

## ENGAGED IN THE BUSINESS

During the Obama Administration, gun control proponents called on regulators to redefine a key term that would impact the firearm industry. As established by the Gun Control Act of 1968, federal law requires a license to engage in the business of dealing firearms. Section 923(a), Title 18, U.S.C.

The term at stake is “engaged in the business,” which is defined in current Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulations. The goal was to redefine the term to include more non-licensees in the definition of “dealer,” so as to expand the number of background checks.

Currently, the term “dealer” is defined at 18 U.S.C. § 921(a)(11)(A) to include any person “engaged in the business” of selling firearms at wholesale or retail. According to the ATF:

The term “engaged in the business,” as applicable to a firearms dealer, is defined 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, but such 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 his personal collection of firearms. 27 CFR 478.11

Essentially, the definition captures individuals who earn a

livelihood from buying and selling firearms, but excludes the occasional sale or purchase for personal collections or as a hobby. In fiscal year 2019, there were 53,746 dealers.<sup>ii</sup>

Gun control proponents advocated for an expanded definition that sets a threshold of the number of firearms that an individual may sell in a given year before being “engaged in the business.” While this would increase the number of licensees and background checks, there are serious unintended consequences for those that are captured by the new definition, for existing licensees and for the ATF. Even lawyers within the Obama Administration acknowledged that setting an arbitrary numerical threshold would open the door to a legal challenge.<sup>iii</sup>

This explains why, in January 2016, then-President Obama directed ATF to “clarify” that anyone engaged in the business must get a license and conduct background checks, but stopped short of calling for a new definition or setting a threshold. In response, ATF issued guidance that outlines current law and makes no regulatory changes.<sup>iv</sup>

However, gun control advocacy groups still sought to redefine this term.<sup>v</sup> This represented a drastic reversal from the same groups’ lobbying activities under the Clinton Administration, when the goal was to reduce the number of licenses given to what the gun control groups vilified as so-called “kitchen table” dealers and ensure those with licenses were actually engaged in the business of dealing firearms.

According to news reports at the time, Clinton’s Treasury Secretary Lloyd Bentsen said the Administration wanted to raise fees to reduce the number of dealers, arguing, “It makes no sense at all to have over 250,000 dealers in guns today and to have a very minimum payment where you have people even operating out of their kitchens” and “said the goal was to reduce the number of dealers to a manageable level.”<sup>vi</sup> During the Clinton Administration, the fees to obtain a license were increased to \$200 for the initial three year license (and \$90 on renewal), from \$30, and regulations were tightened to dramatically reduce the number of licensees. At the time, the then-director of the pro-gun control Brady Center said, “This is a major policy success of the Clinton administration, because the gun distribution system has been out of control for a long time.”<sup>vii</sup> Despite the apparent reaching of the gun control groups’ goals, they have now reversed course and desire to see more gun owners and hobbyists become licensed dealers.

### IMPACT ON NEW DEALERS

Regardless of the fact that individuals who would be captured under a new broader definition are not actually in the firearms business, new “dealers” would need to apply for and obtain a license, including paying the required fees and submitting to a background check and fingerprinting, comply with state and local laws (including

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state licensing in the 15 states where required), local business laws, and zoning laws which may or may not allow the individual to operate what would likely be a home-based firearms business. The “licensed premises,” likely the gun owner’s private home, would have to be open to ATF inspection once a year. ATF policy for many years has been that the licensed premises must be open to the public. Indeed, item 11 of ATF Form 7, Application for License, requires applicants to list hours of operation for all seven days. Applicants would have to get ATF approval to operate by appointment only.

Among myriad other requirements, the new licensees must keep and maintain for life federally mandated records on the acquisition and disposition of firearms and must keep any form 4473 for at least 20 years.<sup>viii</sup> All firearms in their collection which are for sale would have to be entered into the acquisition and disposition record. In addition, they would have to register with the Federal Bureau of Investigation’s background check system, the National Instant Criminal Background Check System (NICS), request the FBI or Point of Contact (POC) state to run the background check for each transfer,<sup>9</sup> report to ATF and their local chief law enforcement officer on the multiple sale of handguns to the same person within a 5 day period, report lost or stolen firearms to the ATF and to local authorities within 48 hours, and provide Youth Handgun Safety Act notices and a gun safety device with each handgun sold. When a licensee goes out of business, which might include any year that they would dispose of fewer firearms than the number established by regulation,

it must send its required records to the ATF Out of Business Records Repository.

Even beyond the formal paperwork and recordkeeping burdens that come with being a federally licensed firearms dealer, these individuals would face challenges of juggling their actual jobs with the new obligations of their hobby. For example, if an individual who sells a handful of firearms a year receives a request from law enforcement for a trace on one of their firearms, that person must be at the licensed premises to handle the request for information. By law, traces from ATF must be responded to within 24 hours. 18 U.S.C. 923(g)(7)

A likely result of the new burdens would be for the individuals to not get the license. These individuals may choose to curtail their activities to stay below the number requiring licensure or to exit their hobby all together. This likely curtailment would also shut down a small but valid amount of private party transfers.

While this is no doubt a goal of the gun control advocates, there is no evidence that reducing the number of gun owners who occasionally sell a firearm they no longer want would reduce the criminal misuse of firearms. As multiple federal and private surveys have demonstrated, criminals are not purchasing firearms from gun shows or from licensed store fronts. The research shows about 80 percent of inmates obtained their firearms from family members, friends, or on the black market.<sup>x</sup> No one can claim that black market criminals buying and selling firearms illegally will suddenly begin to apply for federal firearms licenses if the term were redefined.

## **IMPACT ON FIREARMS INDUSTRY AND ATF**

NICS would inevitably see some increase in new background checks for what were previously private-party transfers. While the increase would fall well short of the 40 percent figure cited erroneously by gun control advocates, the increase would slow down the system to an unknown extent, depending on how sweeping the new definition is written. Unquestionably, there will be an adverse impact on those that actually run businesses in the industry and prevent these businesses from getting as timely responses as they do now.<sup>xi</sup>

The crux of the problem is that an influx of new licensees would strain ATF’s limited resources, which was one of the main reasons given for reducing the number of dealers during the Clinton Administration. ATF’s Federal Firearms Licensing Center (FFLC) would be impacted by an increased workload that could come from such a change. Not only would there be more applicants for FFLs, but ATF would have to process the records and update the licensing databases when these new FFLs go out of business.

ATF field operations would also be impacted. Longstanding ATF policy is that all new applicants for FFLs must have a face to face qualification inspection with an ATF Industry Operations Investigator at their proposed licensed premises. If there were a large number of new applicants, as a result of this proposed rule, the number of compliance inspections would likely be reduced. Under the current regulations, ATF often faces criticism that it does not inspect enough licensees each year. In fiscal year

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2019, there were 811 field industry operations investigators (IOIs) to oversee 53,746 dealers.<sup>xii</sup>

Currently many cases investigated by ATF Special Agents already involve allegations of dealing in firearms without a license. In many ATF field divisions, the Special Agent in Charge sends the person a “SAC Letter.” The letter explains the law and the addressee is given a Form 7, Application for License and other forms and is advised to apply for the FFL. Then, if they ignore the notice and keep dealing, they can be charged. Whether or not this is a formal practice, ATF has had to do this to put persons on actual notice of the legal requirements.

## UNANSWERED QUESTIONS

Abstract discussions about a new expanded definition naturally

raised a number of unanswered questions. The answers to these questions, and others, hold additional risks for the industry and ATF. Some of these questions include:

- What would the new definition look like?
- If there is an arbitrary number set as the threshold for being engaged in the business, how would that be determined?
- How would the government enforce the new definition?
- What will the renewal process be and how much of an additional strain will it put on ATF FFLC operations? How about if the new dealer hasn't sold any firearms?

## ENFORCEMENT IS THE KEY

It is clear that broadly redefining or reinterpreting the term “engaged in the business” will have no impact on criminal activity, while adding unnecessary burdens onto law-abiding individuals who own and collect firearms or have a related hobby. The burdens would be shared by the ATF, which already faces limited resources to oversee the actual firearms industry, the industry itself, and ultimately taxpayers.

Rather than overhauling the existing regulation and leaving a trail of significant unintended consequences, it is vital that ATF enforces current law. Individuals who are engaged in the business, but are operating without a license are breaking the law. ATF must hold them accountable.

i See for example, Eilperin, Juliet, “Obama weighs expanding background checks through executive authority,” Washington Post, Oct. 8, 2015, [https://www.washingtonpost.com/politics/obama-weighs-expanding-background-checks-through-executive-authority/2015/10/08/6bd45e56-6b63-11e5-9bfe-e59f5e244f92\\_story.html](https://www.washingtonpost.com/politics/obama-weighs-expanding-background-checks-through-executive-authority/2015/10/08/6bd45e56-6b63-11e5-9bfe-e59f5e244f92_story.html)

ii ATF's Fact Sheet - Facts and Figures for Fiscal Year 2019: <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019>

iii Eilperin, “Obama weighs expanding background checks”

iv ATF, “Do I Need a License to Buy and Sell Firearms,” January 2016. <https://www.atf.gov/file/100871/download>

v See for example, Becker, Olivia, “Obama's Executive Action May Actually Have Little Impact on Gun Violence,” Jan. 5, 2016. <https://news.vice.com/article/obamas-executive-action-may-actually-have-little-impact-on-gun-violence>. Also, Everytown includes a recommendation to the Obama Administration to take executive action to redefine the term “engaged in the business” in an October 2015 report, “Beyond Gridlock.” [http://everytownresearch.org/reports/beyond-gridlock/?source=etno\\_ETHomePage&utm\\_source=et\\_n\\_&utm\\_medium=o&utm\\_campaign=ETHomePage](http://everytownresearch.org/reports/beyond-gridlock/?source=etno_ETHomePage&utm_source=et_n_&utm_medium=o&utm_campaign=ETHomePage)

See also, Parsons, Chelsea and Arkadi Gerney, “Executive Action to Strengthen Background Checks by Addressing High-Volume Gun Sellers,” Center for American Progress, Oct. 15, 2015. <https://cdn.americanprogress.org/wp-content/uploads/2015/10/14101739/EngagedintheBusiness-brief.pdf>

vi “Gun Dealers May Face Higher Fees,” Chicago Tribune, Dec. 20, 1993. [http://articles.chicagotribune.com/1993-12-20/news/9312210202\\_1\\_number-of-gun-dealers-treasury-secretary-loyd-bentsen-face-higher-fees](http://articles.chicagotribune.com/1993-12-20/news/9312210202_1_number-of-gun-dealers-treasury-secretary-loyd-bentsen-face-higher-fees)

vii Marks, Alexandra, “Why gun dealers have dwindled,” The Christian Science Monitor, March 14, 2006. <http://www.csmonitor.com/2006/0314/p02s01-ussc.html>

viii FFL Record Retention Guide, National Shooting Sports Foundation, <https://www.nssf.org/factsheets/PDF/FFLRecordRetention.pdf>

ix This raises another question of whether the current POC states would be willing to take on this additional responsibility. If not, they may drop out of the POC State Program all together, leaving the FBI to run all checks for a particular former POC state and not just those associated with the new FFLs generated as a result of the change in definition of “engaged in the business.”

x Keane, Larry, “Breaking News: Criminals Break the Law to Get Guns,” National Shooting Sports Foundation, Sept. 9, 2015. <http://www.nssfblog.com/breaking-news-criminals-break-the-law-to-get-guns/>

xi The myth that 40 percent of firearms are sold without a background check has been refuted by the Washington Post (most recently on Oct. 16, 2015, <https://www.washingtonpost.com/news/fact-checker/wp/2015/10/16/clintons-claim-that-40-percent-of-guns-are-sold-at-gun-shows-and-over-the-internet/>), as well as by the National Shooting Sports Foundation (“Universal Background Checks and the 40%,” <http://www.nssf.org/factsheets/PDF/40Percent.pdf>).

xii ATF's Fact Sheet - Facts and Figures for Fiscal Year 2019: <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019>

