NSSF
The Firearm Industry Trade Association

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Via Federal eRulemaking Portal

The Honorable Steven Dettelbach
ATF Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave, N.E.
Washington, DC 20226

Re: Notice of Proposed Rulemaking
Definition of "Engaged in the Business" as a Dealer in Firearms
Docket No. ATF 2022R-17
RIN 1140-AA58

Dear Hon. Steven Dettelbach:

The NSSF is the trade association for America's firearm, ammunition, hunting and shooting sports industry. Our 10,000 members are comprised of manufacturers, distributors, retailers, shooting ranges, sportsmen's organizations, and endemic media. The NSSF advocates on behalf of our industry (Industry). We work cooperatively with law enforcement, including the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to help prevent criminal and unauthorized access to firearms. We encourage the safe and responsible ownership, use, and storage of firearms. NSSF partners with others, including the Veterans Administration, on suicide prevention. NSSF works to further the enjoyment of recreational shooting and hunting. NSSF shares the concerns of all Americans about the criminal and accidental misuse of our industry's products. That is why NSSF works toward real solutions that help create safer communities.

On behalf of our members, NSSF offers the following public comments on the ATF Proposed Rule on Definition of "Engaged in the Business" as a Dealer in Firearms: Federal Register Number 2023-19177, published on September 8, 2023 (the "Proposed Rule").

Congress defined the term "engaged in the business . . . as applied to a dealer in firearms" in the Gun Control Act ("GCA"), 18 U.S.C. § 921(a)(21)(C) & (D), and created crimes and other adverse consequences concerning activities within the scope of that definition. The proposed regulations would greatly redefine and expand the definitions enacted by Congress. Respectfully, ATF lacks the legal authority to do so.

The definitions of "engaged in the business" and related provisions passed by Congress in the GCA have the exclusive meanings "as used in this chapter," excluding any redefinition or

expansion by ATF. The legislative history of the Firearm Owners' Protection Act (FOPA), which enacted the larger part of the definitions, buttresses the exclusivity of the textual definitions.

The severity of the consequences of engaging in the business without a license requires strict adherence to the definitions enacted by Congress. Being engaged in the business without a license is a felony, subjects firearms to forfeiture, and may result in denial of a license.

The Proposed Rule exceeds ATF's limited authority to adopt regulations. In enacting the Gun Control Act of 1968, Congress rejected making a violation of a regulation a crime. In enacting the Firearm Owner's Protection Act of 1986, Congress further reduced ATF's regulatory power. The specificity of authorized regulations negates a broad power.

ATF has no authority to "improve" on what Congress enacted or to create new crimes not enacted by Congress. An agency may not re-write statutory terms or fill in what the agency considers to be "gaps" or "loopholes" in the statute. The GCA is a criminal statute, and ATF's reading is not entitled to any deference. Given that the GCA is a criminal statute with the same meaning in a civil context, ATF may not create presumptions thereon for civil or administrative purposes.

This Proposed Rule is an outgrowth of President Biden's March 2023 Executive Order. The White House's announcement stated the goal of the Executive Order was to increase "the number of background checks conducted before firearm sales, moving the U.S. as close to universal background checks as possible without additional legislation. " …. "Specifically, the President is directing the Attorney General to move the U.S. as close to universal background checks as possible without additional legislation by clarifying, as appropriate, the statutory definition of who is "engaged in the business" of dealing in firearms, as updated by the Bipartisan Safer Communities Act. "[1] But Congress rejected so-called "Universal Background Checks" in 2013.[2]

Adoption of the rule would frighten untold numbers of collectors and other persons not actually engaged in the business to obtain licenses, create untold numbers of licensees (who could then obtain firearms at wholesale), divert ATF resources away from licensee inspections and industry service and compliance, distract ATF from bona fide criminal investigations, and harm both the legitimate firearm industry and ATF operations.

According to the Office of Management and Budget (OMB), the Proposed Rule is considered a significant regulatory action and as such, is required to go through a regulatory impact process. The private and administrative costs estimated by the ATF are significantly

[1] https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/14/fact-sheet-president-biden-announces-new-actions-to-reduce-gun-violence-and-make-our-communities-safer/.

[2] Machin-Toomey Amendment https://www.senate.gov/legislative/LIS/roll_call_votes/vote1131/vote_113_1_00097.htm.

understated. The rule would cost private citizens about $338 to obtain a new license, and $35 to $194 annually to maintain the license. Additionally, this new rule would cost the government $116 million to process new licenses. See the Memorandum "Proposed ATF Licensing Rule" from John Dunham and Associates dated October 26, 2023, which is attached at the end of this letter.

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Summary of Proposed Rule

The following describes the major proposals in ATF 2022R–17. As explained in the comments that follow, ATF has no authority to add to the statutory definitions enacted by Congress. Nor does it have the authority to ignore other sections of the GCA that bear on what it means to be "engaged in the business" of dealing in firearms. Nor does it have authority to create presumptions in civil and administrative matters, or to claim any weight to such presumptions in criminal matters, such as in jury instructions. Moreover, many of the propositions set forth in the definitions are contrary to law and fact.

After repeating the statutory definition of "dealer," the proposal adds numerous activities to that definition. None of these activities are found in the statute.

The Proposed Rule adds that selling or offering to sell large numbers of firearms may be a business activity, and then states:

> 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 to acquire more firearms for resale or offers more firearms for sale), may require a license.

The proposal continues, "A person shall be presumed to be engaged in the business of dealing in firearms in civil and administrative proceedings, absent reliable evidence to the contrary, 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 ...." Under the Proposed Rule, no firearms need actually be sold, and mere representations suffice. The list further includes: "Spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported gross taxable income during the applicable period of time ...." The list then includes repetitive purchases or sale of firearms unlawfully.

But collectors in general buy guns with the purpose of eventual resale when they locate and can afford guns of ever-higher quality and rarity, and they certainly intend to sell guns for more than they paid as the collection moves up the ladder. Any gun owner would hope that the value of his or her firearms will increase, even if only to be sold by his or her heirs at a profit.

The presumption further exists when a person "Repetitively sells or offers for sale firearms—(A) Within 30 days after the person purchased the firearms; (B) That are new, or like new in their original packaging; or (C) Of the same or similar kind ... and type ...." Selling firearms soon after their acquisition may only entail that more desirable acquisitions have been found. As is true for collection of any item, keeping the original packaging always increases the value of firearms. "Anytime you see a gun for sale or someone asks how much one is worth, it is always worth more if it has the original box and papers."[3] "Collectors and enthusiasts love getting the original packaging ... that came with the gun in the first place."[4]

Firearms of a similar type include variations desired by collectors. "Many collectors choose to collect a particular type or make or model of gun."[5] After describing situations in which the presumption would not exist, it adds that the presumptions "are not exhaustive." That can only leave the public to wonder what else is included. See *VanDerStok v. Garland*, 86 F.4th 179, 194 (5th Cir. 2023) ("key determinations ... are exceedingly unclear under the Final Rule, such that the individual must guess at what he is and is not allowed to do."); *id*. at 197 ("ATF's overarching goal in the Final Rule is to replace a clear, bright-line rule with a vague, indeterminate, multi-factor balancing test. ATF's rationale: The new uncertainty will act like a Sword of Damocles hanging over the heads of American gun owners.") (Oldham, J., concurring).

ATF cites no legal authority authorizing it to make presumptions in civil or administrative matters, "absent reliable evidence to the contrary," that a person is violating the law. Indeed, the presumption is that a citizen is *not* violating the law absent evidence that he or she *is* doing so. The rule would turn this presumption upside down.

Indeed, ATF recognizes that it may not make presumptions in criminal matters, as it adds that the above rebuttable presumptions "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." Jury instructions are for courts, not agencies, to give based on the elements of offenses found in the law and judicial decisions.

The proposal goes on to define at length "Personal collection, personal collection of firearms, or personal firearms collection," including: "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)."[6] Self-defense is not included, although that's a predominant reason to acquire firearms. As the Supreme Court stated in *District of Columbia v. Heller,* 554 U.S. 570, 628 (2008), "the inherent

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[3] "Why are guns worth more with the box and original paperwork?" https://thefiringline.com/forums/showthread.php?t=379479

[4] "Best Value-Holding Pistols: It's an Investment!" https://www.pewpewtactical.com/best-value-holding-pistols/

[5] "Gun Collecting." https://www.nrablog.com/articles/2017/11/gun-collecting-introduction-and-types-of-collecting/

[6] "For Most U.S. Gun Owners, Protection Is the Main Reason They Own a Gun," Pew Research Center. https://www.pewresearch.org/politics/2023/08/16/for-most-u-s-gun-owners-protection-is-the-main-reason-they-own-a-gun/

right of self-defense has been central to the Second Amendment right," and handguns are "overwhelmingly chosen by American society for that lawful purpose."

"Predominantly earn a profit" is defined initially by the concise terms used in the statute, but then the following is added:

> A person shall be presumed to have the intent to predominantly earn a profit from the sale or disposition of firearms in civil and administrative proceedings, absent reliable evidence to the contrary, when the person—
>
> (i) Advertises, 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;
>
> (ii) 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;
>
> (iii) Makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales;
>
> [iv-viii adds additional presumptions.]

The above statement that "a person shall be presumed to have the intent to predominantly earn a profit from the sale or disposition of firearms" deletes the following words from the statutory text: "a *regular course* of trade or business to predominantly earn a profit through the *repetitive* purchase and resale of firearms."[7] (emphasis supplied.)

Some collectors post firearms for sale on websites such as GunBroker.com, or pass out cards seeking rarities, such as Colt single-action revolvers. An ordinary gun owner who wishes to sell just a single firearm may typically post an ad on the gun club's bulletin board or the local newspaper's classified ad section. Guns may also be advertised in estate sales.

Many who display at gun shows are there to improve a collection, or just to gab with persons who happen by about firearm history or political topics. Display cases are often used to exhibit rare guns competing for "best in show" or other prizes. Many gun owners keep track of how much they paid for and sold guns without being in the gun business.

Apparently, ATF special agents will be assigned to snoop around at gun shows randomly to determine the motivations of persons with tables, rather than to use their scarce resources to investigate and arrest illegal firearms traffickers, straw purchases, armed drug traffickers and armed criminals ("trigger pullers" as ATF has referred to them)[8]. Generally speaking, ATF

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[7] 18 U.S.C. § 921(a)(21)(C).

[8] See e.g., Justice Department, ATF Announce New Surge of Resources to Fight Violent Crime https://www.atf.gov/news/pr/justice-department-atf-announce-new-surge-resources-fight-violent-crime (dated November 28, 2023).

special agents are highly-motivated individuals who want to go after real criminals, not hang out at gun shows.

The above is the second instance in which ATF purports to create a presumption, "absent reliable evidence to the contrary," that a citizen is violating the law. No legal authority is cited authorizing ATF to create any such presumption, which turns upside down the presumption that the citizen is *not* violating the law.

Again, the proviso is added that the presumptions do not apply in a criminal case, but they could be used for jury instructions. An agency has no authority to adopt regulations for use in criminal cases to create the impression that the agency's opinion is somehow "law."

The remaining proposed regulations relate primarily to the conduct of business by licensees. Proposed 27 C.F.R. § 478.57 would require a licensee who discontinues business for any reason, "within 30 days, or such additional period designated by the Director for good cause," either to sell the inventory to another licensee or to transfer it to one's personal inventory. Proposed § 478.78 would require the same by a revoked or denied licensee. No such timeline is required by the GCA.

Finally, proposed § 478.124 restates the requirement of the Form 4473, but adds 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 ...." However, the statute does not require that the firearm be delivered "for the sole purpose of repair or customizing," which should be deleted. Instead, § 18 U.S.C. 922(a)(2)(A) provides:

> this paragraph [prohibiting transfer in interstate commerce to a non-licensee] and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector ....

The following explains in detail the reasons why ATF lacks the authority to promulgate the Proposed Rule.

I. The Definition of "Engaged in the Business" Passed by Congress in the GCA Excludes Any Redefinition or Expansion by ATF

A. "Engaged in the Business" Has the Exclusive Meaning "As Used in this Chapter"

The GCA, 18 U.S.C. § 921(a), begins: "As used in this chapter," following which are various definitions. It does *not* begin, "as used in this chapter *and as further defined in regulations*." ATF has no authority to devise its own definitions.

As pertinent here, § 921(a)(11) provides: "The term 'dealer' means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker."

Next are a series of finely-crafted definitions. Section 921(a)(21) provides in pertinent part:

> The term "engaged in the business" means – . . .
>
> (C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), 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, 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;
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> (D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms . . . .

The above term "to predominantly earn a profit" was enacted by the Bipartisan Safer Communities Act of 2022 (BSCA). It deleted "with the principal objective of livelihood and profit," which had been enacted by the Firearm Owners' Protection Act of 1986 (FOPA).

Finally, § 921(a)(22) states: "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. . . ." That was the same definition that FOPA enacted for "with the principal objective of livelihood and profit." Given that this definition remained the same, the BSCA amendment must be regarded as stylistic, not substantive. Importantly, the BSCA did not amend or alter the requirements of Section 921(a)(21)(C) and (D).

As noted above, § 921(a) begins: "As used in this chapter," generally precluding any addition of definitions by regulation. There is a single exception to this rule: "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 . . . ." § 921(a)(13). That explicit authorization negates any implied regulatory power to expand definitions for other terms. "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[9]

[9] *Bittner v. United States*, 598 U.S. 85, 94 (2023).

B. FOPA's Legislative History Buttresses the Exclusivity of the Textual Definitions

The Firearm Owners' Protection Act (FOPA) of 1986 was enacted "to correct existing firearms statutes and enforcement policies." § 1(a), P.L. 99-308, 100 Stat. 449 (1986). That referred in part to the lack of a definition of "engaged in the business" and related terms. Virtually all of the above pertinent definitions in current law were enacted by FOPA. See *id*. at 450. The amendment by the Bipartisan Safer Communities Act of 2022 noted above did not alter the basic definitions. The following explains the reasons for and meaning of the FOPA definitions.

The Gun Control Act of 1968 defined "dealer" in part as "any person engaged in the business of selling firearms or ammunition at wholesale or retail ...." P.L. 90-618, 82 Stat. 1213, 1216. It made it unlawful to engage in the business of dealing in firearms without being a licensed dealer. *Id*. at 1216-17.

The lack of a more specific definition for "engaged in the business" proved unfair and unworkable. After several Congressional hearings, a Senate subcommittee reported: "Agents anxious to generate an impressive arrest and gun confiscation quota have repeatedly enticed gun collectors into making a small number of sales – often as few as four – from their personal collections. ... The agents then charged the collector with having 'engaged in the business' of dealing in guns without the required license." The Right to Keep and Bear Arms, Report of the Subcommittee on the Constitution, Sen. Jud. Com., 97th Cong., 2d Sess., at 21 (1982).

In 1984, the Senate Judiciary Committee noted witness testimony showing "the urgent need for changes in current law to prevent the recurrence of abuses documented in detail."[10] It explained: "Many firearm hobbyists sell or trade firearms from their collections, and hearings have repeatedly established that many such hobbyists have been charged and convicted for technically violating the broad reading which courts had given this phrase."[11] One of those vague tests applied to "anyone who 'has guns on hand' or can obtain them and is willing to sell …."[12] The FOPA bill "would substantially narrow these broad parameters by requiring that the person undertake such activities as part of a 'regular course of trade or business with the principal objective of livelihood and profit.'"[13]

In debate in the Senate in 1985, Sen. Abhnor noted "tremendous confusion over who should possess a FFL license ...."[14] According to Sen. Laxalt, "Current law is ambiguous in its requirements, ensnaring many people who have neither the desire nor the intent to violate the law."[15] Sen. Hatch, the bill's floor manager, noted "a hodgepodge of definitional interpretations

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[10] Federal Firearms Owners Protection Act, Report 98-583, Sen. Jud. Com., 98th Cong., 2d Sess., at 3 (1984).

[11] *Id* at page 8.

[12] *Id*.

[13] *Id*.

[14] 131 Cong. Rec. S9111 (1985).

[15] *Id*. at H9113.

found in court rulings" which "has led to many collectors being convicted for just a few sales which were made during the regular and normal course of their collecting or hobby activities."[16]

Without a specific definition, courts had held that "there is no minimum profit, no requirement of advertising, employment of others, or premises used for business," according to Sen. Sasser, who added: "One court has even claimed that the display of a firearms collection in a glass case is listed among the characteristics associated with a 'firearms business venture,' so that a normal collector's display at a gun show is itself evidence of violation."[17]

Similar comments were made throughout the debates. See *id*. at S9170 (Sen. Durenberger) ("Many gun collectors have been enticed into two, three, or four gun sales out of their collection over a period of 6 months, then charged with having engaged in the business."); *id*. at S9173 (Sen. Grassley) (bill's definition would "preclude the present unwarranted prosecutions of gun collectors and hobbyists"); *id*. at S9174 (Sen. Hatfield) (noting "widespread confusion among gun dealers, collectors, and owners about the act's definition of being engaged in the business").

FOPA was debated in the House in 1986. Rep. Volkmer, chief sponsor of the bill, detailed specific cases of abuse. R.C. Lindsey, a witness in one of the hearings, had a license: "BATF sought to revoke it, not upon the grounds that he had ever done wrong, but on the grounds that he was not selling enough guns to merit the license. He had sold three, at a time when the Bureau was prosecuting unlicensed persons selling three or four guns for dealing without a license."[18] By contrast, Patrick Mulcahey was arrested for dealing without a license "after he sold three firearms from his personal collection over the period of 1 year."[19]

Rep. Moore said that the bill clarifies the definition "to end confusion of who needs a license for firearm sales, so unsuspecting, law-abiding gun owners and hunters do not find themselves guilty of a felony for sales without a license such as an exchange of firearms from their personal collection ...."[20]

In response to comments about the large number of licensees, Rep. Marlenee asked, "Has anybody ever thought that perhaps the reason that we have 225,000 licensed gun dealers is because of the harassment of the BATF and the requirements that are placed on them? ... You cannot clean a gun hardly without having a license."[21]

That comment seems eerily similar to what will be the effect of the rule that is now proposed. Before FOPA, some complained that there were too many dealers, and that many who were not really engaged in the business obtained licenses just so they could purchase firearms at

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[16] *Id*. at S9125.

[17] *Id*. at S9127, citing *United States v. Jackson*, 352 F. Supp. 672 (D. Ohio 1972), aff'd, 480 F.2d 927 (6th Cir. 1973).

[18] 132 Cong. Rec. H1651 (1986).

[19] *Id*. at H1652.

[20] *Id*. at H1659.

[21] *Id*. at H1691.

wholesale for personal use. But many collectors who were *not* engaged in the business obtained licenses out of fear of being prosecuted for engaging in the business. The Proposed Rule will reinstate the pre-FOPA regime.

What could be called the anti-FOPA bill, sponsored by Rep. Hughes, defined "engaged in the business" as "devoting time, attention, and labor to that activity on a recurring basis, and for that purpose maintaining firearms on hand or being willing and able to procure firearms," excluding sale of a personal collection "in connection with liquidation of that collection." H1682. As Rep. Hughes explained his bill, for a license to be required "a person must maintain guns on hand or be ready and able to obtain them for sale."[22]

The Hughes bill would be defeated, but the Proposed Rule would essentially enact the same content, even using similar phraseology. Just having firearms on hand that might be sold, or just saying that one is able to procure firearms, in no way meet the statutory definition of engaged in the business.

Rep. Volkmer characterized the Hughes bill as requiring that "if you, even as a hunter, sell to your neighbor or friend one of your shotguns, and the amendment says on a recurring basis – that means if I have other guns and that later on, in another 6 months or a year, I would like to trade my other shotgun or rifle or handgun to a fellow sportsman, that I would have to be licensed as a dealer."[23]

According to Rep. Fields, "The Treasury Department and Justice Department think it [the Hughes bill] is clearly unworkable and would basically require anyone who sells more than two firearms a year to obtain a Federal Firearms License. The end result could be 20 million Federal Firearms Licenses, all with the ability to do mail order sales."[24] Rep. Dingell added that Hughes proposed "a nightmare definition" which "could require anyone who buys or sells more than two guns a year, the duty to become a licensed firearms dealer."[25]

The Hughes bill, including its definition of "engaged in the business," was overwhelmingly defeated in a House vote. *Id*. at H1699. FOPA then passed with its definition of the term, *id.* at 1754, which largely remains part of the GCA today.

As is evident, much of what ATF now proposes is similar to what the above legislative history indicates the FOPA definitions were designed to prevent. Put more directly, ATF appears to be implementing by its Proposed Rule what Congress expressly rejected by not enacting H1682.

C. The Severity of the Consequences of Engaging in the Business Without a License Requires Strict Adherence to the Definitions Enacted by Congress

[22] *Id*. at H1694.
[23] *Id.* at H1678.
[24] *Id*. at H1693.
[25] *Id*. at H1697.

1. Being Engaged in the Business Without a License is a Serious Felony

Whether a person is "engaged in the business" may have severe criminal consequences. "It shall be unlawful – (1) for any person – (A) except a . . . licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce …."[26] A person who "willfully violates" this provision "shall be fined under this title, imprisoned not more than five years, or both."[27]

ATF has no authority to redefine and expand what Congress has made criminal. *VanDerStok v. Blackhawk Manufacturing*, 86 F.4th 179, 182 (5th Cir. 2023) (holding challenged portions of ATF final rule redefining the statutory definition of "frame or receiver" published on April 26, 2022, 87 Fed. Reg. 24652 invalid.[28])

2. Being Engaged in the Business Without a License Subjects Firearms to Forfeiture

A firearm involved in a willful violation of § 922(a)(1) or a valid GCA regulation is subject to forfeiture: "Any firearm . . . involved in or used in any . . . willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, . . . or any firearm . . . intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture . . . ."[29]

However, the firearms subject to forfeiture are subject to strict limits: "Only those firearms . . . particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, . . . or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition."[30]

The above-referenced paragraph (3) includes firearms intended to be used in a violation of § 922(a)(1), engaging in the business without a license, as follows: "The offenses referred to in paragraphs (1) and (2)(C) of this subsection are – . . . (C) any offense described in section 922(a)(1) . . . of this title, where the firearm . . . intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1) . . . of this title . . . ."[31] As noted above, that intent must be "demonstrated by clear and convincing evidence."

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[26] 18 U.S.C. § 922(a)(1).

[27] § 924(a)(1)(D).

[28] "Where an executive agency engages in what is, for all intents and purposes, 'law-making' the legislature is deprived of its primary function under our Constitution, as our citizens are robbed of their right to fair representation in in government. This is especially true when the executive rule-turned-law criminalizes conduct without the say of the people who are subject to its penalties."

[29] 18 U.S.C. § 922(d)(1).

[30] § 922(d)(2)(C).

[31] § 924(d)(3).

Forfeitures 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 above requirement of clear and convincing evidence in § 922(a)(1) cases involving forfeiture.

Congressional debates leading to FOPA highlighted the confiscation and forfeiture of firearms from collectors based on lack of a clear definition of engaged in the business. The Proposed Rule would nullify the FOPA definitions and frighten collectors into getting licenses to preclude having their firearms forfeited, and will result in unwarranted forfeitures of firearms of those who do not obtain licenses.

3. Willful Violation of a Regulation May Result in Denial or Revocation of a License

An application for an importer's, manufacturer's, or dealer's license shall be approved, inter alia, if "the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder …."[32] A license may be revoked "if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter …." [33]

The references to rules and regulations refer to those prescribed "under this chapter," meaning those authorized by the explicit delegations in chapter 44 of Title 18, U.S.C. Examples include regulations about record keeping under § 923(g) and serial numbers under § 923(i). No authority exists to adopt rules not authorized by this chapter and then to disapprove or revoke licenses pursuant to such unauthorized rules.

Under the Proposed Rule, collectors will be stampeded into getting licenses, but may be denied based on having previously been engaged in the business under the new expanded, unauthorized regulations.

II. The Proposed Rule Exceeds ATF's Limited Authority to Adopt Regulations

A. In Enacting the Gun Control Act of 1968, Congress Rejected Making Violation of a Regulation a Crime

Redefinition and expansion of the terms defined in the GCA by regulation would allow ATF to redefine and expand crimes in the GCA. But in passing the GCA, Congress explicitly rejected a regulatory power that would have allowed just that.

As originally proposed, the bill that became the GCA provided: "Whoever 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." (Emphasis added.) It also

[32] 18 U.S.C. § 923(d)(1)(C).
[33] § 923(e).

stated that "the Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter."[34]

Senator Robert P. Griffin objected that "if there is one area in which we should not delegate our legislative power, it is in the area of criminal law. If we are concerned about due process, surely then, we should spell out in the law what is a crime." He added that, under the bill, "the Congress would delegate to the Secretary the power to prescribe regulations such as he deems necessary, and would provide that a violation of such a regulation to be promulgated in the future – no matter what it says – would be a crime." Thus, "this provision violates a fundamental principle of constitutional law and that, as such, should be stricken from the bill."[35]

That statement remains good law today. "Only Congress can actually criminalize behavior." *VanDerStok v. Garland*, 86 F.4th 179, 196 & n.25 (5th Cir. 2023), quoting 1 Charles E. Torcia, Wharton's Criminal Law § 10 (15th ed. 2019) ("It is for the legislative branch of a state or the federal government to determine … the kind of conduct which shall constitute a crime.").

Senator Howard Baker also objected to the provision, explaining:

> To permit, on the one hand, the Secretary to prescribe, to promulgate, and to propound regulations which he, and he alone, may propound, which are treated as criminal statutes and are punishable as such, is to me the height of the abdication of our responsibility with respect to the protection of all citizens. Even more serious is the idea that some future Secretary might change or alter a rule or a regulation in order to form it up into a criminal offense, and thus place in the hands of an executive branch administrative official the authority to fashion and shape a criminal offense to his own personal liking and charge a citizen of the United States with the peril of imprisonment for violation thereof.[36]

An amendment to the GCA bill was then adopted to delete the provision making it an offense to violate "any rule or regulation promulgated thereunder." *Id*. at 14793. As passed, all GCA offenses were defined in terms of violations of "this chapter." P.L. 90-618, 82 Stat. 1213, 1223 (1968).

Yet ATF 2022R-17 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.

B. In Enacting the Firearm Owner's Protection Act of 1986, Congress Further Reduced ATF's Regulatory Power

[34] 114 Cong. Rec. 14792 (May 23, 1968).
[35] *Id.*
[36] 114 Cong. Rec. 14792 (May 23, 1968).

In passing the Firearm Owners' Protection Act of 1986 (FOPA), Congress reaffirmed the Second Amendment right to keep and bear arms and found it necessary "to correct existing firearms statutes and enforcement policies." § 1(a), 100 Stat. 449 (1986). It added that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968," as follows:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[37]

FOPA reduced ATF's regulatory power as follows: "The Attorney General may prescribe "*only* such rules and regulations as *are necessary* to carry out the provisions of this chapter" (chapter 44 of title 18). 18 U.S.C. § 926(a) (emphasis added). FOPA deleted the prior language that "the Secretary may prescribe such rules and regulations *as he deems reasonably necessary* to carry out the provisions of this chapter." FOPA, § 106. Thus, FOPA "will decrease regulation of law-abiding citizens who choose to own and use firearms for legitimate purposes."[38]

Under FOPA, "regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment. The deletion of the term 'reasonably' narrows the boundaries of an agency's discretion, discretion which has been at times exercised in an abusive manner. . . . In addition, the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law." 131 Cong. Rec., 99th Cong., 1st Sess., at S9171 (1985) (remarks of Senator Mattingly). "The Protection Act requires that regulations issued be only those necessary to enforcement of the Act. (Current law allows any regulations the Secretary thinks reasonably necessary, a broader standard.)."[39]

In sum, FOPA delegated ATF authority to prescribe "only such rules and regulations as are necessary to carry out the provisions of this chapter." ATF 2022R-17 is not only unnecessary to carry out the provisions of chapter 44, but also it conflicts with chapter 44 by expanding and changing the statutory definitions. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[40]

C. The Specificity of Authorized Regulations Negates a Broad Power

The GCA is very specific in delegating limited authority to ATF to adopt regulations. The specificity of these delegations demonstrates Congressional intent against a broad delegation of authority. As noted above, "When Congress includes particular language in one section of a

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[37] FOPA, § 1(b).

[38] Senate Judiciary Committee Rep. 583, 98th Cong., 2d Sess., at 30 (1984).

[39] *Id*. at S9125 (remarks of Senator Hatch).

[40] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[41]

An application for a firearm license "shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe …."[42] That limits the scope of such regulation only to determine eligibility for licensing, which is specified in 18 U.S.C. § 923(d)(1).

ATF's regulatory authority extends to the time period and form of recordkeeping by licensees. "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."[43] Regulatory authority over licensed collectors is very specific: "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. Such records shall include the name and address of any person to whom the collector sells or otherwise disposes of a firearm."[44]

ATF's authority extends to certain marking requirements. "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."[45] "Licensed importers and licensed manufacturers shall mark all armor piercing projectiles and packages containing such projectiles for distribution in the manner prescribed by the Attorney General by regulation."[46]

Finally, ATF is authorized to promulgate regulations concerning the conduct of business by licensees at gun shows: "A licensed importer, licensed manufacturer, or licensed dealer may, under rules or regulations prescribed by the Attorney General, conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event . . . ."[47]

None of the above specific authorizations would be necessary if ATF had broad power to issue regulations at its discretion. Yet ATF 2022R-17 is based on the premise that ATF may expand on the limited powers authorized by Congress.

III. ATF Has No Authority to "Improve" upon What Congress Enacted or to Create New Crimes Not Enacted by Congress

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[41] *Bittner*, 598 U.S. at 94.

[42] 18 U.S.C. § 923(a). See § 923(b) (same for collector's license).

[43] § 923(g)(1)(A).

[44] § 923(g)(2).

[45] § 923(i).

[46] § 923(k).

[47] § 923(j).

A. An Agency May Not Re-Write Statutory Terms

ATF 2022R–17 purports to correct a perceived inadequacy or deficiency in the definitions that Congress enacted. That is not the role of an administrative agency. This is particularly the case because the definitions enacted by Congress apply to criminal provisions, which ATF has no authority to enlarge, including in a civil or administrative context.

"We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014). "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Texas v. FCC*, 569 U.S. 290, 296 (2013); *id*. at 307 ("Where Congress has established a clear line, the agency cannot go beyond it"). *VanDerStok*, 86 F.4th at 25 ("Where the statutory text does not support ATF's proposed alterations, ATF cannot step into Congress's shoes and rewrite its words, regardless of the good intentions that spurred ATF to act."); *id*. at 28 ("unless and until Congress so acts to expand or alter the language of the Gun Control Act, ATF must operate within the statutory text's existing limits.") *id*. at 19 ("ATF cannot legislate.").

Congress did not leave any "gap for the agency to fill" with respect to the meaning of "engaged in the business," *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); nor did it give ATF the authority to define statutory terms itself. *Cf., e.g.*, 15 U.S.C. §18(a)(d)(2)(A) (giving the Federal Trade Commission authority to "define the terms used in this section"). The ATF's attempt to shoehorn a list of presumptions into the definition of "engaged in the business" usurps congressionally enacted text and disregards the agency's subordinate role in our constitutional system.

Like other agencies, ATF is "a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress …. Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. E.P.A.,* 268 F.3d 1075, 1081-82 (D.C. Cir. 2001). Further, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000). See *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991) (invalidating ATF regulations which contradicted "the plain language of the statute" and rejecting ATF's policy arguments as a matter for Congress).

B. The GCA is a Criminal Statute, and ATF's Reading is Not Entitled to Any Deference

What Congress had in mind when it defined "engaged in the business" is not for ATF to mold like clay into something different. As the Supreme Court has reiterated, "we have never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014) (also noting that executive branch "views may reflect overly cautious legal advice …. Or they may reflect legal error."). *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (Attorney General not entitled to deference in interpretation of criminal law); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("we have

never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

Abramski v. United States, 573 U.S. 169, 191 (2014), rejected ATF's interpretation of a GCA provision with this explanation:

> The critical point is that criminal laws are for courts, not for the Government, to construe…. We think ATF's old position no more relevant than its current one – which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly … a court has an obligation to correct its error.

C. Given that the GCA's Criminal Provisions Have the Same Meaning in a Civil Context, ATF May Not Create Presumptions Thereon for Civil or Administrative Purposes

ATF recognizes that it may not create rebuttable presumptions regarding GCA definitions in a criminal context. 88 F.R. at 62000 n.60. For that very reason, since the definitions are the same in both civil and criminal contexts, ATF may not create rebuttable presumptions regarding the definitions in a civil or administrative context.

That principle was applied in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), which rejected ATF's interpretation of the application of a certain definition in the National Firearms Act. 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."[48]

Thompson/Center was thus a civil case involving a statute that is also criminal. The Proposed Rule's "rebuttable presumptions" applicable to civil and administrative matters, but not criminal cases, is thus based on a false dichotomy.

Moreover, ATF has cited no authority authorizing it to adopt regulations that create presumptions applicable to the statutory terms. Congress has that authority, but even its presumptions must be limited.

For instance, the Federal Firearms Act of 1938 provided that possession of a firearm by a person convicted of a crime of violence "shall be presumptive evidence" that it was shipped or received in violation of the Act. *Tot v. United States*, 319 U.S. 463, 467 (1943), held that "the conclusion does not rationally follow," adding that "it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."[49]

[48] *Id.* at 517.
[49] *Id.* at 468.

Here, ATF purports to create rebuttable presumptions and then to shift the burden of showing otherwise to the person: "A person shall be presumed to be engaged in the business of dealing in firearms in civil and administrative proceedings, absent reliable evidence to the contrary," based on a long list of non-exhaustive factors.

While conceding that its purported presumptions may not apply in criminal cases, ATF argues that they may be given in jury instructions as "permissive inferences."[50] It cites three cases in which ATF's definition of an unlawful drug user was mentioned, but the cases were decided based on the statutory text and judicial precedents. See *id.*, citing *United States v. Antonoff*, 424 F. App'x 846, 848 (11th Cir. 2011).

To the contrary, "a jury instruction requires the jury to find guilt on the elements of the charged crime," *Musacchio v. United States*, 577 U.S. 237, 243 (2016), and that is based on the statute and relevant case law. Agencies are not entitled to draft jury instructions.

ATF cannot just disclaim any problem with its foray into enlarging criminal statutes. *See* 88 Fed. Reg. at 62,000 (the "rebuttable presumptions would apply in civil and administrative proceedings" but "shall not apply to criminal cases"). Indeed, it cannot help itself but admitting in the very next breath that the presumptions it seeks to impose "may be useful to courts in criminal cases … when instructing juries." *Id.* at 62,000 n.60. But just as it would be "preposterous" "to say that when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit," Cass R. Sunstein*, Chevron Step Zero*, 92 Va. L. Rev. 187, 210 (2006), it would be "preposterous" to permit an agency involved in the prosecution of a case to direct the drafting of jury instructions. "Such deference would" wreak so much havoc with fundamental separations of powers it would "threaten liberty itself." *Id.*

In sum, Congress enacted the definitions of "engaged in the business" and related terms in the GCA, and ATF has no authority to change them.

IV. The Proliferation of Licensees Would Divert ATF's Resources Away from Criminal Enforcement and Industry Services and Regulation

Adoption of the rule would frighten untold numbers of collectors and other gun owners not actually engaged in the business to obtain licenses, create untold numbers of licensees (who could then obtain firearms at wholesale), divert ATF resources away from licensee inspections, industry service and compliance, distract ATF special agents from bona fide criminal investigations, and harm both the legitimate firearm industry and ATF operations.

The Proposed Rule threatens civil and criminal liabilities that collectors and other gun owners – who are *not* engaged in the business as defined by Congress – will rightly perceive as threats that will induce many to obtain licenses. Citizens wish to avoid felony convictions, imprisonment, confiscation of firearms, and other penalties. ATF should not underrate or brush off such fears, as the consequences of alleged violations will ruin lives. Given the ambiguities in

[50] 88 F.R. at 62000 n.60.

the proposed definitions articulated above, ATF is not in a position to assume that citizens need only choose between clear-cut courses of conduct.

An ordered society exists when the citizenry and law enforcement agencies are cooperative and have unified goals, including adherence to the rule of law. "More than half of American voters – 52% – say they or someone in their household owns a gun, per the latest NBC News national poll."[51] The perception that "ATF will come after you if you sell a gun" does not bode well for cooperative relations between ATF and American gun owners, both of whose interests are to get criminals with guns off the streets.

Citizens who don't need licenses, but obtain them out of fear, will be subject to ATF inspections in their homes and offices. Their records of firearm acquisitions and dispositions, and their firearm collections, will be subject to inspection. Being pressured to get licensees will force citizens to waive their Fourth Amendment privacy rights and render them subject to overwhelming regulatory obligations.

The floodgates will open in which millions of gun owners will be pressured into obtaining licenses. Some will obtain licenses just to buy guns at dealer prices and receive them by common carrier. Are ATF's Industry operations investigators (IOIs) expected to monitor this deluge of new licensees? "The Attorney General must approve or deny an application for a license within the 60-day period beginning on the date it is received."[52] It will be impossible for IOIs to conduct the normal initial interviews within this period. Nor will it be possible for IOIs to inspect inventory and records at the licensed premises of more than a tiny percentage of licensees pursuant to § 923(g).

The Proposed Rule is a complete reversal of ATF policies dating back to 1993, when President Clinton directed the Secretary of Treasury to take "whatever steps are necessary" to reduce the number of gun dealers. He explained:

> Today there are in excess of 287,000 Federal firearms licensees, and a great number of these persons probably should not be licensed. The Bureau of Alcohol, Tobacco and Firearms (ATF) estimates that only about 30 percent of these are bona fide storefront gun dealers. ATF estimates that probably 40 percent of the licensees conduct no business at all, and are simply persons who use the license to obtain the benefits of trading interstate and buying guns at wholesale. The remaining 30 percent of licensees engage in a limited level of business, typically out of private residences.[53]

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[51] "Poll: Gun ownership reaches record high with American electorate," Nov. 21, 2023. https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-gun-ownership-reaches-record-high-american-electorate-rcna126037

[52] 18 U.S.C. § 923(d)(2).

[53] President Clinton, Memorandum on Gun Dealer Licensing, Aug. 11, 1993. https://www.presidency.ucsb.edu/documents/memorandum-gun-dealer-licensing.

By 2006 there were only 51,462 dealer licensees.[54] Even then, ATF and others argued there were insufficient numbers of personnel to inspect more than a fraction of the licensees:

> While the ATF does not release the number of inspectors it employs (OR SIC?) to monitor gun-dealer compliance, sources within the agency say there are "only hundreds of them" to inspect an estimated 54,000 dealers nationwide. As a result, less than 5 percent of gun dealers are inspected each year. A July 2004 inspector general's report estimated that with the ATF's current resources, it would take 22 years to inspect every licensed gun dealer in the country.[55]

The Proposed Rule will strain ATF's budget and divert scarce ATF resources away from service to firearm importers and manufacturers, state and local law enforcement, and the other entities it serves. The Firearms and Ammunition Technology Division (FATD) is very important to the industry but is already overly strained in rendering classifications and approvals on a timely basis. Other ATF operations will be adversely impacted such as processing required National Firearms Act forms, issuing import permits, processing variance requests, and renewing existing licenses.

The FBI NICS is mandated by the U.S. Attorney General to maintain an "immediate proceed" rate of at least 90%.[56] The addition of several hundred thousand additional "dealers" who would be required to conduct background checks on the sale of firearms will result in lengthy delays in processing background checks, adversely impacting NICS ability to maintain a 90% immediate proceed rate. This will harm the ability of currently licensed dealers to operate their businesses. This cost to industry and the taxpayer is not factored into ATF's economic impact analysis.

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Perhaps most importantly, the Proposed Rule will divert ATF special agents from doing what they do best – apprehending armed criminals on the streets – to wasting time in gun shows or reading classified ads in newspapers and posing as purported gun buyers, in hopes of purchasing a couple of guns to make cases against unsuspecting, harmless members of the public. ATF's mission is to fight crime and violence, not to test compliance with ambiguous rules by random members of the public.

V. The Private and Administrative Costs Estimated by the ATF Are Significantly Understated

[54] "Number of federal firearm dealers in the United States from 1975 to 2020." https://www.statista.com/statistics/215666/number-of-federal-firearm-dealers-in-the-us/.

[55] Alexandra Marks, "Why gun dealers have dwindled," *Christian Science Monitor*, March 14, 2006. https://www.csmonitor.com/2006/0314/p02s01-ussc.html.

[56] 2017 NICS Operations Report at p. 11 "The U.S. Attorney General requires the NICS Section to maintain a 90 percent or better rate of immediate determinations."

The following summarizes the supplemental analysis "ATF Proposed Rule Docket No. ATF 2022R-17 Economic Analysis" from John Dunham and Associates (JDA) dated October 26, 2023, which is submitted with this comment letter.

The ATF is required to provide economic impact under the regulatory flexibility analysis rule. Studying this analysis raises several grave concerns not only for Industry but for ATF as well. ATF relied on Firearms Industry Programs Branch (FIPB) subject matter expert (SME) opinion to estimate a 1.31 million person population that is selling, trading, or bartering firearms at any given time.[57] Of this 1.31 million person population, "ATF continues to assume, based on the best, very conservative assessment from SME experts, that 25 percent (or 328,296 unlicensed individuals) may be engaged in the business with an intent to profit."[58] Parameters of the Proposed Rule would suggest that the full estimate of 1.31 million unlicensed persons would be affected as discussed in this comment letter. The FIPB SME experts reflect in large ATF expert opinion which in practice is clearly subject to change.[59],[60] The JDA analysis, however, is based on ATF's conservative 328,296 population estimate.

Analyzing the ATF's economic impact revealed a purposeful rounding down of hourly wage of $16.23 to $16.00 per the 2020 cost of leisure time established by the Department of Transportation. Additionally, this cost was not adjusted for inflation from 2020 to the present which avoids record high-cost adjustment. "Adjusting for inflation and keeping raw values (as opposed to rounding down), the difference is just over a 6.0 percent increase."[61] This 6 percent in cost translates to approximately $6 million additional cost for the first year of the Proposed Rule under the Russel Sage Foundation estimate of unlicensed firearm sellers in the United States.

The recurring costs for ATF to inspect are also understated in the provided economic impact. JDA estimates the fees required for the potential 328,296 additional FFLs to obtain a Federal Firearms License to be $110.7 million and maintain said license to be $15.8 million annually. This income to ATF is significantly less than the cost to inspect a new potential population of law-abiding Americans at a combined cost of almost $220 million. This cost includes processing and inspecting all the new FFLs.[62] This analysis does not consider the staff needed to accomplish the nearly impossible goal of the Proposed Rule.

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[57] 88 FR 61993.

[58] *Id.*

[59] 87 FR 24652.

[60] 88 FR 6478.

[61] John Dunman & Associates, October 26. 2023, "ATF Proposed Rule Docket No. ATF 2022R-17 Economic Analysis".

[62] *Id.*

CONCLUSION

Based on the above considerations, the proposed Definition of "Engaged in the Business" as a Dealer in Firearms, Docket No. ATF 2022R-17, NSSF urges ATF to abandon the Proposed Rule in its entirety. The Proposed Rule is an unconstitutional attempt by ATF to usurp Congressional power by legislating through rulemaking. The Proposed Rule if made final would violate Section 706(2) of the Administrative Procedures Act ("APA") because, *inter alia*, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

Sincerely,

Lawrence G. Keane

JOHN DUNHAM & ASSOCIATES

ATF Proposed Rule Docket No. ATF 2022R-17 Analysis

The US Department of Justice, through the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), is proposing a new rule that would classify many additional private (unlicensed) firearms sellers/barterers throughout the country as firearms "dealers", essentially forcing these individuals to pay for and maintain a Federal Firearms License (FFL).[1] The rule would cost private citizens about $338 to obtain a new license, and $35 to $194 annually to maintain the license. Additionally, this new rule would cost the government $116 million to process new licenses.

This proposed rule would cost both the government and private citizens tens of millions of dollars in the first year alone, ballooning to hundreds of millions over a 20-year period.

According to the Office of Management and Budget, the proposed rule is considered a *significant regulatory action* and as such, is required to go through a regulatory impact process. ATF estimates that there would be either $7.8 million[2] or $104.4 million[3] in initial costs to private citizens resulting from:

- Form 7 Application Fees
- Fingerprints
- Passport Photographs
- Postage
- Qualification Inspections

ATF suggests that the annualized administrative costs would equal $1.5 million (assuming a 7 percent discount rate and 10-year time period). Both the private and administrative costs estimated by the ATF are significantly understated, and therefore have been adjusted by JDA accordingly.

Table 1
ATF Initial Cost Estimates to Obtain FFL

Cost Item	Hourly Burden	Hourly Wage Rate*	Hourly Cost	Cost Item	Rounded cost for each activity	First Year SME	First Year RSF
Form 7	1	$ 16.00	$ 16.00	$ 200.00	$ 216.00	$ 5,300,640.00	$ 70,911,936.00
Fingerprints	1	$ 16.00	$ 16.00	$ 12.00	$ 28.00	$ 687,120.00	$ 9,192,288.00
Passport Photograph	0.5	$ 16.00	$ 8.00	$ 17.00	$ 25.00	$ 613,500.00	$ 8,207,400.00
Postage	N/A	$ 16.00	N/A	$ 0.63	$ 1.00	$ 24,540.00	$ 328,296.00
Qualification Inspection	3	$ 16.00	$ 48.00	N/A	$ 48.00	$ 1,177,920.00	$ 15,758,208.00
Total Initial cost					$ 318.00	$ 7,803,720.00	$104,398,128.00

*Based on the Department of Transportation's estimated costs for leisure time, and the mediuan household income from the most recent U.S Census.

Table 1 shows ATF initial estimates for costs in obtaining an FFL. The $16 hourly wage rate is based on the cost of leisure time, established by the Department of Transportation, and using data from the 2020 Census. This rate was rounded down from the original $16.23 by ATF. It was also not adjusted for inflation from 2020 to present. The final cost for each activity was rounded down, as well. Table 2 adjusts for these issues below. Adjusting for inflation and keeping raw values (as opposed to rounding down), the difference is just over a 6.0 percent increase.[4]

1 US Department of Justice, *Definition of "Engaged in the Business" as a Dealer in Firearms*, ATF 2022R-17.

2 Based on ATF estimates of unlicensed private firearms sellers, using Bureau subject matters experts, numbered at 24,540.

3 Based on ATF estimates of unlicensed private firearms sellers, using a published survey by the Russel Sage Foundation, numbered at 328,296.

4 Inflation adjustments were made using the BLS CPI Inflation Calculator, from April 2020 (the year the 2020 Census was completed) to September 2023.

Table 2
JDA Initial Cost Estimates to Obtain FFL

Cost Item	Hourly Burden	Hourly Wage Rate*	Hourly Cost	Cost Item	Cost for each activity	First Year SME	First Year RSF
Form 7	1	$ 19.48	$ 19.48	$ 200.00	$ 219.48	$ 5,386,039.20	$ 72,054,406.08
Fingerprints	1	$ 19.48	$ 19.48	$ 12.00	$ 31.48	$ 772,519.20	$ 10,334,758.08
Passport Photograph	0.5	$ 19.48	$ 9.74	$ 17.00	$ 26.74	$ 656,199.60	$ 8,778,635.04
Postage	N/A	$ 19.48	N/A	$ 0.63	$ 1.00	$ 24,540.00	$ 328,296.00
Qualification Inspection	3	$ 19.48	$ 58.44	N/A	$ 58.44	$ 1,434,117.60	$ 19,185,618.24
Total Initial cost					$ 337.14	$ 8,273,415.60	$ 110,681,713.44

*Based on aforementioned costs for leisure time, adjusted for inflation (2020-2023).

According to ATF, there are either 24,540 or 328,296 unlicensed firearm sellers in the United States. As such, estimates for the total initial cost vary considerably. Using the SME value of 24,540 (attained from ATF *subject matter experts*, "SME"), JDA estimates that first year initial costs of the proposed rule would total approximately $8.3 million. Using a firearms survey published by the Russel Sage Foundation (RSF), the number of unlicensed firearms sellers is significantly higher – 328,296. The much higher estimate leads to a total initial cost of $110.7 million. Between the two values, the Russel Sage Foundation estimate seems to be the more accurate, as they rely on actual data and less on assumptions, as the SME estimate does. The SME estimate is also almost entirely based on information pulled from a single *private party* firearm sales website, as opposed to the RSF survey, which considers multiple mediums of firearms sales.

Table 3
ATF Recurring Cost Estimates to Maintain FFL

Item	Number of entries or applications	Hourly Burden	Hourly Wage Rate	Hourly Cost	Cost Item	Rounded cost for each	Recurring SME	Recurring RSF
Form 8 Renewal Application	1 (every 3 years)	0.5	$ 16.00	$ 8.00	$ 90.00	$ 98.00	$ 2,404,920.00	$32,173,008.00
Form 4473	3 (firearm sales every year)	0.5	$ 16.00	$ 24.00	N/A	$ 24.00	$ 588,960.00	$ 7,879,104.00
A&D Records	6 (two entries per firarm every year)	0.05	$ 16.00	$ 4.80	N/A	$ 5.00	$ 122,700.00	$ 1,641,480.00
Compliance Inspections	1 (periodically)	3	$ 16.00	$ 48.00	N/A	$ 48.00	$ 1,177,920.00	$15,758,208.00

The same adjustments were made for the recurring costs to maintain an FFL. The difference was even more significant, a nearly 21.8 percent increase.

Table 4
JDA Recurring Cost Estimates to Maintain FFL

Item	Number of entries or applications	Hourly Burden	Hourly Wage Rate	Hourly Cost	Cost Item	Cost for each activity	Recurring SME	Recurring RSF
Form 8 Renewal Application	1 (every 3 years)	0.5	$ 19.48	$ 9.74	$ 90.00	$ 99.74	$ 2,447,619.60	$ 32,744,243.04
Form 4473	3 (firearm sales every year)	0.5	$ 19.48	$ 29.22	N/A	$ 29.22	$ 717,058.80	$ 9,592,809.12
A&D Records	6 (two entries per firarm every year)	0.05	$ 19.48	$ 5.84	N/A	$ 5.84	$ 143,411.76	$ 1,918,561.82
Compliance Inspections	1 (periodically)	3	$ 19.48	$ 58.44	N/A	$ 58.44	$ 1,434,117.60	$ 19,185,618.24

In addition to the initial costs to obtain an FFL, JDA estimates that private sellers would need to spend between $35 (Form 4473 and A&D Records) and $194 (Form 8 Renewal Application, Form 4473, A&D Records, Compliance Inspections) annually to maintain their new license. Using the SME estimate for unlicensed sellers, this would total between $860,470 and $4.8 million, annually. Using the RSF estimate, this value would again be significantly higher, between $11.5 million and $63.5 million, annually.

Table 5
Hourly Burden and Cost to Process New Applications for an FFL (JDA, not rounded)

Activity	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Cost	First Year SME	First Year RSF
Average Contracting Time to Prepare and Enter Application	0.5	Contracting Staff	$ 13.29	$ 13.29	$ 6.65	$ 163,068.30	$ 2,181,526.92
Processing Time for New Applications	1	GS 10	$ 38.85	$ 64.49	$ 64.49	$ 1,582,584.60	$ 21,171,809.04
Processing Time for Fingerprint Cards	2	GS 12	$ 51.15	$ 84.91	$ 169.82	$ 4,167,382.80	$ 55,751,226.72
Qualification Inspection Time (Includes Travel)	5	GS 5/7 to GS 13	$ 37.65	$ 62.50	$ 312.50	$ 7,668,750.00	$ 102,592,500.00
Subtotal					$ 553.46	$ 13,581,785.70	$ 181,697,062.68
Fees Incurred from New Application					$ (200.00)	$ (4,908,000.00)	$ (65,659,200.00)
Total					$ 353.46	$ 8,673,785.70	$ 116,037,862.68

The Federal Government would also have costs incurred through the proposed rule, not only to process new licenses, but to inspect and enforce compliance of said rule.

Table 6
Recurring Government Costs to Inspect an FFL (JDA, not rounded)

Activity	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Cost	Recurring SME	Recurring RSF
Compliance Inspection (Includes Travel)	5	GS 5/7 to GS 13	$ 37.65	$ 62.50	$ 312.50	$ 7,668,750.00	$ 102,592,500.00

The government cost to process new applications isn't entirely offset by the application fee paid by private sellers. As such, the net cost to ATF is still significant, at about $8.7 million annually (using the SME estimate) and just over $116 million annually (using the RSF estimate), shown in Table 5. These values are initial costs. In addition, ATF must pay for compliance investigators, known as Industry Operations Investigators, to inspect whether or not new licensees are compliant with the requirements of the proposed rule. This recurring cost is shown in Table 6.

Table 7
Total Private and Government Costs of Proposed Rule (JDA, based on RSF estimates)

Year	Undiscounted Private	Undiscounted Government
1	$ 110,681,713	$ 116,039,504
2	$ 11,511,371	$ 8,207,400
3	$ 11,511,371	$ 8,207,400
4	$ 63,441,232	$ 1,969,776
5	$ 11,511,371	$ 8,207,400
6	$ 11,511,371	$ 8,207,400
7	$ 63,441,232	$ 1,969,776
8	$ 11,511,371	$ 8,207,400
9	$ 11,511,371	$ 8,207,400
10	$ 63,441,232	$ 1,969,776
11	$ 11,511,371	$ 8,207,400
12	$ 11,511,371	$ 8,207,400
13	$ 63,441,232	$ 1,969,776
14	$ 11,511,371	$ 8,207,400
15	$ 11,511,371	$ 8,207,400
16	$ 63,441,232	$ 1,969,776
17	$ 11,511,371	$ 8,207,400
18	$ 11,511,371	$ 8,207,400
19	$ 63,441,232	$ 1,969,776
20	$ 11,511,371	$ 8,207,400
NPV 7%	$ 366,487,576	$ 169,486,910
Annualized	$ 18,324,378.78	$ 8,474,345.49

As shown in Table 7 on the prior page, the proposed rule would cost ATF significantly more than estimated in their analysis. Based on JDA's corrections to the ATF analysis, the present value cost of the rule over a 20-year period would be $169.5 million. Discounted at a 7 percent rate, this would equal

nearly $8.5 million per year on an annualized basis. The total present value cost (private and government) over a 20-year period would be just under $536 million, with a total annualized cost of $26.8 million.

While the costs to the Federal Government would be borne by all taxpayers through higher debt service payments, the costs to those requiring the new licenses would be borne by firearms purchasers. Those individuals selling firearms face a competitive marketplace, where prices are equal to marginal costs in the long run. As the marginal cost of selling firearms would increase to reflect the higher licensing fees, these would eventually pass through to prices.

The total firearms market in the United States was estimated to be $32.1 billion in 2022.[5] An increase of $18.3 million (the annualized cost of the rule to the private sector), would be equivalent to a 0.099 percent price increase.

Table 8
Firearms Industry 2023

	Jobs		Wages		Output
Direct	172,685	$	9,372,349,931	$	32,110,233,023
Supplier	97,817	$	8,188,511,187	$	24,468,956,321
Induced	123,178	$	8,026,288,161	$	24,151,650,496
Total	393,679	$	25,587,149,280	$	80,730,839,840

Based on the model developed for NSSF by JDA, this additional fee will result in 0.89 percent fewer firearms sales.[6] Lower sales volumes will result in reduced jobs as retailers (including those new retailers licensed under the proposed rule) would require fewer personnel.

Table 9
Economic Impact of the Proposed Rule on the Firearms Industry

	Jobs		Wages		Output
Direct	(349)	$	(11,656,668)	$	(25,523,498)
Supplier	(78)	$	(6,508,811)	$	(19,449,668)
Induced	(127)	$	(8,302,632)	$	(24,983,189)
Total	(554)	$	(26,468,111)	$	(69,956,355)

As Table 9 shows, the fees would impact both the firearms industry and its customers. Nearly 350 FTE retailing jobs could be lost due to the higher prices under the proposed rule. Including businesses that supply these retailers, and those that depend on re-spending by direct and supplier firm employees, the rule would lead to a total of over 550 fewer FTE jobs and $26.5 million in lost wages and benefits. On top of this, the American economy would be $70.0 million smaller.

Demand Model Methodology

JDA's Regulatory Assessment Model (RAM) is an updated version of a multi-market demand model first developed by the American Economics Group (AEG) under contract with Philip Morris. It was completely rebuilt by Dr. Hyeyeon Park in 2001, and its structure was updated by JDA in 2019. The

[5] *Firearm And Ammunition Industry Economic Impact Report: 2023*, Prepared for the National Shooting Sports Foundation by John Dunham & Associates, December 2022, at: https://www.nssf.org/government-relations/impact/.

[6] Based on a demand elasticity of -0.894673215. Developed by John Dunham & Associates in 2012 using volume and price data for long guns provided by NSSF.

model was presented to the National Conference of State Legislatures, Senior Fiscal Analysts Seminar in Portland, Maine, on September 4, 1999, where it was well received. In fact, at that time, many state fiscal analysts asked if the model could be made available to them as a forecasting tool. The results from the model were also presented to the Tax Foundation Excise Tax Seminar, held in Jacksonville, Florida, on January 12, 2001, as part of a larger discussion on the economic impact of tobacco taxes.

Since then, the RAM model has been modified to work with nearly any product or market. It is designed to measure product sales in a multi-state market structure with differential pricing. The general methodology is a two-stage estimation of the demand equation linked to a non-linear programming model of import and export patterns. Data for the model comes from the 2021 Economic Impact Model of the Firearms Industry, as well as from the US Census Bureau, the Bureau of Economic Analysis, the Bureau of Transportation Statistics Commodity Flow Survey and JDA research. Caliper Corporation was used to estimate distances between states.

Estimates on what sales should be in each state are developed first. In this case, both demand and prices come directly from the Impact model. If cross-border sales were observable, the calculations would be complete; however, since they are not, the model must estimate them through non-linear programming techniques that solve the fifty-one demand functions simultaneously. The model adjusts the cross-price elasticities between states to balance the actual sales with expected demand.

Demand elasticities are calculated using a logarithmic demand curve with a base of -0.894673215 which is an average for long guns.

Once the linear program model balances, the model can be *shocked* with either new prices or demand values. By rebalancing the model following the shock, it is possible to calculate demand response estimates across all states (as well as cross-border sales changes).

Revenue and job impacts can then be estimated through linear extrapolation.