

The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) is proposing new regulations that change who is required to have a Federal Firearms License (“FFL”) in order to sell a firearm. ATF as part of the rule making process has issued the proposed new regulations and explanations for the regulations (the “Proposal”). The new regulations are based on changes in federal law that occurred in 2022. The ATF provided the following relevant statement in the Summary section of the Proposal:

The Department of Justice (“Department”) proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) regulations to implement the provisions of the Bipartisan Safer Communities Act (“BSCA”), effective June 25, 2022, that broaden the definition of when a person is considered “engaged in the business” as a dealer in firearms other than a gunsmith or pawnbroker. This proposed rule incorporates the BSCA’s definition of “predominantly earn a profit,” creates a stand-alone definition of “terrorism,” and amends the definitions of “principal objective of livelihood and profit” and “engaged in the business” to ensure each conforms with the BSCA’s statutory changes and can be relied upon by the public. The proposed rule also clarifies what it means for a person to be “engaged in the business” of dealing in firearms, and to have the intent to “predominantly earn a profit” from the sale or disposition of firearms.

Proposal Page 1 (emphasis added).

The “engaged in business” and intent to “predominately earn a profit” provisions are the critical portions of the Proposal. For purposes of brevity, the specific language at issue is being provided as an addendum.

The provisions provide amongst other things that a Dealer is someone “engaged in the business of selling firearms”. Engaged in business is defined as a person who sells firearms to “predominately earn a profit”. The Proposal contains rebuttable presumptions listing who is presumed to be “engaged in the business”. The presumptions include a person who:

- 1 Sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms;
- 2 Spends more money or its equivalent on purchases of firearms for the purpose of resale than the person’s reported gross taxable income during the applicable period of time;
- 3 Repetitively sells or offers for sale firearms—
 - i. Within 30 days after the person purchased the firearms;
 - ii. That are new, or like new in their original packaging; or
 - iii. Of the same or similar kind (*i.e.*, make/manufacturer, model, caliber/gauge, and action) and type (*i.e.*, rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or ‘other’ firearm)

The proposal provides rebuttable presumptions of who is selling firearms to “predominately earn a profit” and thus they are “engaged in business” and they are a dealer who must be licensed. The rebuttable presumptions are:

(1) Advertises, markets, or otherwise promotes a firearms business (*e.g.*, advertises or posts firearms for sale, including on any website, establishes a website for 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;

(2) Purchases, rents, or otherwise secures or sets aside permanent or temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case;

(3) Makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales.

(4) Purchases or otherwise secures merchant services as a business (*e.g.*, credit card transaction services, digital wallet for business) through which the person makes or offers to make payments for firearms transactions;

(5) Formally or informally purchases, hires, or otherwise secures business security services (*e.g.*, a central station-monitored security system registered to a business, or guards for security) to protect business assets or transactions that include firearms;

(6) Formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions;

(7) Secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or

(8) Purchases a business insurance policy, including any riders that cover firearms inventory.

What does all of this mean? The Proposal is that a person must be licensed if they sell firearms with intent to predominately earn a profit, this is defined to include tagging a firearm with a sale price, renting a table at a gun show, or maintain records regarding purchased and sold prices. Further, offering firearms of a similar kind or type for sale. These are rebuttable presumptions. What a “rebuttable presumption” means is that if ATF establishes one of these facts, such as renting a table at a gun show that offered firearms for sale, one is presumed to be a firearms dealer, who is required to have an FFL license. In footnote 83 of the Proposal it states in part in reference to when the rebuttable presumptions could be used:

An example of a civil case would be an asset forfeiture proceeding, pursuant to 18 U.S.C. 924(d)(1), on the basis that the seized firearms were intended to be involved in willful conduct presumed to be engaging the business without a license under this rule.

Thus, if a person engaged in conduct that pursuant to the rebuttable presumptions constituted selling firearms when a dealer's license was required, unless the person could rebut the presumption in an ATF civil forfeiture proceeding, their firearms would be forfeited.

To put it mildly, these regulations if adopted would drastically change who could without risk of civil forfeiture, rent a table at a gun show or a collector organization event and offer a firearm for sale.

The purpose of regulations are to provide guidance to law. In this case the regulations take the strictest possible position on what "engaged in business" constitutes and go beyond Congress's intent in amending the law in 2022. Recently the Federal Department of Education sought through this same law to restrict federal education funding to schools that offered hunter education, archery, shooting clubs or teams etc. Congress has been taking action to reverse that course of conduct as it was not intended by the legislation. Such action gives hope that a strong outcry could have similar results.

The Ohio Gun Collector's Association (O.G.C.A.) wishes to bring this situation to your attention, and requests that you take action along the following lines:

1. Submit comments opposing the Proposal before the end of the comment period December 7, 2023.
2. Bring the situation to the attention of your congressional representatives immediately noting your objections and requesting action to prevent the adoption of regulations that go beyond the provisions of the Bipartisan Safer Communities Act.

The O.G.C.A. Board encourages you to take action in opposition to these Proposed Regulations.

Thankyou for your consideration of this important matter.

ADDENDUM

The language of concern:

Section 478.11 defines terms (commencing at page 97 of the Proposal):

Dealer. Any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term shall include any person who engages in such business or occupation on a part-time basis. The term shall include such activities wherever, or through whatever medium, they may be conducted, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order; over the Internet; through the use of other electronic means (*e.g.*, an online broker, online auction, text messaging service, social media raffle, or website); or at any other domestic or international public or private marketplace or premises.

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Engaged in the business—

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(c) *Dealer in firearms other than a gunsmith or a pawnbroker.* (1) 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 the person's personal collection of firearms.

* * *

Whether a person is engaged in the business of dealing in firearms requiring a license is a fact-specific inquiry. Selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity. However, there is no minimum threshold number of firearms purchased or sold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is "engaged in the business" of dealing in firearms. For example, even a single firearm transaction or offer to engage in a transaction, when combined with other evidence (*e.g.*, where a person represents to others a willingness to acquire more firearms for resale or offers more firearms for sale), may require a license. 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—

a. 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;

b. 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;

* * *

(v) Repetitively sells or offers for sale firearms—

i. Within 30 days after the person purchased the firearms;

- ii. That are new, or like new in their original packaging; or
- iii. Of the same or similar kind (*i.e.*, make/manufacturer, model, caliber/gauge, and action) and type (*i.e.*, rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or ‘other’ firearm);

* * *

(4) Where a person’s conduct does not otherwise demonstrate a predominant intent to earn a profit, the person shall not be presumed to be engaged in the business of dealing in firearms when the person transfers firearms only as bona fide gifts, or occasionally sells firearms only to obtain more valuable, desirable, or useful firearms for the person’s personal collection or hobby.

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(6) The rebuttable presumptions in paragraphs (c)(3)(i) through (vi) of this section shall not apply to any criminal case, although they may be useful to courts in criminal cases, for example, when instructing juries regarding permissible inferences.

Predominantly earn a profit. (a) The intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, that proof of profit, including the intent to profit, shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this definition, a person may have the intent to profit even if the person does not actually obtain pecuniary gain from the sale or

disposition of
firearms.

(c) The intent to predominantly earn a profit is a fact-specific inquiry. 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—

(1) Advertises, markets, or otherwise promotes a firearms business (*e.g.*, advertises or posts firearms for sale, including on any website, establishes a website for 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;

(2) Purchases, rents, or otherwise secures or sets aside permanent or temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case;

(3) Makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales;

(4) Purchases or otherwise secures merchant services as a business (*e.g.*, credit card transaction services, digital wallet for business) through which the person makes or offers to make payments for firearms transactions;

(5) Formally or informally purchases, hires, or otherwise secures business security services (*e.g.*, a central station-monitored security system registered to a business, or guards for security) to protect business assets or transactions that

include firearms;

(6) Formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions;

(7) Secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or

(8) Purchases a business insurance policy, including any riders that cover firearms inventory.

(d) The activities set forth in the rebuttable presumptions in paragraphs (b)(1) through (8) of this section are not exhaustive of the conduct that may show that, or be considered in determining whether, a person has the intent to predominantly earn a profit from the sale or disposition of firearms.

(e) The rebuttable presumptions in paragraphs (b)(1) through (8) of this section shall not apply to any criminal case, although they may be useful to courts in criminal cases, for example, when instructing juries regarding permissible inferences.

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