terms thereof) means the act of disposing of a firearm in an agreed exchange for something of value, and the term "resale" means selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person; and

(3) The term "something of value" includes money, credit, personal property (*e.g.,* another firearm or ammunition), a service, a controlled substance, or any other medium of exchange or valuable consideration, legal or illegal.

* * * * *

Former licensee inventory. Firearms that were in the business inventory of a licensee at the time the license was terminated. Such firearms differ from a personal collection and other personal firearms in that they were purchased repetitively before the license was terminated as part of a licensee's business inventory with the predominant intent to earn a profit.

* * * * *

Personal collection (or personal collection of firearms, or personal firearms collection). (1) *General definition.* Personal firearms that a person accumulates for study, comparison, exhibition (*e.g.*, collecting curios or relics, or collecting unique firearms to exhibit at gun club events), or for a hobby (*e.g.*, noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction). The term shall not include any firearm purchased for the purpose of resale with the predominant intent to earn a profit (*e.g.*, primarily for a commercial purpose or financial gain, as distinguished from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, but which the person may also intend to increase in value). In addition, the term shall not include firearms accumulated primarily for personal protection: *Provided*, that nothing in this section shall be construed as precluding a person from lawfully acquiring firearms for self-protection or other lawful personal use.

(2) *Personal collection of licensee*. In the case of a firearm imported, manufactured, or otherwise acquired by a licensed manufacturer, licensed importer, or licensed dealer, the term shall include only a firearm described in paragraph (1) of this definition that was—

(i) Acquired or transferred without the intent to willfully evade the restrictions placed upon licensees under chapter 44, title 18, United States Code;

(ii) Recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with §§ 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);

(iii) Recorded as a disposition from the licensee's business inventory to the licensee's personal collection or otherwise as a personal firearm in accordance with §§ 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);

(iv) Maintained in such personal collection or otherwise as a personal firearm (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; and

(v) Stored separately from, and not commingled with the business inventory. When stored or displayed on the business premises, the personal collection and other personal firearms shall be appropriately identified as "not for sale" (*e.g.*, by attaching a tag).

* * * * *

Predominantly earn a profit. The term "predominantly earn a profit" shall have the same meaning as in § 478.13.

* * * * *

Responsible person. Any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a sole proprietorship, corporation, company, partnership, or association, insofar as they pertain to firearms.

* * * * *

Terrorism. For purposes of the definitions "predominantly earn a profit," and "principal objective of livelihood and profit," the term "terrorism" means activity, directed against United States persons, which—

(1) Is committed by an individual who is not a national or permanent resident alien of the United States;

(2) Involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(3) Is intended—

(i) To intimidate or coerce a civilian population;

(ii) To influence the policy of a government by intimidation or coercion; or

(iii) To affect the conduct of a government by assassination or kidnapping.

3. Add § 478.13 to subpart B to read as follows:

§ 478.13 Definition of "engaged in the business as a dealer in firearms other than a gunsmith or a pawnbroker."

(a) *Definition*. A person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. The term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of the person's personal collection of firearms. In addition, the term shall not include an auctioneer who provides only auction services on commission to assist in liquidating firearms at an estate-type auction; *provided,* that the auctioneer does not purchase the firearms, or take possession of the firearms for sale on consignment.

(b) *Fact-specific inquiry.* Whether a person is engaged in the business as a dealer under paragraph (a) of this section is a fact-specific inquiry. Selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly

indicative of business activity. However, there is no minimum threshold number of firearms purchased or sold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is "engaged in the business" of dealing in firearms. For example, even a single firearm transaction or offer to engage in a transaction, when combined with other evidence (*e.g.*, where a person represents to others a willingness and ability to purchase more firearms for resale), may require a license; whereas, a single isolated firearm transaction without such evidence would not require a license. At all times, the determination of whether a person is engaged in the business of dealing in firearms is based on the totality of the circumstances.

(c) *Presumptions that a person is engaged in the business as a dealer*. In civil and administrative proceedings, a person shall be presumed to be engaged in the business of dealing in firearms as defined in paragraph (a) of this section, absent reliable evidence to the contrary, when it is shown that the person—

(1) Resells or offers for resale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms (*i.e.*, to be a source of additional firearms for resale);

(2) Repetitively purchases for the purpose of resale, or repetitively resells or offers for resale, firearms—

(i) Through straw or sham businesses, or individual straw purchasers or sellers; or

(ii) That cannot lawfully be purchased, received, or possessed under Federal, State, local, or Tribal law, including:

(A) Stolen firearms (*e.g.*, 18 U.S.C. 922(j));

(B) Firearms with the licensee's serial number removed, obliterated, or altered, or not identified as required by law (*e.g.*, 18 U.S.C. 922(k) or 26 U.S.C. 5861(i));

(C) Firearms imported in violation of law (*e.g.*, 18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(D) Machineguns or other weapons defined as firearms under 26 U.S.C. 5845(b) that cannot lawfully be possessed (*e.g.*, 18 U.S.C. 922(o); 26 U.S.C. 5861(d));

(3) Repetitively resells or offers for resale firearms—

(i) Within 30 days after the person purchased the firearms; or

(ii) Within one year after the person purchased the firearms if they are—

(A) New, or like new in their original packaging; or

(B) The same make and model, or variants thereof;

(4) As a former licensee (or responsible person acting on behalf of the former licensee), resells or offers for resale to a person (other than a licensee in accordance with §§ 478.57 or 478.78) firearms that were in the business inventory of the former licensee at the time the license was terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), whether or not such firearms were transferred to a responsible person of the former licensee after the license was terminated in accordance with §§ 478.57(b)(2) or 478.78(b)(2); or

(5) As a former licensee (or responsible person acting on behalf of the former licensee), resells or offers for resale firearms that were transferred to the licensee's

personal collection or otherwise as personal firearms in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a(a) prior to the time the license was terminated, unless:

(i) The firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, United States Code; and

(ii) One year has passed from the date of transfer to the licensee's personal collection or otherwise as personal firearms.

(d) *Predominantly earn a profit*. (1) *Definition*. The intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, that proof of profit, including the intent to profit, shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this section, a person may have the intent to profit even if the person does not actually obtain the intended pecuniary gain from the sale or disposition of firearms.

(2) *Presumptions that a person has intent to predominantly earn a profit*. In civil and administrative proceedings, a person shall be presumed to have the intent to predominantly earn a profit through the repetitive purchase and resale of firearms as defined in paragraph (d)(1) of this section, absent reliable evidence to the contrary, when it is shown that the person—

(i) Repetitively or continuously advertises, markets, or otherwise promotes a firearms business (*e.g.*, advertises or posts firearms for resale, including through the Internet or other digital means, establishes a website to offer their firearms for resale,

makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally;

(ii) Repetitively or continuously purchases, rents, or otherwise exchanges (directly or indirectly) something of value to secure permanent or temporary physical space to display firearms they offer for resale, including part or all of a business premises, a table or space at a gun show, or a display case;

(iii) Makes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale;

(iv) Purchases or otherwise secures merchant services as a business (*e.g.*, credit card transaction services, digital wallet for business) through which the person intends to repetitively accept payments for firearms transactions;

(v) Formally or informally purchases, hires, or otherwise secures business security services (*e.g.*, a central station-monitored security system registered to a business, or guards for security) to protect firearms assets and repetitive firearms transactions;

(vi) Formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes, or offers to make, repetitive firearms transactions; or

(vii) Secures or applies for a State or local business license to purchase for resale or to resell merchandise that includes firearms.

(e) *Conduct that does not support a presumption.* A person shall not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms—

(1) As bona fide gifts;

(2) Occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection;

(3) Occasionally to a licensee or to a family member for lawful purposes;

(4) To liquidate (without restocking) all or part of the person's personal collection; or

(5) To liquidate firearms—

(i) That are inherited; or

(ii) Pursuant to a court order; or

(6) To assist in liquidating firearms as an auctioneer when providing auction services on commission at an estate-type auction.

(f) *Rebuttal evidence.* Reliable evidence of the conduct set forth in paragraph (e) of this section may be used to rebut any presumption in paragraphs (c) or (d)(2) of this section that a person is engaged in the business of dealing in firearms, or intends to predominantly earn a profit through the repetitive purchase and resale of firearms.

(g) *Presumptions, conduct, and rebuttal evidence not exhaustive*. The activities set forth in the rebuttable presumptions in paragraphs (c) and (d)(2) of this section, and the activities and rebuttal evidence set forth in paragraphs (e) and (f) of this section, are not exhaustive of the conduct or evidence that may be considered in determining whether a person is engaged in the business of dealing in firearms, or has the intent to predominantly earn a profit through the repetitive purchase and resale of firearms.

(h) *Criminal proceedings*. The rebuttable presumptions in paragraphs (c) and (d)(2) of this section shall not apply to any criminal case, although they may be useful to

courts in criminal cases, for example, when instructing juries regarding permissible inferences.

4. In § 478.57, designate the introductory text as paragraph (a) and add paragraph (b) to read as follows:

§ 478.57 Discontinuance of business.

* * * * *

(b) Upon termination of a license (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee shall within 30 days, or such additional period approved by the Director for good cause, either:

(1) Liquidate the former licensee inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the former licensee inventory to a responsible person of the former licensee to whom the receipt, possession, sale, or other disposition is not prohibited by law. Any such transfer, however, does not negate the fact that the firearms were repetitively purchased, and were purchased with the predominant intent to earn a profit by repetitive purchase and resale.

(c) Transfers of former licensee inventory to a licensee or responsible person in accordance with paragraphs (b)(1) or (b)(2) of this section shall be appropriately recorded as dispositions, in accordance with §§ 478.122(b), 478.123(b), or 478.125(e), prior to delivering the records after discontinuing business consistent with § 478.127. Except for liquidation of former licensee inventory to a licensee within 30 days (or approved period) in accordance with paragraph (b)(1) of this section, or occasional sale of a firearm from

such inventory thereafter to a licensee, a former licensee (or responsible person of such licensee) who resells any such inventory, including former licensee inventory transferred in accordance with paragraph (b)(2) of this section, is subject to the presumptions in § 478.13 (definition of "engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker") that apply to a person who repetitively purchased those firearms for the purpose of resale.

(d) The former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, "restocking").

5. In § 478.78, redesignate the introductory text as paragraph (a) and add paragraph (b) to read as follows:

§ 478.78 Operations by licensee after notice.

* * * * *

(b) Upon final disposition of license proceedings to disapprove or terminate a license (*i.e.*, by revocation or denial of renewal), the former licensee shall within 30 days, or such additional period approved by the Director for good cause, either:

(1) Liquidate the former licensee inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the former licensee inventory to a responsible person of the former licensee to whom the receipt, possession, sale, or other disposition is not prohibited by law. Any such transfer, however, does not negate the fact that the firearms were

repetitively purchased, and were purchased with the predominant intent to earn a profit by repetitive purchase and resale.

(c) Transfers of former licensee inventory to a licensee or responsible person in accordance with paragraphs (b)(1) or (b)(2) of this section shall be appropriately recorded as dispositions, in accordance with §§ 478.122(b), 478.123(b), or 478.125(e), prior to delivering the records after discontinuing business consistent with § 478.127. Except for the sale of former licensee inventory to a licensee within 30 days (or approved period) in accordance with paragraph (b)(1) of this section, or occasional sale of a firearm from such inventory thereafter to a licensee, a former licensee (or responsible person of such former licensee) who resells any such inventory, including former licensee inventory transferred in accordance with paragraph (b)(2), is subject to the presumptions in § 478.13 (definition of "engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker") that apply to a person who repetitively purchased those firearms for the purpose of resale.

(d) The former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, "restocking").

6. In § 478.124, revise paragraph (a) to read as follows:

§ 478.124 Firearms transaction record.

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearm transaction

record, Form 4473: *Provided,* that a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement firearm is returned to the person from whom received; *provided further,* that a firearms transaction record, Form 4473, shall not be used if the sale or other disposition is being made to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor who transfers a firearm to their personal collection or otherwise as a personal firearm in accordance with § 478.125a. When a licensee transfers a firearm to another licensee, the licensee shall comply with the verification and recordkeeping requirements in § 478.94 and subpart H of part 478.

* * * * *

7. In § 478.125a, in paragraphs (a)(2) and (3), remove the citation "§ 478.125(e)" and add in its place "§§ 478.122(a), 478.123(a), or 478.125(e)".

April 8, 2024
Date

Merrick B. Garland
Attorney General