

**DEPARTMENT OF JUSTICE**

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

**27 CFR Part 478**

**Docket No. ATF 2022R-17; AG Order No.**

**RIN 1140-AA58**

**Definition of “Engaged in the Business” as a Dealer in Firearms**

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

**ACTION:** Notice of proposed rulemaking; request for comment.

**SUMMARY:** 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. In addition, it clarifies the term “dealer,” including how that term applies to auctioneers, and defines the term “responsible person.” These proposed changes would assist persons in

understanding when they are required to have a license to deal in firearms. Consistent with the Gun Control Act (“GCA”) and existing regulations, the proposed rule also defines the term “personal collection” to clarify when persons are not “engaged in the business” because they make only occasional sales to enhance a personal collection, or for a hobby, or if the firearms they sell are all or part of a personal collection. This proposed rule further addresses the lawful ways in which former licensees, and responsible persons acting on behalf of such licensees, may liquidate business inventory upon revocation or other termination of their license. Finally, the proposed rule clarifies that a licensee transferring a firearm to another licensee must do so by following the verification and recordkeeping procedures in 27 CFR 478.94 and Subpart H of title 27 CFR, part 478, rather than by using a Firearms Transaction Record, ATF Form 4473 (“Form 4473”).

**DATES:** Written comments must be post-marked and electronic comments must be submitted on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

**ADDRESSES:** You may submit comments, identified by docket number ATF 2022R-17, by either of the following methods—

- *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

- *Mail:* Helen Koppe, Mail Stop 6N-518, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Ave. NE, Washington DC 20226;  
*ATTN: ATF 2022R-17.*

*Instructions:* All submissions received must include the agency name and docket number (ATF 2022R-17) for this notice of proposed rulemaking (“NPRM” or “proposed rule”). All properly completed comments received from either of the methods described above will be posted without change to the Federal eRulemaking portal, *www.regulations.gov*. This includes any personal identifying information (“PII”) submitted in the body of the comment or as part of a related attachment. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the Internet should omit PII from the body of their comment or in any uploaded attachments. Commenters who submit through mail should likewise omit their PII from the body of the comment and provide any PII on the cover sheet only. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the SUPPLEMENTARY INFORMATION section of this document.

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Department is proposing to amend ATF regulations to implement the provision of the Bipartisan Safer Communities Act, Pub. L. 117-159, sec. 12002, 136 Stat. 1313, 1324 (2022) (“BSCA”), that amended the definition of “engaged in the business” in the Gun Control Act of 1968 (“GCA”) at 18 U.S.C. 921(a)(21)(C), and to facilitate compliance with the statute.

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

The GCA, at 18 U.S.C. 922(a)(1)(A), makes it unlawful for any person, except a licensed dealer, to “engage in the business” of dealing in firearms.<sup>1</sup> The GCA further provides that no person shall engage in the business of dealing in firearms until the person has filed an application with and received a license to do so from the Attorney General (18 U.S.C. 923(a)), who has delegated that function to ATF (28 CFR 0.130(a)(1)). The application contains information necessary to determine eligibility for

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<sup>1</sup> Persons who engage in the business of manufacturing or importing firearms, including those that are 3D printed or assembled from parts, must also be licensed. 18 U.S.C. 922(a)(1)(A), 923(a). Once licensed, importers and manufacturers may also engage in the business of dealing but only at their licensed premises and only in the same type of firearms their license authorizes them to import or manufacture. *See* 27 CFR 478.41(b).

licensing and must include a photograph, fingerprints of the applicant, and a license application fee. The fee for dealers in firearms other than destructive devices is currently set by the GCA at \$200 for the first three-year period and \$90 for a renewal period of three years. 18 U.S.C. 923(a)(3)(B); 27 CFR 478.42(c)(2). The Application for Federal Firearms License, ATF Form 7(5310.12)/7CR (5310.16) (“Form 7”), requires the applicant to include a completed Federal Bureau of Investigation (“FBI”) Form FD-258 (“Fingerprint Card”) and a photograph for all responsible persons, including sole proprietors. *See* ATF Form 7, Instruction 6.

Significantly, under the GCA, once licensed, firearms dealers are required to conduct background checks through the FBI’s National Instant Criminal Background Check System (“NICS”) on prospective firearm recipients to prevent prohibited persons from receiving firearms, and to maintain firearms transaction records for crime gun tracing purposes. *See* 18 U.S.C. 922(t); 923(g)(1)(A). Persons who willfully engage in the business of dealing in firearms without a license are subject to a term of imprisonment of up to five years, a fine of up to \$250,000, or both. *Id.* 922(a)(1)(A); 924(a)(1)(D); 3571(b)(3).

*A. Advance Notice of Proposed Rulemaking (1979)*

The term “dealer” is defined by the GCA, 18 U.S.C. 921(a)(11)(A), and 27 CFR 478.11, to mean “any person engaged in the business of selling firearms at wholesale or retail.” However, as originally enacted, the GCA did not define the term “engaged in the business.”<sup>2</sup> Nor did ATF define the term “engaged in the business” in the original GCA

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<sup>2</sup> *See generally* Pub. L. 90-617, 82 Stat. 1213 (1968).

implementing regulations.<sup>3</sup> Although courts had “continually found that the current situation” was “adequate for enforcement purposes,” ATF published an Advance Notice of Proposed Rulemaking (“ANPRM”) in the *Federal Register* in 1979 in an effort to “develop a workable, commonly understood definition of [‘engaged in the business’].” *See* 44 FR 75186, 75186–87 (Dec. 19, 1979) (“1979 ANPRM”); 45 FR 20930 (Mar. 31, 1980) (extending the comment period for 30 more days). The ANPRM referenced the lack of a common understanding of that term by the courts and requested comments from the public and industry on how the phrase should be defined and the feasibility and desirability of defining it.

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

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<sup>3</sup> 33 FR 18555 (Dec. 14, 1968).

<sup>4</sup> Memorandum for Assistant Director, Regulatory Enforcement, ATF, from Chief, Regulations and Procedures Division, ATF, *Re: Evaluation of Comments Received Concerning a Definition of the Phrase “Engaged in the Business,” Notice No. 331*, at 1–2 (June 9, 1980) (“ATF Internal Memorandum”), attach. *Summary Sheet on “Engaged in the Business,” ANPRM No. 331, Published December 19, 1979*, at 1.

<sup>5</sup> *Id.*

firearms under the minimum threshold.<sup>6</sup> Ultimately, ATF decided not to proceed further with rulemaking at that time. Congress also had not yet acted on then-proposed legislation—the McClure-Volkmer bill (discussed below)—which, among other provisions, sought to define “engaged in the business.”<sup>7</sup> For additional reasons why ATF has not adopted a minimum number of sales, see Section II.D of this preamble.

*B. Firearms Owners’ Protection Act of 1986*

Approximately six years later, the McClure-Volkmer bill was enacted as part of the Firearms Owners’ Protection Act (“FOPA”), Pub. L. 99–308, 100 Stat. 449 (1986). With its passage, FOPA added a statutory definition of “engaged in the business” to the GCA. As applied to a person selling firearms at wholesale or retail, it defined the term “engaged in the business” in 18 U.S.C. 921(a)(21)(C) as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”<sup>8</sup> The term excluded “a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>9</sup> FOPA further defined the term “with the principal objective of livelihood and profit” to mean “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal

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<sup>6</sup> *See id.* at 2.

<sup>7</sup> ATF Internal Memorandum at 4.

<sup>8</sup> Pub. L. 99-308, sec. 101, 100 Stat. at 450.

<sup>9</sup> *Id.*

firearms collection.”<sup>10</sup> Congress amended FOPA a few months later, clarifying that “proof of profit” was not required “as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.”<sup>11</sup>

Consistent with their text, the definitions’ purposes were to clarify that individuals not otherwise engaged in the business of dealing firearms who make only occasional firearms sales for a hobby are not required to obtain a license, and to benefit law enforcement “by establishing clearer standards for investigative officers and assisting in the prosecution of persons truly intending to flout the law.”<sup>12</sup> The legislative history also reveals that Congress did not intend to limit the license requirement to only persons for whom selling or disposing of firearms is a principal source of income or a principal business activity. The Committee Report stated, “[t]hus, this provision would not remove the necessity for licensing from part-time businesses or individuals whose principal income comes from sources other than firearms, but whose main objective with regard to firearm transfers is profit, rather than hobby.”<sup>13</sup>

Two years after enactment, FOPA’s definition of “engaged in the business” was incorporated into ATF’s implementing regulations at 27 CFR 178.11 (now 478.11) in defining the term “Dealer in firearms other than a gunsmith or a pawnbroker.”<sup>14</sup> At the same time, consistent with the statutory text and legislative history, ATF amended the

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<sup>10</sup> *Id.*

<sup>11</sup> Pub. L. 99–360, sec. 1(b), 100 Stat. 766, 766 (1986).

<sup>12</sup> S. Rep. No. 98–583, at 8 (1984).

<sup>13</sup> *Id.* The Committee Report further explained that a statutory reference to pawnbrokers in the definition of “engaged in the business” was deleted because “all pawnbrokers whose business includes the taking of any firearm as security for the repayment of money would automatically be a ‘dealer.’” *Id.* at 9.

<sup>14</sup> 53 FR 10480, 10491 (Mar. 31, 1988).



regulatory term “dealer” to clarify that the term includes “any person who engages in such business or occupation on a part-time basis.”<sup>15</sup>

With respect to “personal collections,” FOPA included a provision, codified at 18 U.S.C. 923(c), that expressly authorized licensees to maintain and dispose of private firearms collections separately from their business operations. However, under FOPA, as amended, the “personal collection” provision was and remains subject to three limitations. 18 U.S.C. 923(c). First, if a licensee records the disposition (i.e., transfer) of any firearm from their business inventory into a personal collection, that firearm legally remains part of the licensee’s business inventory until one year has elapsed after the date of transfer. Should the licensee wish to sell or otherwise dispose of any such “personal” firearm during that one-year period, the licensee must re-transfer the applicable firearm back into the business inventory at the licensee’s business premises “with appropriate recording.”<sup>16</sup> A subsequent transfer from the business inventory would then be subject to the recordkeeping and background-check requirements of the GCA applicable to all other firearms in the business inventory. Second, if a licensee acquires or disposes of any firearm for the purpose of willfully evading the restrictions placed upon licensees under the GCA, that firearm always legally remains part of the business inventory. Thus, “circuitous transfers are not exempt from otherwise applicable licensee requirements.”<sup>17</sup> Third, even when a licensee has made a bona fide transfer of a firearm from their personal collection, section 923(c) requires the licensee to record the description of the firearm in a bound volume along with the name, place of residence, and date of birth of

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<sup>15</sup> *Id.* 10490–91.

<sup>16</sup> S. Rep. No. 98–583, at 13.

<sup>17</sup> *Id.*

an individual transferee, or if a corporation or other business entity, the transferee's identity and principal and local places of business.<sup>18</sup> ATF incorporated these provisions into its FOIA implementing regulations in 1988.<sup>19</sup>

Courts interpreting the 1986 FOIA definition of "engaged in the business" found a number of factors relevant to assessing whether a person met that standard. For example, in one leading case, the U.S. Court of Appeals for the Third Circuit listed the following nonexclusive factors for consideration to determine whether the defendant's principal objective was livelihood and profit (i.e., economic): (1) quantity and frequency of sales; (2) location of the sales; (3) conditions under which the sales occurred; (4) defendant's behavior before, during, and after the sales; (5) price charged for the weapons and the characteristics of the firearms sold; and (6) intent of the seller at the time of the sales. *United States v. Tyson*, 653 F.3d 192, 200–01 (3d Cir. 2011). The court expanded further that, "[a]s is often the case in such analyses, the importance of any one of these considerations is subject to the idiosyncratic nature of the fact pattern presented." *Id.* at 201. In a separate case, the Third Circuit also stated, "[a]lthough the definition explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi*, it does not establish a specific quantity or frequency requirement. In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business. This inquiry is not limited to the number of weapons sold or the timing of the sales." *United States v.*

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<sup>18</sup> See Pub. L. 99–360, sec. 1(c), 100 Stat. at 766–67.

<sup>19</sup> See 53 FR 10480; 27 CFR 178.125a (now 478.125a).

*Palmieri*, 21 F.3d 1265, 1268 (3d Cir. 1994), *vacated on other grounds*, 513 U.S. 957 (1994).<sup>20</sup>

C. *Executive Action to Reduce Gun Violence (2016)*

On January 4, 2016, President Obama announced several executive actions to reduce gun violence and to make communities across the United States safer. Among them was a requirement that ATF clarify, in a manner consistent with court rulings on the issue: (1) that a person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted, and (2) that there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement.<sup>21</sup> To provide this clarification, ATF published a guidance document entitled *Do I Need a License to Buy and Sell Firearms?*, ATF Publication 5310.2 (Jan. 2016), <https://www.atf.gov/file/100871/download>, which addressed these topics. The guidance was developed to assist unlicensed persons in understanding when they will likely need to obtain a license as a dealer in firearms. ATF is updating this guidance to conform with the “engaged in the business” definition as amended by the BSCA. Further, once a final

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<sup>20</sup> See also *United States v. Brenner*, 481 F. App’x 124, 127 (5th Cir. 2012) (“Needless to say, in determining the character and intent of firearms transactions, the jury must examine all circumstances surrounding the transaction, without the aid of a ‘bright-line rule.’”); *United States v. Bailey*, 123 F.3d 1381, 1392 (11th Cir. 1997) (“In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business.” (quotation marks and citation omitted)); *United States v. Nadirashvili*, 655 F.3d 114, 119 (2d Cir. 2011) (“[T]he government need not prove that dealing in firearms was the defendant’s primary business. Nor is there a ‘magic number’ of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers.” (quoting *United States v. Carter*, 801 F.2d 78, 81–82 (2d Cir. 1986))).

<sup>21</sup> See The White House, Office of the Press Secretary, FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer (Jan. 4, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>.

rule is adopted based on this NPRM, ATF intends to update the guidance to include additional detail as needed to conform with the rule.

#### *D. Bipartisan Safer Communities Act (2022)*

Over 35 years after FOPA's enactment, on June 25, 2022, President Biden signed into law the Bipartisan Safer Communities Act, Pub. L. 117-159, 136 Stat. 1313. Section 12002 of the BSCA broadened the definition of "engaged in the business" under 18 U.S.C. 921(a)(21)(C) to all persons who intend to "predominantly earn a profit" from wholesale or retail dealing in firearms by eliminating the requirement that a person's "principal objective" of purchasing and reselling firearms must include both "livelihood and profit." The statute now provides that, as applied to a dealer in firearms, the term "engaged in the business" means "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." However, the BSCA definition does 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." 18 U.S.C. 921(a)(21)(C).

As now defined by the BSCA, the term "to predominantly earn a profit" means that the person who engages in selling or disposing of firearms has a predominant intent of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. The statutory definition further provides that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. 18 U.S.C. 921(a)(22). According to the BSCA's sponsors, the BSCA's change to the definition was driven by

“confusion about the GCA’s definition of ‘engaged in the business,’ as it pertained to individuals who bought and resold firearms repetitively for profit, but possibly not as the principal source of their livelihood.”<sup>22</sup> The sponsors “maintain[ed] that these changes clarify who should be licensed, eliminating a ‘gray’ area in the law, ensuring that one aspect of firearms commerce is more adequately regulated.”<sup>23</sup> Congress did not make the same amendment to the various definitions of “engaged in the business” in 18 U.S.C. 921(a)(21) with respect to licensed gunsmiths, manufacturers, or importers.<sup>24</sup>

*E. Executive Order 14092 (2023)*

On March 14, 2023, President Biden issued Executive Order 14092, “Reducing Gun Violence and Making Our Communities Safer.” That order requires the Attorney General to report actions taken to implement the BSCA and to develop and implement a plan to: (1) clarify the definition of who is engaged in the business of dealing in firearms, and thus required to become Federal firearms licensees (“FFLs”), in order to increase

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<sup>22</sup> William J. Krouse, Cong. Research Serv., IF12197, *Firearms Dealers “Engaged in the Business”* at 2 (Aug. 19, 2022).

<sup>23</sup> *Id.*; 168 Cong. Rec. H5906 (daily ed. June 24, 2022) (Statement of Rep. Jackson Lee) (“[O]ur bill would . . . further strengthen the background check process by clarifying who is engaged in the business of selling firearms and, as a result, is required to run background checks.”); 168 Cong. Rec. S3055 (daily ed. June 22, 2022) (Statement of Sen. Murphy) (“We clarify in this bill the definition of a federally licensed gun dealer to make sure that everybody who should be licensed as a gun owner is. In one of the mass shootings in Texas, the individual who carried out the crime was mentally ill. He was a prohibited purchaser. He shouldn’t have been able to buy a gun. He was actually denied a sale when he went to a bricks-and-mortar gun store, but he found a way around the background check system because he went online and found a seller there who would transfer a gun to him without a background check. It turned out that seller was, in fact, engaged in the business, but didn’t believe the definition applied to him because the definition is admittedly confusing. So we simplified that definition and hope that will result—and I believe it will result—in more of these frequent online gun sellers registering, as they should, as federally licensed gun dealers which then requires them to perform background checks.”); *see also* Letter for Director, ATF, *et al.*, from Sens. John Cornyn and Thom Tillis at 2–3 (Nov. 1, 2022) (“Cornyn/Tillis Letter”) (“The BSCA provides more clarity to the industry for when someone must obtain a federal firearms dealers license. In Midland and Odessa, Texas, for example, the shooter—who at the time was prohibited from possessing or owning a firearm under federal law—purchased a firearm from an unlicensed firearms dealer.”).

<sup>24</sup> The BSCA retained the existing term “with the principal objective of livelihood and profit,” which still applies to persons engaged in the business as manufacturers, gunsmiths, and importers. That definition became 18 U.S.C. 921(a)(23), and Congress renumbered other definitions in section 921 accordingly.

compliance with the Federal background check requirement for firearm sales, including by considering a rulemaking, as appropriate and consistent with applicable law; and (2) prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.<sup>25</sup>

This NPRM proposes to implement the “engaged in the business” provisions of the BSCA<sup>26</sup> and the Department’s plan in response to Executive Order 14092 by making conforming changes to the new or amended definitions, by clarifying the updated BSCA definition of “engaged in the business,” and by preventing former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms. The rule proposes to accomplish this clarity and deterrence by setting forth specific activities demonstrating when an unlicensed person’s buying and selling of firearms presumptively rises to the level of being “engaged in the business,” thus requiring that person to obtain a dealer’s license, conduct background checks, and abide by the other requirements set forth in the GCA. At the same time, it recognizes that individuals who purchase firearms for the enhancement of a personal collection or a legitimate hobby are permitted by the GCA to occasionally buy and sell firearms for those purposes without the need to obtain a license.

## II. Proposed Rule

As stated previously, the BSCA revised 18 U.S.C. 921(a)(21)(C) to change part of the definition of persons “engaged in the business” of dealing in firearms. This

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<sup>25</sup> *Reducing Gun Violence and Making Our Communities Safer*, E.O. 14092, secs. 2, 3(a)(i)–(ii), 88 FR 16527, 16527–28 (Mar. 14, 2023).

<sup>26</sup> The Department is also issuing a separate rulemaking to amend ATF’s regulations to conform with other provisions in the BSCA.

amendment broadened the definition to reflect that it applies to persons who engage in the business of purchasing and selling firearms at wholesale or retail with the predominant purpose of earning a profit, rather than just to persons whose primary purpose is both livelihood and profit. This means “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.” 18 U.S.C. 921(a)(22). “As a result, the BSCA definitional changes could make some, but not all, intrastate, private firearm transfers subject to GCA recordkeeping and background check requirements” that previously were not subject to those requirements, “if those transfers are made by profit-oriented, repetitive firearms buyers and sellers.”<sup>27</sup>

To implement the new statutory language, this proposed rule amends paragraph (c) of the regulatory definition of “engaged in the business,” in § 478.11, pertaining to a “dealer in firearms other than a gunsmith or pawnbroker,” to conform with 18 U.S.C. 921(a)(21)(C) by removing the phrase “with the principal objective of livelihood and profit” and replacing it with the phrase “to predominantly earn a profit.” This rule also amends § 478.11 to conform with new 18 U.S.C. 921(a)(22) by adding the statutory definition of “predominantly earn a profit” as a new regulatory definition. Additionally, this rule proposes to move the regulatory definition of “terrorism,” which currently exists in the regulations under the definition of “principal objective of livelihood and profit,” to a new stand-alone definition. This is because the BSCA definitions of “to predominantly earn a profit” (18 U.S.C. 921(a)(22)) and “with the principal objective of livelihood and profit” (18 U.S.C. 921(a)(23)) both include the same exception to the requirement to

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<sup>27</sup> Krouse, Cong. Research Serv., *Firearms Dealers “Engaged in the Business”* at 2.

prove intent to profit when a licensee engages in the firearms business for the purpose of terrorism.

To further implement these statutory changes, this rule then proposes to clarify when a person is “engaged in the business” as a dealer in firearms at wholesale or retail by: (a) clarifying the definition of “dealer”; (b) defining the terms “purchase” and “sale” as they apply to dealers; (c) clarifying when a person would not be engaged in the business of dealing in firearms as an auctioneer, or when purchasing firearms for, and selling firearms from, a personal collection; (d) setting forth conduct that is, in civil and administrative proceedings, presumed to constitute “engaging in the business” of dealing in firearms and presumed to demonstrate the intent to “predominantly earn a profit” from the sale or disposition of firearms, absent reliable evidence to the contrary; (e) adding a single definition for the terms “personal collection,” “personal firearms collection,” and “personal collection of firearms”; (f) adding a definition for the term “responsible person”; (g) clarifying that the intent to “predominantly earn a profit” does not require the person to have received pecuniary gain, and that intent does not have to be shown when a person purchases or sells a firearm for criminal or terrorism purposes; (h) addressing how former licensees, and responsible persons acting on behalf of former licensees, may lawfully liquidate business inventory upon revocation or other termination of their license; and (i) clarifying that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and Subpart H of title 27, part 478, rather than using a Form 4473 when firearms are transferred to other licensees, including transfers by a licensed sole proprietor to that person’s personal collection.

*A. Definition of “Dealer”*



In enacting the BSCA, Congress expanded the definition of “engaged in the business” “as applied to a dealer in firearms,” as noted above. 18 U.S.C. 921(a)(21)(C). Consistent with the text and purpose of the GCA, ATF regulations have long defined the term “dealer” to include persons engaged in the business of selling firearms at wholesale or retail, or as a gunsmith or pawnbroker, on a part-time basis. 27 CFR 478.11 (definition of “Dealer”).<sup>28</sup> Due to the BSCA amendments, the Department has further considered what it means to be a “dealer” engaged in the firearms business in light of new technologies, mediums of exchange, and forums in which firearms are bought and sold with the predominant intent of obtaining pecuniary gain.

Since 1968, advancements in manufacturing (e.g., 3D printing) and distribution technology (e.g., Internet sales) and changes in the marketplace for firearms and related products (e.g., large-scale gun shows) have increased the ways in which individuals shop for firearms, and therefore have created a need for further clarity in the regulatory

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<sup>28</sup> 53 FR at 10481 (“The final rule retains the sentence [including part-time dealers] since it comports with legislative intent as expressed in committee reports.”); *see also* *United States v. McGowan*, 746 F. App’x 679, 680 (9th Cir. 2018) (“Selling firearms need not have been McGowan’s primary source of income.”); *United States v. Focia*, 869 F.3d 1269, 1281 (11th Cir. 2017) (“[N]othing in the [FOIPA] amendments or the rest of the statutory language indicates that a person violates § 922(a)(1)(A) only by selling firearms as his primary means of income.”); *United States v. Valdes*, 681 F. App’x 874, 877 (11th Cir. 2017) (“The government must prove the defendant’s activity rose above ‘the occasional sale of a hobbyist,’ but does not need to show ‘the defendant’s primary business was dealing in firearms or that [she] necessarily made a profit from dealing.’”); *United States v. Ibarra*, 581 F. App’x 687, 690 (9th Cir. 2014) (“The statute requires that the defendant have a ‘principal objective of livelihood and profit,’ . . . but nowhere requires a principal objective that that profit be one’s *primary* source of income.”); *United States v. Shipley*, 546 F. App’x 450, 454 (5th Cir. 2013) (upholding conviction for dealing in firearms as a regular side business to supplement lawful income); *United States v. Gray*, 470 F. App’x 468, 472 (6th Cir. 2012) (“[A] defendant need not deal in firearms as his primary business for conviction.”); *Nadirashvili*, 655 F.3d at 119 (*quoting Carter*, 801 F.2d at 81–81, as holding that “[t]he government need not prove that dealing in firearms was the defendant’s primary business”); *United States v. Manthey*, 92 F. App’x 291, 297 (6th Cir. 2004) (“[A] defendant need not deal in firearms as his primary business for conviction.”); *United States v. Allah*, 130 F.3d 33, 43–44 (2d Cir. 1997) (“[I]t is not a necessary element of the crime [of dealing without a license] that a defendant’s only business be that of selling firearms”); *United States v. Beecham*, Nos. 92-5147, 92-5399, 1993 WL 188295, at \*3 (4th Cir. June 2, 1993) (“The government need not prove that a defendant’s primary business was dealing in firearms or that he necessarily made a profit from it.” (internal quotation marks omitted)).

definition of “dealer.”<sup>29</sup> The proliferation of new communications technologies and e-commerce has made it simple for persons to advertise and sell firearms to a large potential market at minimal cost and with minimal effort, using a variety of means, and often as a part-time activity. The proliferation of sales at larger-scale gun shows, flea markets, other similar events, and online has also altered the marketplace since the GCA was enacted in 1968.

Therefore, to provide additional guidance on what it means to be engaged in the business as a “dealer” within the diverse modern marketplace, this rule first proposes to amend the regulatory definition of “dealer” in 27 CFR 478.11 to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities may be conducted. This includes at any domestic or international public or private marketplace or premises. The revised definition provides nonexclusive examples of such marketplaces: a gun show<sup>30</sup> or event,<sup>31</sup> flea market,<sup>32</sup> auction house,<sup>33</sup> or gun range or club; at one’s home; by mail order;<sup>34</sup> over the Internet;<sup>35</sup> through the use of other

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<sup>29</sup> See Cornyn/Tillis Letter at 3 (“Our legislation aims at preventing someone who is disqualified from owning or possessing a firearm from shopping around for an unlicensed firearm dealer.”).

<sup>30</sup> See ATF FFL Newsletter, July 2017, at 9 (gun show guidelines); *Important Notice to Dealers and Other Participants at This Gun Show*, ATF Information 5300.23A (Sept. 2010); ATF Ruling 69-59.

<sup>31</sup> See ATF Q&A, *How may a licensee participate in the raffling of firearms by an unlicensed organization?*, <https://www.atf.gov/firearms/qa/how-may-licensee-participate-raffling-firearms-unlicensed-organization> (May 22, 2020); ATF FFL Newsletter, June 2021, at 8–9 (addressing conduct of business at firearm raffles); Letter to Pheasants Forever, from Acting Chief, Firearms Programs Division, ATF at 1–2 (July 9, 1999) (addressing nonprofit fundraising banquets); 1 ATF FFL Newsletter, Feb. 1999, at 4–5 (addressing dinner banquets).

<sup>32</sup> See ATF FFL Newsletter, June 2010, at 5–6 (flea market guidelines).

<sup>33</sup> See *Selling firearms—legally: A Q&A with the ATF*, Auctioneer, at 22–27 (June 2010).

<sup>34</sup> See, e.g., *United States v. Buss*, 461 F. Supp. 1016 (W.D. Pa. 1978) (holding that mail order sales by unlicensed defendant violated statute proscribing illegally engaging in business of dealing in firearms, even though defendant acted in concert with licensed firearms dealers who recorded the transfers).

<sup>35</sup> See ATF FFL Newsletter, June 2021, at 8 (addressing internet sales of firearms); ATF Intelligence Assessment, *Firearms and Internet Transactions* (Feb. 9, 2016); *Felon Seeks Firearm, No Strings*

electronic means (e.g., an online broker,<sup>36</sup> online auction,<sup>37</sup> text messaging service,<sup>38</sup> social media raffle,<sup>39</sup> or website<sup>40</sup>); or at any other domestic or international public or private marketplace or premises. **These examples are provided to clarify for unlicensed persons that firearms dealing requires a license in whatever place or through whatever medium the firearms are purchased and sold, including the Internet and locations other**

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*Attached: How Dangerous People Evade Background Checks and Buy Illegal Guns Online*, City of New York (Sept. 2013), [https://www.nyc.gov/html/om/pdf/2013/felon\\_seeks\\_firearm.pdf](https://www.nyc.gov/html/om/pdf/2013/felon_seeks_firearm.pdf); *Point, Click, Fire: An Investigation of Illegal Online Gun Sales*, City of New York (Dec. 2011); *Focia*, 869 F.3d at 1274 (affirming defendant’s conviction for engaging in the business without a license by dealing firearms through the “Da rk Web”).

<sup>36</sup> See, e.g., *Fulkerson v. Lynch*, 261 F. Supp. 3d 779, 783–86, 788–89 (W.D. Ky. 2017) (denying summary judgment to applicant whose license was denied by ATF for previously willfully engaging in the business of dealing without a license through an online broker and granting summary judgement to the government). Although some dealers may sell firearms through online services sometimes called “brokers,” like a magazine or catalog company that only advertises firearms listed by known sellers and processes orders for them for direct shipment from the distributor to their buyers, these “brokers” are not themselves considered “dealers.” This is because these online “brokers” do not purchase the firearms for valuable consideration (i.e., take or transfer title to them). Rather, they typically only collect a commission or fee for providing contracted services to market and process the transaction for the seller. This is distinguished from a broker who, for example, purchases the firearms from a manufacturer, importer, or other distributor, sells the firearms to the buyer, and has them shipped directly to the buyer from the distributor. Such persons must be licensed as dealers since they are purchasing and selling the firearms with the predominant intent to earn a profit. See, e.g., ATF FFL Newsletter, Sept. 2016, at 3; 2 ATF FFL Newsletter, Mar. 2023, at 6–7.

<sup>37</sup> See, e.g., Press Release, Department of Justice Office of Public Affairs (“OPA”), *Minnesota Man Indicted for Dealing Firearms without a License* (Feb. 18, 2016), <https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license> (defendant dealt in firearms through websites such as gunbroker.com, an online auction website).

<sup>38</sup> See, e.g., Press Release, OPA, *Odenton, Maryland Man Exiled to 8 Years in Prison for Firearms Trafficking Conspiracy*, DOJ/OPA (Apr. 27, 2017), <https://www.justice.gov/usao-md/pr/odenton-maryland-man-exiled-8-years-prison-firearms-trafficking-conspiracy> (defendant texted photos of firearms for sale to his customer and discussed prices).

<sup>39</sup> See ATF FFL Newsletter, June 2021, at 9 (“Social media gun raffles are gaining popularity on the internet. In most instances, the sponsor of the event is not a Federal firearms licensee, but will enlist the aid of a licensee to facilitate the transfer of the firearm to the raffle winner. Often, the sponsoring organization arranges to have the firearm shipped from a distributor to a licensed third party and never takes physical possession of the firearm. If the organization’s practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must obtain a Federal firearms license.”).

<sup>40</sup> See, e.g., Press Release, Department of Justice United States Attorney’s Office (“USAO”), *Snapchat Gun Dealer Convicted of Unlawfully Manufacturing and Selling Firearms* (Oct. 4, 2022), <https://www.justice.gov/usao-edca/pr/snapchat-gun-dealer-convicted-unlawfully-manufacturing-and-selling-firearms>; Press Release, USAO, *Sebring Resident Sentenced to Prison for Unlawfully Dealing Firearms on Facebook* (Nov. 7, 2016), <https://www.justice.gov/usao-sdfl/pr/sebring-resident-sentenced-prison-unlawfully-dealing-firearms-facebook>.

than a traditional brick and mortar store.<sup>41</sup> However, regardless of the medium or location at which a dealer buys and sells firearms, to obtain a license under the GCA, the dealer must still have a fixed premises in a State from which to conduct business subject to the license, and comply with all applicable State and local laws regarding the conduct of such business.<sup>42</sup> 18 U.S.C. 923(d)(1)(E)–(F).

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

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<sup>41</sup> See Letter for Outside Counsel to National Association of Arms Shows, from Chief, Firearms and Explosives Division, ATF, *Re: Request for Advisory Opinion on Licensing for Certain Gun Show Sellers* at 1 (Feb. 17, 2017) (“Anyone who is engaged in the business of buying and selling firearms, regardless of the location(s) at which those transactions occur is required to have a Federal firearms license. ATF will issue a license to persons who intend to conduct their business primarily at gun shows, over the internet, or by mail order, so long as they otherwise meet the eligibility criteria established by law. This includes the requirement that they maintain a business premises at which ATF can inspect their records and inventory, and that otherwise complies with local zoning restrictions”); ATF FFL Newsletter, June 2010, at 5 (Unless there is a permanent business premises from which to conduct firearms business (e.g., an identified rented space that can securely hold required records), “[t]he GCA prohibits any person from engaging in the business of selling, dealing, or trading in firearms at flea markets. The only exceptions would be an unlicensed individual making an occasional firearm sale or for a Federal firearms licensee to display firearms and take orders of firearms.”); Letter for Sen. Dan Coats, from Deputy Director, ATF (Aug. 22, 1990) (an FFL cannot be issued at a table or booth at a temporary flea market); ATF Internal Memorandum #23264 (June 15, 1983) (same); *United States v. Allman*, 119 Fed. App’x. 751, 754 (6th Cir. 2005) (“Illegal gun transactions at flea markets are not atypical.”); *United States v. Orum*, 106 F. App’x 972 (6th Cir. 2004) (defendant illegally displayed and sold firearms at flea markets and gun shows).

<sup>42</sup> See *Abramski v. United States*, 573 U.S. 169, 172, 181 (2014) (“The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer’s ‘business premises’ by prohibiting, except in limited circumstances, the sale of a firearm ‘to a person who does not appear in person’ at that location.”); *National Rifle Ass’n v. Brady*, 914 F.2d 475, 480 (4th Cir. 1990) (holding that FOPA did not eliminate the requirement that a licensee have a business premises from which to conduct business “so that regulatory authorities will know where the inventory and records of a licensee can be found”); *Meester v. Bowers*, No. 12CV86, 2013 WL 3872946 (D. Neb. July 25, 2013) (upholding ATF’s denial of license in part because the applicant lacked a means of accessing the premises).

engaged in the business of dealing in firearms,<sup>43</sup> and 18 U.S.C. 924(n) prohibits travelling from a foreign country to a State in furtherance of conduct that constitutes a violation of section 922(a)(1)(A).

Further, as recently amended by the BSCA, the GCA now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. 18 U.S.C. 924(k)(2). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see* 18 U.S.C. 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for resale in another country would still be engaging in unlawful dealing in firearms without a license, among other violations of United States law. Accordingly, this rule proposes to clarify in the definition of “dealer” that purchases or sales of firearms as a wholesale or retail dealer may occur either domestically or internationally.

*B. Definition of “Engaged in the Business”—“Purchase” and “Sale”*

To further clarify the regulatory definition of a dealer “engaged in the business” with the predominant intent of earning a profit through the repetitive purchase and resale

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<sup>43</sup> *See, e.g., United States v. Baptiste*, 607 F. App’x 950, 953 (11th Cir. 2015) (upholding section 922(a)(1) conviction where firearms purchased in the United States were to be resold in Haiti); *United States v. Murphy*, 852 F.2d 1, 8 (1st Cir. 1988) (same with firearms to be resold in Ireland); *United States v. Hernandez*, 662 F.2d 289, 291 (5th Cir. 1981) (same with firearms to be resold in Mexico). *But see United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981) (reversing conviction for purchasing firearms for resale in Lebanon on the basis that there was no mention of exporting firearms in the GCA or any suggestion of Congressional concern about firearm violence in other countries).

of firearms in 27 CFR 478.11, this rule also proposes to define, based on common dictionary definitions and relevant case law, the terms “purchase” and “sale” (and derivative terms thereof, such as “purchases,” “purchasing,” “purchased,” and “sells,” “selling,” or “sold”). This should help clarify, through examples, how those terms apply to dealing in firearms. Specifically, this rule proposes to define “purchase” (and derivative terms thereof) as “the act of obtaining a firearm in exchange for something of value,”<sup>44</sup> and the term “sale” (and derivative terms thereof, including “resale”) as “the act of providing a firearm in exchange for something of value.”<sup>45</sup> The term “something of value” includes money, credit, personal property (e.g., another firearm<sup>46</sup> or ammunition<sup>47</sup>), a service,<sup>48</sup> a controlled substance,<sup>49</sup> or any other medium of exchange<sup>50</sup> or valuable consideration.”<sup>51</sup>

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<sup>44</sup> This definition is consistent with the common meaning of “purchase,” which is “to obtain (as merchandise) by paying money or its equivalent.” Webster’s Third New International Dictionary 1844 (1971); *see also* Black’s Law Dictionary 1491 (11th Ed. 2019) (The term “purchase” means “[t]he acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.”).

<sup>45</sup> This definition is consistent with the common meaning of “sale,” which is “a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (a sum of money or any other consideration).” Webster’s Third New International Dictionary 2003 (1971). The related term “resale” is “the act of selling again.” *Id.* at 1929.

<sup>46</sup> *See, e.g., United States v. Gross*, 451 F.2d 1355, 1360 (7th Cir. 1971) (defendant “had traded firearms [for other firearms] with the object of profit in mind”).

<sup>47</sup> *See, e.g., United States v. Huffman*, 518 F.2d 80 (4th Cir. 1975) (defendant traded large quantities of ammunition in exchange for firearms).

<sup>48</sup> *See, e.g., United States v. 57 Miscellaneous Firearms*, 422 F. Supp. 1066, 1070–71 (W.D. Mo. 1976) (defendant obtained the firearms he sold or offered for sale in exchange for carpentry work he performed).

<sup>49</sup> *See, e.g., Johnson v. Johns*, No. 10-CV-904(SJF), 2013 WL 504446 (E.D.N.Y. Feb. 5, 2013) (on at least one occasion, petitioner, who was engaged in the unlicensed dealing in firearms through straw purchasers, compensated a straw purchaser with cocaine base).

<sup>50</sup> *See, e.g., Focia*, 869 F.3d at 1274 (defendant sold pistol online to undercover ATF agent for 15 bitcoins).

<sup>51</sup> The term “medium of exchange” generally means “something commonly accepted in exchange for goods and services and recognized as representing a standard of value,” and “valuable consideration” is “an equivalent or compensation having value that is given for something (as money, marriage, services) acquired or promised and that may consist either in some right, interest, profit, or benefit accruing to one

Defining these terms to include any method of payment for a firearm would clarify that persons cannot avoid licensing by, for instance, bartering or providing or receiving services in exchange for firearms with the predominant intent to earn pecuniary gain even where no money is exchanged. It would also clarify that a person requires a license to engage in the business of dealing in firearms even when the medium of payment or consideration is unlawful, such as exchanging illicit drugs or performing illegal acts for firearms, and that it is a distinct crime to do so without a license.

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

Because the definitions of “purchase” and “sale” broadly include services provided in exchange for firearms, both as defined by common dictionaries and as proposed in this rule, the Department further proposes to make clear that certain persons who provide auctioneer services are not required to be licensed as dealers. ATF has long interpreted the statutory definition of “engaged in the business” as excluding auctioneers who provide only auction services on commission by assisting in liquidating a personal collection of firearms at an “estate-type” auction.<sup>52</sup> The new definition in the BSCA does not affect that determination. The Department is proposing to incorporate this

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party or some responsibility, forbearance, detriment, or loss exercised by or falling upon the other party.” Webster’s Third New International Dictionary 1403, 2530 (1971). See, e.g., *United States v. Berry*, 644 F.2d 1034, 1036 (5th Cir. 1981) (defendant sold firearms in exchange for large industrial batteries to operate his demolition business); *United States v. Reminga*, 493 F. Supp. 1351, 1357 (W.D. Mich. 1980) (defendant traded his car for three guns that he later sold or traded).

<sup>52</sup> See ATF Q&A, *Does an auctioneer who is involved in firearms sales need a dealer’s license?*, <https://www.atf.gov/firearms/qa/does-auctioneer-who-involved-firearms-sales-need-dealer-license> (July 10, 2020); ATF Federal Firearms Regulations Reference Guide, P 5300.4, Q&A L1, at 207 (2014); ATF FFL Newsletter, May 2001, at 3; ATF Ruling 96-2, *Engaging in the Business of Dealing in Firearms (Auctioneers)*; 1 ATF FFL Newsletter, 1990, at 7; Letter for Editor, CarPac Publishing Company, from Acting Assistant Director (Regulatory Enforcement), ATF, CC-28,953 (July 26, 1979).

longstanding interpretation into the regulations while otherwise clarifying the regulatory definition.

In this context, the auctioneer is generally providing services only as an agent of the owner or executor of an estate who is liquidating a personal collection. The firearms are within the estate's control and the sales made on the estate's behalf. This limited exclusion from the definition of "dealer" is conditioned on the auctioneer not purchasing the firearms, taking possession of the firearms prior to the auction, or consigning the firearms for sale. If the auctioneer were to engage in any of that conduct, the auctioneer would need to have a dealer's license because that person would be engaged in the business of purchasing and reselling firearms to earn a profit. An "estate-type" auction as described above differs from liquidating a personal collection of firearms by means of a "consignment-type" auction, in which the auctioneer is paid to accept firearms into a business inventory and then resells them in lots, or over a period of time. In this "consignment-type" auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification.<sup>53</sup> Therefore, under "consignment-type" auctions, an auctioneer would generally need to be licensed.

*D. Presumptions that a Person is "Engaged in the Business"*

The Department has observed through its enforcement efforts and subject-matter expertise that persons who are engaged in certain firearms purchase-and-sale activities are highly likely to be "engaged in the business" of dealing in firearms at wholesale or retail. These activities have been observed through a variety of criminal, civil, and administrative enforcement actions and proceedings brought by the Department, to

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<sup>53</sup> *Id.*



include: (1) ATF inspections of prospective and existing wholesale and retail dealers of firearms who are engaged, or intend to engage in the business;<sup>54</sup> (2) criminal investigations and prosecutions of persons who engaged in the business of dealing in firearms without a license;<sup>55</sup> (3) civil and administrative actions under 18 U.S.C. 924(d) to seize and forfeit firearms intended to be sold by persons engaged in the business without a license;<sup>56</sup> (4) ATF cease and desist letters issued to prevent section 922(a)(1)(A) violations;<sup>57</sup> and (5) ATF administrative proceedings under 18 U.S.C. 923 to deny licenses to persons who willfully engaged in the business of dealing in firearms without a license, or to revoke or deny renewal of existing licenses held by licensees who aided and abetted that misconduct.<sup>58</sup> In addition, numerous courts have identified certain activities or factors they deemed relevant to determining whether a person is “engaged in the business” even prior to Congress’s decision to expand the definition in the BSCA.<sup>59</sup>

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<sup>54</sup> In Fiscal Year 2022, for example, ATF conducted 11,156 qualification inspections of new applicants for a license, and 6,979 compliance inspections of active licensees. *See* ATF, *Fact Sheet- Facts and Figures for Fiscal Year 2022* (Jan. 2023), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2022>.

<sup>55</sup> *See* footnotes 62 through 72, *infra*.

<sup>56</sup> *See, e.g., United States v. Four Hundred Seventy Seven (477) Firearms*, 698 F. Supp. 2d 890 (E.D. Mich. 2010) (civil forfeiture of firearms intended to be sold from an unlicensed gun store); *United States v. One Bushmaster, Model XM15-E2 Rifle*, No. 5:06-CV-156 (WDO), 2006 WL 3497899 (M.D. Ga. Dec. 5, 2006) (civil forfeiture of firearms intended to be sold by an unlicensed person who acquired an unusually large amount of firearms quickly for the purpose of selling or trading them); *United States v. Twenty Seven (27) Assorted Firearms*, No. SA-05-CA-407-XR, 2005 WL 2645010 (W.D. Tex. Oct. 13, 2005) (civil forfeiture of firearms intended to be sold at gun shows without a license).

<sup>57</sup> Over the years, ATF has issued numerous letters warning unlicensed persons not to continue to engage in the business of dealing in firearms without a license, also called a “cease and desist” letter. *See, e.g., United States v. Kubowski*, 85 F. App’x 686, 687 (10th Cir. 2003) (defendant served cease and desist letter after selling five handguns and one rifle to undercover ATF agents).

<sup>58</sup> *See, e.g., In the Matter of Scott*, Application Nos. 9-93-019-01-PA-05780 and 05781 (Seattle Field Division, Apr. 3, 2018) (denied applicant for license to person who purchased and sold numerous handguns within one month; *In the Matter of S.E.L.L. Antiques*, Application No. 9-87-035-01-PA-00725 (Phoenix Field Division, Feb. 21, 2006) (denied applicant who repetitively sold modern firearms from unlicensed storefront).

<sup>59</sup> *See* footnote 20, *supra*, and accompanying text.

This rule, therefore, proposes to establish rebuttable presumptions in certain contexts to help unlicensed persons, industry operations personnel, and others determine when a person is presumed to be “engaged in the business” requiring a dealer’s license.

**These rebuttable presumptions would apply in civil and administrative proceedings.** While the criteria set forth in the proposed rule may be useful to a court in a criminal case—for example, to inform appropriate jury instructions regarding permissible inferences<sup>60</sup> —the regulatory text makes clear that the presumptions shall not apply to criminal cases.<sup>61</sup>

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<sup>60</sup> While rebuttable presumptions may not be presented to a jury in a criminal case, jury instructions may include, for example, reasonable permissive inferences. *See Francis v. Franklin*, 471 U.S. 307, 314 (1985) (“A permissive inference suggests to the jury a possible conclusion to be drawn if the [government] proves predicate facts, but does not require the jury to draw that conclusion.”); *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979) (upholding jury instruction that gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion); *Baghdad v. Att’y Gen. of the U. S.*, 50 F.4th 386, 390 (3d Cir. 2022) (“Unlike mandatory presumptions, permissive inferences . . . do not shift the burden of proof or require any outcome. They are just an ‘evidentiary device . . . [that] allows—but *does not require*—the trier of fact to infer’ that an element of a crime is met once basic facts have been proven beyond a reasonable doubt.”); *Patton v. Mullin*, 425 F.3d 788 (10th Cir. 2005) (upholding jury instruction that created a permissive inference rather than a rebuttable presumption); *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994) (same); *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (same); *Lannon v. Hogan*, 719 F.2d 518 (1st Cir. 1983) (same); *United States v. Gaines*, 690 F.2d 849 (11th Cir. 1982) (same); *cf., e.g., United States v. Antonoff*, 424 F. App’x 846, 848 (11th Cir. 2011) (district court relied on permissive inference of current drug use in ATF’s definition of “unlawful user” in 27 CFR 478.11 to conclude that the defendant’s drug use was “contemporaneous and ongoing” sufficient to apply the 2K2.1 sentencing guideline); *United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006) (upholding application of a sentencing enhancement based on the permissive inference of current drug use in 27 CFR 478.11); *United States v. Stanford*, No. 11-10211-01-EFM, 2012 WL 1313503 (D. Kan. Apr. 16, 2012) (upholding arrest under 18 U.S.C. 922(g)(3) relying, in part, on ATF’s regulatory definition of “unlawful user”).

<sup>61</sup> *See generally* 2 Handbook of Fed. Evid. § 303:4 (9th ed. 2020) (explaining Federal Rule of Evidence Standard 303(c), which “provides that whenever the existence of a presumed fact against the accused is submitted to the jury, the court should instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt, is an element of the offense, or negatives a defense, the court should instruct the jury that its existence on all the evidence must be proved beyond a reasonable doubt. The applicability and constitutionality of Standard 303(b) must be evaluated in light of the Supreme Court decisions in *County Court of Ulster v. Allen*, *Sandstrom v. Montana*, and *Francis v. Franklin*. As a result of these decisions it is clear, if it wasn’t before, that it is never permissible to shift to the defendant the burden of persuasion to disprove an element of a crime charged by means of a presumption, and of course, that a conclusive or irrebuttable presumption operating against the criminal defendant is also unconstitutional.”).

The Department has considered, but not proposed in the NPRM, an alternative that would have set a minimum numerical threshold of firearms sold by a person within a certain period of time. That approach has not been proposed for several reasons. First, while selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity, neither the courts nor the Department has recognized a set minimum number of firearms purchased or resold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is “engaged in the business” of dealing in firearms. Instead, the established approach for determining whether an individual is “engaged in the business” is to look at the totality of circumstances. Thus, even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license. For example, even under the previous statutory definition, courts have upheld convictions for dealing without a license when few firearms, if any, were actually sold, provided other factors were also present, such as the person representing to others a willingness and ability to repetitively purchase firearms for resale. *See, e.g., United States v. King*, 735 F.3d 1098, 1107 n.8 (9th Cir. 2013) (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that “Section 922(a)(1)(A) does not require an actual sale of firearms”).<sup>62</sup> Second, in addition to the tracing

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<sup>62</sup> *See* Do I Need a License to Buy and Sell Firearms?, ATF Publication 5310.2 (Jan. 2016). *See also* *Nadirashvili*, 655 F.3d at 120–21 (despite defendants’ knowledge of only a single firearms transaction, there was sufficient evidence to prove they had “engaged in the business” because they knew co-defendant held himself out generally as a source of firearms, and was ready to procure them for customers); *United States v. Shan*, 361 F. App’x 182 (2d Cir. 2010) (defendant sold two firearms within roughly a month and acknowledged he had a source of supply for other weapons); *United States v. Shan*, 80 F. App’x 31 (9th Cir. 2003) (sale of weapons in one transaction where the defendant was willing and able to find more weapons for resale); *Murphy*, 852 F.2d at 8 (“[T]his single transaction was sufficiently large in quantity,

concerns expressed by ATF in response to comments on the 1979 ANPRM, a person could structure their transactions to avoid a minimum threshold by spreading out their sales over time. Finally, the Department does not believe there is a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered “engaged in the business.”

Rather than establishing a minimum threshold number of firearms purchased or sold, this rule proposes to clarify that, absent reliable evidence to the contrary, a person will be presumed to be engaged in the business of dealing in firearms when the person:

(1) sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms;<sup>63</sup>

(2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person’s reported taxable gross income during the applicable period of time;<sup>64</sup>

(3) repetitively purchases for the purpose of resale, or sells or offers for sale firearms—

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price and length of negotiation to constitute dealing in firearms.”); *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975) (“Swinton’s sale [of one firearm] to Agent Knopp, standing alone, without more, would not have been sufficient to establish a violation of Section 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms. The un rebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns.” (internal citation omitted)).

<sup>63</sup> See *King*, 735 F.3d at 1107 (defendant attempted to sell one of the 19 firearms he had ordered, and represented to the buyer that he was buying, selling, and trading in firearms and could procure any item in a gun publication at a cheaper price).

<sup>64</sup> See, e.g., *Focia*, 869 F.3d at 1282 (“And finally, despite efforts to obtain Focia’s tax returns and Social Security information, agents found no evidence that Focia enjoyed any source of income other than his firearms sales. This evidence overwhelmingly demonstrates that Focia’s sales of firearms were no more a hobby than working at Burger King for a living could be described that way.”).

(A) through straw or sham businesses,<sup>65</sup> or individual straw purchasers or sellers;<sup>66</sup> or

(B) that cannot lawfully be purchased or possessed, including:

(i) stolen firearms (18 U.S.C. 922(j));<sup>67</sup>

(ii) firearms with the licensee's serial number removed, obliterated, or altered (18 U.S.C. 922(k); 26 U.S.C. 5861(i));<sup>68</sup>

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<sup>65</sup> See, e.g., *MEW Sporting Goods, LLC v. Johansen*, 992 F. Supp. 2d 665, 674–75 (N.D.W.V. 2014), *aff'd*, 594 F. App'x 143 (4th Cir. 2015) (corporate entity disregarded where it was formed to circumvent firearms licensing requirement); *King*, 735 F.3d at 1106 (defendant felon could not “immunize himself from prosecution” for dealing without a license by “hiding behind a corporate charter.”); *United States v. Fleischli*, 305 F.3d 643, 652 (7th Cir. 2002) (“In short, a convicted felon who could not have legitimately obtained a manufacturer’s or dealer’s license may not obtain access to machine guns by setting up a sham corporation.”); *National Lending Group, L.L.C. v. Mukasey*, No. CV 07-0024, 2008 WL 5329888 (D. Ariz. Dec. 19, 2008), *aff'd*, 365 F. App'x 747 (9th Cir. 2010) (straw ownership of corporate pawn shops); *Casanova Guns, Inc. v. Connally*, 454 F.2d 1320, 1322 (7th Cir. 1972) (“[I]t is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provisions of a statute.”); *XVP Sports, LLC v. Bangs*, No. 2:11CV379, 2012 WL 4329258, at \*5 (E.D. Va. Sept. 17, 2012) (“unity of interest” existed between firearm companies controlled by the same person); *Virlow LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:06-CV-375, 2008 WL 835828 (W.D. Mich. Mar. 28, 2008) (corporate form disregarded where a substantial purpose for the formation of the company was to circumvent the statute restricting issuance of firearms licenses to convicted felons); Press Release, OPA, *Utah Business Owner Convicted of Dealing in Firearms without a License and Filing False Tax Returns* (Sept. 23, 2016), <https://www.justice.gov/opa/pr/utah-business-owner-convicted-dealing-firearms-without-license-and-filing-false-tax-returns> (defendant illegally sold firearms under the auspices of a company owned by another Utah resident).

<sup>66</sup> See, e.g., *Bryan v. United States*, 524 U.S. 184, 189 (1998) (defendant used straw purchasers to buy pistols in Ohio for resale in New York); *United States v. Ochoa*, 726 F. App'x 651, 652 (9th Cir. 2018) (“[W]hile the evidence demonstrated that Ochoa did not purchase and sell the firearms himself, it was sufficient to demonstrate that he had the princip[al] objective of making a profit through the repetitive purchase and sale of firearms, even if those purchases and sales were carried out by others.”); *United States v. Hosford*, 843 F.3d 161, 163 (4th Cir. 2016) (defendant purchased firearms through a straw purchaser who bought them at gun shows); *United States v. Paye*, 129 F. App'x 567, 570 (11th Cir. 2005) (defendant paid straw purchaser to buy firearms for him to sell); *United States v. Bryan*, 122 F.3d 90, 92 (2d Cir. 1997) (defendant enlisted the aid of two straw purchasers to buy guns for resale in another state).

<sup>67</sup> See, e.g., *United States v. Simmons*, 485 F.3d 951 (7th Cir. 2007); *United States v. Perkins*, 633 F.2d 856 (8th Cir. 1981).

<sup>68</sup> See, e.g., *United States v. Ilarraza*, 963 F.3d 1 (1st Cir. 2020); *United States v. Fields*, 608 F. App'x 806 (11th Cir. 2015); *United States v. Barrero*, 578 F. App'x 884 (11th Cir. 2014); *United States v. Teleguz*, 492 F.3d 80 (1st Cir. 2007); *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004); *United States v. Kitchen*, 87 F. App'x 244 (3d Cir. 2004); *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003); *United States v. Jackson*, No. 97-6756, 1997 WL 618902 (4th Cir. Oct. 8, 1997); *United States v. Rosa*, 123 F.3d 94 (2d Cir. 1997); *United States v. Twitty*, 72 F.3d 228 (1st Cir. 1995); *United States v. Collins*, 957 F.2d 72 (2d Cir. 1992).

(iii) firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(iv) machineguns or other weapons defined as firearms under 26 U.S.C. 5845(a) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d));<sup>69</sup>

(4) repetitively sells or offers for sale firearms—

(A) within 30 days after they were purchased;<sup>70</sup>

(B) that are new, or like new in their original packaging;<sup>71</sup> or

(C) that are of the same or similar kind (i.e., make/manufacturer, model, caliber/gauge, and action) and type (i.e., the classification of a firearm as a rifle,

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<sup>69</sup> See, e.g., *United States v. Fridley*, 43 F. App'x 830 (6th Cir. 2002) (defendant purchased and sold unregistered machineguns); *United States v. Idarecis*, No. 97-1629, 1998 WL 716568 (2d Cir. Oct. 9, 1998) (defendant converted rifles to automatic weapons and obliterated the serial numbers on the firearms he sold).

<sup>70</sup> See, e.g., Press Release, OPA, *Minnesota Man Indicted for Dealing Firearms without a License* (Feb. 18, 2016), <https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license#:~:text=U.S.%20Attorney%20Andrew%20M.,least%20nine%20firearms%20transaction%20records> (defendant sold firearms he purchased through online websites, and the average time he actually possessed a gun before offering it for sale was only nine days); Press Release, USAO, *Ex-Pasadena Police Lieutenant Sentenced to One Year in Federal Prison for Unlicensed Selling of Firearms and Lying on ATF Form* (Feb. 25, 2019), <https://www.justice.gov/usao-cdca/pr/ex-pasadena-police-lieutenant-sentenced-one-year-federal-prison-unlicensed-selling> (defendant resold 79 firearms within six days after he purchased them); *United States v. D'Agostino*, No. 10-20449, 2011 WL 219008 (E.D. Mich. Jan. 20, 2011) (some of the weapons defendant sold at gun shows were purchased “a short time earlier”).

<sup>71</sup> See, e.g., *United States v. Carter*, 203 F.3d 187, 189 n.1 (2d Cir. 2000) (defendant admitted to willfully shipping and transporting interstate eleven handguns in the course of engaging in the business of dealing in firearms without a license that were contained in their original boxes); *United States v. Van Buren*, 593 F.2d 125, 126 (9th Cir. 1979) (defendant’s “gun displays were atypical of those of a collector because he exhibited many new weapons, some in the manufacturers’ boxes”); *United States v. Powell*, 513 F.2d 1249 (8th Cir. 1975) (defendant acquired and sold six “new” or “like new” shotguns over several months); *United States v. Posey*, 501 F.2d 998, 1002 (6th Cir. 1974) (defendant offered firearms for sale, some of them in their original boxes); *United States v. Day*, 476 F.2d 562, 564, 567 (6th Cir. 1973) (60 of the 96 guns to be sold by defendant were new handguns still in the manufacturer’s original packages).

shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm);<sup>72</sup>

(5) who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (i.e., license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal collection in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or

(6) who, as a former licensee (or responsible person acting on behalf of a former licensee) sells or offers for sale firearms that were transferred to a personal collection of such former licensee or responsible person prior to the time the license was terminated, unless: (A) the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, of the United States Code; and (B) one year has passed from the date of transfer to the personal collection.

Any one or a combination of the circumstances above gives rise to a presumption in civil and administrative proceedings that the person is engaged in the business of dealing in firearms and must be licensed under the GCA. The activities set forth in these rebuttable presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. Further, as noted above, while the criteria may be useful to courts in criminal

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<sup>72</sup> See, e.g., Press Release, USAO, *FFL Sentenced for Selling Guns to Unlicensed Dealers* (May 27, 2022), <https://www.justice.gov/usao-ndtx/pr/ffl-sentenced-selling-guns-unlicensed-dealers> (defendant regularly sold large quantities of identical firearms to unlicensed associates who sold them without a license); *Shiple*, 546 F. App'x at 453 (defendant sold mass-produced firearms of similar make and model that were not likely to be part of a personal collection).

cases when instructing juries regarding permissible inferences, the presumptions outlined above shall not apply to criminal cases.

At the same time, the Department recognizes that certain transactions are not likely to be sufficient to support a presumption that a person is engaging in the business of dealing in firearms. For this reason, the proposed rule also includes examples of when a person is not presumed to be engaged in the business of dealing in firearms.

Specifically, under this proposed rule, a person would not be presumed to be engaged in the business requiring a license as a dealer when the person transfers firearms only as bona fide gifts,<sup>73</sup> or occasionally<sup>74</sup> sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby, unless their conduct also demonstrates a predominant intent to earn a profit.

The rebuttable presumptions set forth above are supported by the Department's investigative and regulatory enforcement experience,<sup>75</sup> as well as conduct that the courts have found to require a license even before the BSCA expanded the definition of "engaged in the business." Moreover, these presumptions are consistent with the case-by-case analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in

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<sup>73</sup> The Department interprets the term "bona fide gift" to mean a firearm given in good faith to another person without expecting any item, service, or anything of value in return. *See* Form 4473, at 4, Instructions to Question 21.a. (Actual Transferee/Buyer) ("A gift is not bona fide if another person offered or gave the person. . . money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm."); ATF FFL Newsletter, June 2021, at 2 (sa me).

<sup>74</sup> While the GCA does not define the term "occasional," that term is commonly understood to mean "of irregular occurrence; happening now and then, infrequent." Letter for Borderview LLC, from Chief, Firearms Industry Programs Branch, ATF (Oct. 14, 2015) (citing Collins American English Dictionary (2015)) (addressing persons engaged in the business of importing firearms).

<sup>75</sup> See the discussion at the beginning of Section II.D of this preamble. "Presumptions that a Person is 'Engaged in the Business.'"



firearms without a license even under the pre-BSCA definition. The fundamental purpose of the GCA would be severely undermined if persons were allowed to repetitively purchase and resell firearms to predominantly earn a profit without conducting background checks, keeping records, and otherwise complying with the license requirements of the GCA simply because the effort needed to conduct commerce in general has dramatically diminished. The Department is therefore providing objectively reasonable standards for when a person is presumed to be “engaged in the business” to strike an appropriate balance that captures persons who should be licensed, without limiting or regulating activity truly for the purposes of a hobby or enhancing a personal collection.

The first presumption stated above—that a person will be presumed to be engaged in the business when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms—reflects that the definition of “engaged in the business” in 18 U.S.C. 921(a)(21)(C) does not require that a firearm actually to be sold by a person so long as the person is holding themselves out as a dealer. This is because, under the definition of “engaged in the business” in 18 U.S.C. 921(a)(21)(C), the “repetitive purchase and resale of firearms” is the means through which the person intends to engage in the business even if those firearms are not actually repetitively purchased and resold.

The second presumption above—that a person is engaged in the business when spending more money or its equivalent on purchases of firearms for the purpose of resale than the person’s reported taxable gross income during the applicable period of time—reflects that persons who spend more money or its equivalent on purchases of firearms

for resale than their reported gross income are likely to be earning livelihood from those sales, which is even stronger evidence of an intent to profit than merely supplementing one's income.<sup>76</sup> Alternatively, the funds the person used to purchase the firearms may have been derived from criminal activities, for example, if they were provided by a co-conspirator to repetitively purchase and resell the firearms without a license or for other criminal purposes, or the funds were laundered from past illicit firearms transactions. Such illicit and repetitive firearm purchase and sale activities do not require proof of profit to prove the requisite intent under 18 U.S.C. 921(a)(22), which states that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

The first presumption underlying the third category listed above—that a person is engaged in the business when repetitively purchasing, reselling, or offering to sell firearms through straw or sham businesses or individual straw purchasers or sellers—reflects that persons who willfully engage in the business of dealing without a license often do so to conceal their transactions by setting up straw or sham businesses or hiring “middlemen” to conduct transactions on their behalf.<sup>77</sup> The second presumption under that category—that a person is engaged in the business when repetitively purchasing, reselling, or offering to sell firearms that cannot lawfully be possessed—reflects that such firearms are actively sought by criminals and earn higher profits for the illicit dealer.

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<sup>76</sup> Webster's Online Dictionary defines the term “livelihood” as “means of support or subsistence.” *Livelihood*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/livelihood> (last visited Aug. 25, 2023).

<sup>77</sup> See footnotes 65 and 6666, *supra*; *Abramski*, 573 U.S. at 180 (“[C]onsider what happens in a typical straw purchase. A felon or other person who cannot buy or own a gun still wants to obtain one. (Or, alternatively, a person who could legally buy a firearm wants to conceal his purchase, maybe so he can use the gun for criminal purposes without fear that police officers will later trace it to him.)”).

Such dealers will often buy and sell stolen firearms and firearms with obliterated serial numbers because such firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing.<sup>78</sup> They sometimes sell unregistered National Firearms Act (“NFA”) weapons<sup>79</sup> and unlawfully imported firearms because those firearms are more difficult to obtain, cannot be traced through the National Firearms Registration and Transfer Record, and may sell for a substantial profit. Although these presumptions do not directly address an individual’s intent to profit, they are supported by 18 U.S.C. 921(a)(22), which does not require the government to prove an intent to profit where a person repetitively purchases and disposes of firearms for criminal purposes. This includes willfully engaging in the business of dealing in contraband firearms. These presumptions are also implicitly supported by 18 U.S.C. 923(c), which deems any firearm acquired or disposed of with the purpose of willfully evading the restrictions placed on licensed dealers under the GCA to be business inventory, not part of a personal collection. Indeed, concealing the identity of the seller or buyer of a firearm, or the identification of the firearm, undermines the requirements imposed on legitimate dealers to conduct background checks on actual purchasers (18 U.S.C. 922(t))

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<sup>78</sup> See footnote 68, *supra*; *Twitty*, 72 F.3d at 234 n.2 (defendant resold firearms with obliterated serial numbers, which was “probably designed in part to increase the selling price of the weapons”); *United States v. Hannah*, No. CRIM.A.05-86, 2005 WL 1532534, at \*3 (E.D. Pa. 2005) (defendant told buyers to obliterate the serial numbers on the firearms so he would not “get in trouble”).

<sup>79</sup> The National Firearms Act of 1934, 26 U.S.C. 7801 *et seq.*, restricts certain firearms that Congress determined were particularly dangerous “gangster-type” weapons, to include short-barreled rifles and shotguns, machineguns, silencers, and destructive devices. NFA provisions still refer to the “Secretary of the Treasury.” See *generally* 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this final rule refers to the Attorney General throughout.

and maintain transaction records (18 U.S.C. 923(g)(1)–(2)) through which firearms involved in crime can be traced.

The first presumption under the fourth category listed above—repetitive sales or offers for sale of firearms within 30 days from purchase— reflect that firearms for a personal collection are not likely to be repetitively sold within such a short period of time from purchase.<sup>80</sup> Likewise, under the second and third presumptions under this category, persons who repetitively sell firearms in new condition or in like-new condition in their original packaging, or firearms of the same kind and type, are not likely to be selling such firearms from a personal collection. Individuals who are bona fide collectors are less likely to amass firearms of the same kind and type than amass older, unique, or less common firearms that hold special interest. In contrast, persons engaged in the business

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<sup>80</sup> Further support for this 30-day presumption comes from the fact that, while many retailers do not allow firearm returns, some retailers and manufacturers do allow a 30-day period within which a customer who is dissatisfied with a firearm purchased for a personal collection or hobby can return or exchange the firearm. Dissatisfied personal collectors and hobbyists—persons not intending to engage in the business—a re more likely to return new firearms rather than incurring the time, effort, and expense to resell them within that period of time. See, e.g., *Cabela’s Return Policy: Here’s How it Actually Works*, rather-be-shopping.com, <https://www.rather-be-shopping.com/blog/cabelas-return-policy/> (Jan. 31, 2023) (“[I]f they sell you a fully functioning gun, and you take it to the range, and it will not eject a shell or casing or will not perform basic functions, THEY TYPICALLY WILL exchange it. Make sure you fully test the firearm within 30 days of purchase as it will be MUCH more difficult to exchange the gun after 30 days.”); *LEARN ABOUT THE 30 DAY MONEY BACK GUARANTEE! HOW TO RETURN YOUR FIREARM!*, Waltherarms.com, <https://waltherarms.com/guarantee#:~:text=Walther%20understands%20this%20and%20that,it%20is%20right%20for%20you/> (last visited Aug. 10, 2023); *Retail Policies*, centertargetsports.com, <https://centertargetsports.com/retail-range/> (last visited Aug. 10, 2023) (“When you purchase any gun from Center Target Sports, we guarantee your satisfaction. Use your gun for up to 30 days and if for any reason you’re not happy with your purchase, return it to us within 30 days and receive a store credit for the FULL purchase price.”); *Warranty & Return Policy*, Century Arms (Mar. 6, 2019), [https://www.centuryarms.com/media/wysiwyg/Warranty\\_and\\_Return\\_v02162021.pdf](https://www.centuryarms.com/media/wysiwyg/Warranty_and_Return_v02162021.pdf) (“Customer has 30 days to return surplus firearms, ammunition, parts, and accessories for repair/replacement if the firearm does not meet the advertised condition.”); *I Love You PEW 30 Day Firearm Guarantee*, Alphasdog Firearms, <https://alphadogfirearms.com/i-love-you-pew/> (last visited Aug. 10, 2023) (“Original purchaser has 30 calendar days to return any new firearm purchased for store credit.”); *Return Exceptions Policy*, Big 5 Sporting Goods, <https://www.big5sportinggoods.com/static/big5/pdfs/Custom-Service-RETURN-EXCEPTIONS-POLICY-d.pdf> (last visited Aug. 10, 2023) (“Firearm purchases must be returned to the same store at which they were purchased. No refunds or exchanges unless returned in the original condition within thirty (30) days from the date of release.”).

can earn the greatest profit by selling firearms in the best (*i.e.*, in a new) condition, or by selling the particular makes and models of firearms (*i.e.*, of the same kind and type) that their customers want the most and would generate the greatest profit.

The presumption under the fifth category listed above— that a former licensee, or responsible person acting on behalf of such former licensee, is engaged in the business when they sell or offer for sale firearms that were in the business inventory upon license termination— recognizes the fact that the licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a “personal collection.” Consistent with the GCA’s plain language under section 921(a)(21)(C), this presumption recognizes that former licensees who thereafter intend to predominantly earn a profit from selling firearms that they had previously purchased for resale can still be considered to be “engaged in the business” after termination of their license. The GCA does not provide exceptions to the definition of “engaged in the business” based on one’s prior license status, even if the firearms were purchased while the person had that license.<sup>81</sup>

The final presumption above—that the personal inventory of a former licensee (or responsible person acting on behalf of the former licensee) remains business inventory until one year has passed from license termination or transfer to their personal

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<sup>81</sup> The Department is aware of non-binding dicta in *United States v. Shumann*, 861 F.2d 1234, 1238 (11th Cir. 1988), in which the court expressed its view that had the FOPA definition of “engaged in the business” been applicable (which the court ruled it was not) it would have absolved the petitioner of liability in a forfeiture action if, as he claimed, he was merely closing out his gun business and liquidating his inventory, saying “[w]hile the government presented evidence of firearms sales by Schumann to undercover BATF agents . . . there was no proof of firearms purchases, much less a proven pattern of ‘repetitive purchase and resale.’” However, none of the amendments to the GCA made by FOPA defined the terms “collection” or “personal collection.” The fact remains that the firearms to be liquidated were repetitively purchased for resale by the same person while licensed. And whether a person is “engaged in the business” under post-BSCA section 921(a)(21)(C) is not dependent on the license status of the person so engaged.

collection—is consistent with 18 U.S.C. 923(c) of the GCA, which deems firearms transferred from a licensee’s business inventory to their personal collection as business inventory until one year after the transfer.<sup>82</sup>

The Department notes that these presumptions may be rebutted in an administrative or civil proceeding with reliable evidence demonstrating that a person is not “engaged in the business” of dealing in firearms.<sup>83</sup> If, for example, where there is reliable evidence that a few collectible firearms were purchased from a licensed dealer where “all sales are final” and resold back to the licensee within 30 days because the purchaser was not satisfied, the presumption that the unlicensed reseller is engaged in the business may be rebutted. Similarly, the presumption may be rebutted based on evidence that a collector occasionally sells one specific kind and type of curio or relic firearm to buy another one of the same kind and type that is in better condition to “trade-up” or enhance the seller’s personal collection. Another example in which evidence may rebut the presumption would be the occasional sale, loan, or trade of an almost-new firearm in

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<sup>82</sup> Even if one year has passed from the date of transfer, business inventory transferred to a personal collection of a former licensee (or responsible person acting on behalf of that licensee) prior to termination of the license cannot be treated as part of a personal collection if the licensee received or transferred those firearms with the intent to willfully evade the restrictions placed upon licensees by the GCA (e.g., willful violations as cited in a notice of license revocation or denial of renewal). This is because, under section 923(c), any firearm acquired or disposed of with intent to willfully evade the restrictions placed upon licensees by the GCA is automatically business inventory. Therefore, because the firearms are statutorily deemed to be business inventory under either of these circumstances, a former licensee (or responsible person acting on behalf of such licensee) who sells such firearms is presumed to be engaged in the business, requiring a license.

<sup>83</sup> An example of an administrative proceeding where rebuttable evidence might be introduced would be where ATF denied a firearms license application, pursuant to 18 U.S.C. 923(d)(1)(C) and (f)(2), on the basis that the applicant was presumed under this rule to have willfully engaged in the business of dealing in firearms without a license. An example of a civil case would be an asset forfeiture proceeding, 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.

its original packaging to an immediate family member, such as for their use in hunting, without the intent to earn a profit or to circumvent the requirements placed on licensees.<sup>84</sup>

*E. Definition of “Personal collection,” “personal collection of firearms,” and “personal firearms collection”*

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

Specifically, this rule proposes to define “personal collection,” “personal collection of firearms,” and “personal firearms collection” as “personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (*e.g.*, noncommercial, recreational activities for personal enjoyment such as hunting, or skeet, target, or competition shooting).” This reflects a common definition of the terms

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<sup>84</sup> See, *e.g.*, *Clark v. Scouffas*, No. 99-C-4863, 2000 WL 91411 (N.D. Ill. 2000) (license applicant was not a “dealer” who was “engaged in the business” as defined under section 921(a)(21)(C) where he only sold a total of three .38 Special pistols—two to himself, and one to his wife, without any intent to profit).

“collection” and “hobby.”<sup>85</sup> The phrase “or for a hobby” was adopted from 18 U.S.C. 921(a)(21)(C), which excludes from the definition of “engaged in the business” firearms acquired “for” a hobby. Also expressly excluded from the definition of “personal collection” is “any firearm purchased for resale or made with the predominant intent to earn a profit” because of their inherently commercial nature. 18 U.S.C. 921(a)(21)(C).

Under the GCA, 18 U.S.C. 923(c), and implementing regulations, 27 CFR 478.125(e) and 478.125a, a licensee who acquires firearms for a personal collection is subject to certain additional requirements before the firearms can become part of such a “personal collection.”<sup>86</sup> Accordingly, the proposed rule further explains how that term would apply to firearms acquired by a licensee (*i.e.*, a person engaged in the business as a licensed manufacturer, licensed importer, or licensed dealer under the GCA), by defining “personal collection,” “personal collection of firearms,” or “personal firearms collection,” when applied to licensees, to include only firearms that were: (1) acquired or transferred without the intent to willfully evade the restrictions placed upon licensees by chapter 44,

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<sup>85</sup> See Webster’s Third New International Dictionary 444, 1075, 1686 (1971) (defining the term “personal” to include “of or relating to a particular person,” “collection” to include “an assembly of objects or specimens for the purposes of education, research, or interest” and “hobby” as “a specialized pursuit . . . that is outside one’s regular occupation and that one finds particularly interesting and enjoys doing”); Webster’s Online Dictionary (2023) (defining the term “personal” to include “of, relating to, or affecting a particular person,” “collection” to include “an accumulation of objects gathered for study, comparison, or exhibition or as a hobby”, and “hobby” as a “pursuit outside one’s regular occupation engaged in especially for relaxation”); see also *United States v. Idarecis*, 164 F.3d 620 (2d Cir. 1998) (Table) (“There is no case authority to suggest that there is a distinction between the definition of a collector and of a [personal] collection in the statute.”).

<sup>86</sup> The GCA, 18 U.S.C. 923(c), and implementing regulations, also require that all firearms *disposed of* from a licensee’s personal collection, including firearms acquired before the licensee became licensed, that are held for at least one year and that are sold or otherwise disposed of, must be recorded as a disposition in a personal bound book. See 18 U.S.C. 923(c); 27 CFR 478.125a(a)(4).



title 18, United States Code;<sup>87</sup> (2) recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);<sup>88</sup> (3) recorded as a disposition from the licensee's business inventory to the person's personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e); (4) stored separately from, and not commingled with the business inventory, and appropriately identified as "not for sale" (e.g., by attaching a tag), if on the business premises;<sup>89</sup> and (5) maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and section 478.125a.<sup>90</sup> These proposed parameters to define the term "personal collection" as applied to licensees reflect the statutory and regulatory requirements for personal collections in 18 U.S.C. 923(c) and 27 CFR 478.122(a),

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<sup>87</sup> See ATF Q&A, *May a licensee create a personal collection to avoid the recordkeeping and NICS background check requirements of the GCA?*, <https://www.atf.gov/firearms/qa/may-licensee-create-personal-collection-avoid-recordkeeping-and-nics-background-check> (July 15, 2020).

<sup>88</sup> See ATF Q&A, *Does a licensee have to record firearms acquired prior to obtaining the license in their acquisition and disposition record?*, <https://www.atf.gov/firearms/qa/does-licensee-have-record-firearms-acquired-prior-obtaining-license-their-acquisition> (July 15, 2020); *ATF Federal Firearms Regulations Reference Guide*, ATF P 5300.4, Q&A (F2) at 201 (2014) ("All firearms acquired after obtaining a firearms license must be recorded as an acquisition in the acquisition and disposition record as business inventory."); ATF FFL Newsletter, Feb. 2011, at 7 ("There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity."); ATF FFL Newsletter, Mar. 2006, at 7 ("[E]ven if a dealer acquires a firearm from a licensee by completing an ATF Form 4473, the firearm must be entered in the transferee dealer's records as an acquisition.").

<sup>89</sup> See ATF Q&A, *May a licensee store personal firearms at the business premises?*, <https://www.atf.gov/firearms/qa/may-licensee-store-personal-firearms-business-premises> (July 15, 2020); ATF FFL Newsletter, Feb. 2011, at 7; ATF FFL Newsletter, Mar. 2006, at 6; ATF Industry Circular 72-30, *Identification of Personal Firearms on Licensed Premises Not Offered for Sale* (Oct. 10, 1972).

<sup>90</sup> See ATF Q&A, *May a licensee maintain a personal collection of firearms? How can they do so?*, <https://www.atf.gov/firearms/qa/may-licensee-maintain-personal-collection-firearms-how-can-they-do-so> (July 15, 2020).

478.123(a), 478.125(e), and 478.125a.<sup>91</sup> To implement these changes, the rule also would make conforming changes by adding references in 27 CFR 478.125a to the provisions that relate to the acquisition and disposition recordkeeping requirements for importers and manufacturers.

*F. Definition of “Responsible Person”*

To accompany these changes, this rule also proposes to add a regulatory definition of the term “responsible person” in 27 CFR 478.11, to mean “[a]ny individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and business practices of a corporation, partnership, or association, insofar as they pertain to firearms.” This definition comes from 18 U.S.C. 923(d)(1)(B), and has long been reflected on the application for license (Form 7) and other ATF publications since enactment of a similar definition in the Safe Explosives Act in 2002.<sup>92</sup> As examples, this definition would not include store clerks or cashiers who cannot make management or policy decisions with respect to firearms (*e.g.*, what company or store-wide policies and controls to adopt, which firearms are bought and sold

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<sup>91</sup> The existing regulations, 27 CFR 478.125(e) and 478.125a, which require licensees to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms were upheld by the Fourth Circuit in *National Rifle Ass’n v. Brady*, 914 F.2d 475, 482–83 (4th Cir. 1990) (“The regulations ensure that firearms kept in the personal collection are bona fide personal firearms, and they minimize the opportunity for licensees to evade the statute’s recordkeeping requirements for business firearms by simply designating those firearms ‘personal firearms’ immediately prior to their disposition. In addition, the record-keeping requirements contained in the regulations provide a means for the [Attorney General] to verify that personal firearms were actually held for a year by a licensee prior to sale. Thus, we think the regulations at issue here are both ‘rational and consistent with the statute.’”). See also *United States v. Twelve Firearms*, 16 F. Supp. 2d 738, 742 n.4 (S.D. Tex. 1998) (“[T]he United States appears to be correct that Claimant was required to keep records of the firearms no matter whether they were part of his business inventory, under § 923(g)(1)(A), or whether they were his own personal property, under § 923(c).”).

<sup>92</sup> See 18 U.S.C. 841(s); *Application for Federal Firearms License*, ATF Form 7, Instructions at 6 (5300.12); *Gilbert v. ATF*, 306 F. Supp. 3d 776, 781 (D. Md. 2018); *Gossard v. Fronczak*, 206 F. Supp. 3d 1053, 1065 (D. Md. 2016), *aff’d*, 701 F. App’x 266 (4th Cir. 2017); ATF FFL Newsletter, Sept. 2011, at 6; ATF Letter to Dunham’s Sports (May 30, 2003).

by the business, and who is hired to buy and sell the firearms), even if their clerical duties include buying or selling firearms for the business.

*G. Definition of “Predominantly Earn a Profit”*

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

This rule proposes to further implement these amendments by: (1) clarifying that the “proof of profit” proviso also excludes “the intent to profit,” thus making clear that it is not necessary for the Federal Government to prove that a person intended to make a profit if the person was dealing in firearms for criminal purposes or terrorism; (2) clarifying that a person may have the predominant intent to profit even if the person does not actually obtain pecuniary gain from selling or disposing of firearms; and (3) establishing a presumption in civil and administrative proceedings that certain conduct demonstrates the requisite intent to “predominantly earn a profit,” absent reliable evidence to the contrary.

These proposed regulatory amendments are consistent with the plain language of the GCA. Neither the pre-BSCA definition of “with the principal objective of livelihood and profit” nor the post-BSCA definition of “to predominantly earn a profit” require the government to prove that the defendant actually profited from firearms transactions. *See* 18 U.S.C. 921(a)(22), (a)(23) (referring to “the intent underlying the sale or disposition of firearms”); *Focia*, 869 F.3d at 1282 (“The exact percentage of income obtained through

the sales is not the test; rather, . . . the statute focuses on the defendant’s *motivation* in engaging in the sales.”).<sup>93</sup>

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

**Based on this decades-long body of experience, the proposed rule provides that, absent reliable evidence to the contrary, a person is presumed to have the intent to “predominantly earn a profit” when the person: (1) advertises, markets, or otherwise promotes a firearms business (*e.g.*, advertises or posts firearms for sale, including on any website, establishes a website for selling or offering for sale their firearms, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally;<sup>94</sup> (2) purchases, rents,**

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<sup>93</sup> See also *Valdes*, 681 F. App’x at 877 (the government does not need to show that the defendant “necessarily made a profit from dealing”) (citing *United States v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981)); *King*, 735 F.3d at 1107 n.8 (Section 922(a)(1)(A) does not require an actual sale of firearms); *Allah*, 130 F.3d at 43–44 (upholding jury instruction that selling firearms need not “be a significant source of income”); *United States v. Mastro*, 570 F.Supp. 1388 (E.D. Pa. 1983) (the government need not show that defendant made or expected to make a profit) (citing cases); *United States v. Shirling*, 572 F.2d 532, 534 (5th Cir. 1978) (“The statute is not aimed narrowly at those who profit from the sale of firearms, but rather broadly at those who hold themselves out as a source of firearms.”).

<sup>94</sup> See, *e.g.*, *United States v. Caldwell*, 790 F. App’x 797, 799 (7th Cir. 2019) (defendant placed 192 advertisements on a website devoted to gun sales); *Valdes*, 681 F. App’x at 878 (defendant handed out business card); *United States v. Pegg*, 542 F. App’x 328 (5th Cir. 2013) (defendant sometimes advertised firearms for sale in the local newspaper); *United States v. Crudginton*, 469 F. App’x 823, 824 (11th Cir. 2012) (defendant advertised firearms for sale in local papers, and tagged them with prices); *United States v. Dettra*, 238 F.3d 424, at \*2 (6th Cir. 2000) (Table) (“Dettra’s use of printed business cards and his acceptance of credit payment provide further reason to infer that he was conducting his firearms activity as

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;<sup>95</sup> (3) makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales;<sup>96</sup> (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;<sup>97</sup> (5) formally or informally purchases, hires, or otherwise secures business security services (e.g., a central station-monitored security

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a profitable trade or business, and not merely as a hobby.”); *United States v. Norman*, No. 4-10CR00059-JLH, 2011 WL 2678821, at \*3 (E.D. Ark. 2011) (defendant placed advertisements in local newspaper and on a website).

<sup>95</sup> See, e.g., *United States v. Wilkening*, 485 F.2d 234, 235 (8th Cir. 1973) (defendant set up a glass display case and displayed for sale numerous ordinary long guns and handguns that were not curios or relics); *United States v. Jackson*, 352 F. Supp. 672, 676 (S.D. Ohio 1972), *aff’d*, 480 F.2d 927 (6th Cir. 1973) (defendant set up glass display case, displaying numerous long guns and handguns for sale which were not curios or relics); Press Release USAO, *Asheville Man Sentenced For Dealing Firearms Without A License*, (Jan. 20, 2017), <https://www.justice.gov/usao-wdnc/pr/asheville-man-sentenced-dealing-firearms-without-license-0> (defendant sold firearms without a license from his military surplus store).

<sup>96</sup> See, e.g., *United States v. White*, 175 F. App’x 941, 942 (9th Cir. 2006) (“Appellant also created a list of all the firearms he remembers selling and the person to whom he sold the firearm.”); *Dettra*, 238 F.3d 424, at \*2 (“Dettra carefully recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner.”); *United States v. Angelini*, 607 F.2d 1305, 1307 (9th Cir. 1979) (defendant kept sales slips or invoices).

<sup>97</sup> See, e.g., *King*, 735 F.3d at 1106–07 (defendant incorporated and funded firearms business “on behalf” of friend whose American citizenship enabled business to obtain federal firearms license. He then misappropriated company’s business account, using falsified documentation to set up credit accounts); *Dettra*, 238 F.3d 424, at \*2 (defendant accepted credit card payments).

system registered to a business,<sup>98</sup> or guards for security<sup>99</sup>) 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;<sup>100</sup> (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.<sup>101</sup> Any of these nonexclusive, firearms-business-related activities justifies a rebuttable presumption that the person has the requisite intent to predominantly earn a profit from reselling or disposing of firearms.

This set of rebuttable presumptions that establishes an intent “to predominantly earn a profit”—one of the elements of the definition of “engaged in the business”—is separate from the set of presumptions that establishes a person meets the definition of

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<sup>98</sup> Numerous jurisdictions require all persons with alarms or security systems designed to seek a police response to be registered with or obtain a permit from local police and pay the requisite fee. *See, e.g.*, Albemarle County (Virginia) Code § 12-102(A); Arlington County (Virginia) Code § 33-10; Cincinnati (Ohio) City Ord. Ch. 807-1-A4 (2); City of Coronado (California) Code § 40.42.050(A); Irvine (California) Code § 4-19-105; Kansas City (Missouri) Code § 50-333(a); Larimer County (Colorado) Ord. § 3(A); Lincoln (Nebraska) Mun. Code § 5.56.030(a); Los Angeles (California) Mun. Code § 103.206(b); Loudoun County (Virginia) Code § 655.03(a); Mobile (Alabama) Code § 39-62(g)(1); Montgomery County (Maryland) Code § 3A-3; Prince William County (Virginia) Code § 2.5.25(a); Rio Rancho (New Mexico) Mun. Code § 97.04(A); Scottsdale (Arizona) Code § 3-10(a); Tempe (Arizona) Code § 22-76; Washington County (Oregon) Code § 8.12.040; West Palm Beach (Florida) Code § 46-32(a); Wilmington (Delaware) Code § 10-38(c); Woburn (Massachusetts) Code Title 11 § 8-18. Due to the value of the inventory and assets they protect, for-profit businesses are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property. *See generally What is a Central Station Alarm Monitoring System?*, agmonitoring.com (July 10, 2019), <https://www.agmonitoring.com/blog/industry-news/what-is-a-central-station-monitoring-system>; *Central Station Service Certification*, UL.com, <https://www.ul.com/resources/central-station-service-certification#:~:text=Station%20Service%20Certification-Overview,and%20initiates%20the%20appropriate%20response>.

<sup>99</sup> *See, e.g., United States v. De La Paz-Rentas*, 613 F.3d 18, 22–23 (1st Cir. 2010) (defendant hired as bodyguard for protection in an unlawful firearms transaction).

<sup>100</sup> *See, e.g., United States v. Gray*, 470 F. App'x at 469 (defendant sold firearms through his sporting goods store, advertised his business using signs and flyers, and displayed guns for sale, some with tags).

<sup>101</sup> *See, e.g., United States v. Kish*, 424 F. App'x 398, 404 (6th Cir. 2011) (defendant could only have 200 firearms on display because of insurance policy limitations).

“engaged in the business.” This second set of presumptions that addresses only intent “to predominantly earn a profit” may be used to independently establish the requisite intent to profit in a particular proceeding. As with the “engaged in the business” presumptions, the activities set forth in these intent presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person actually has the requisite intent “to predominantly earn a profit.” There are many other fact patterns that do not fall within the specific conduct that presumptively requires a license under this rule (e.g., firearms that were repetitively resold after 30 days from purchase, or that were not in a like-new condition), but that reveal one or more preparatory steps that presumptively demonstrate a predominant intent to earn a profit from firearms transactions. Again, none of these presumptions apply to criminal cases, but could be useful to courts in criminal cases, for example, to inform appropriate jury instructions regarding permissible inferences. These presumptions are supported by the Department’s investigative and regulatory efforts and experience as well as conduct that the courts have relied upon in determining whether a person was required to be licensed as a dealer in firearms even before the BSCA expanded the definition.

#### *H. Disposition of Business Inventory after Termination of License*

One public safety issue that ATF has encountered over the years relates to former licensees who have improperly liquidated their business inventory of firearms without performing required background checks or maintaining required records after the license was revoked, denied renewal, or otherwise terminated (e.g., license expiration or

surrender of license).<sup>102</sup> Sometimes former licensees even continue to acquire more firearms for resale (“restocking”) after license termination, a practice that is clearly inconsistent with the concept of “liquidation.” These activities, in turn, have resulted in numerous firearms being sold by former licensees (including those whose licenses have been revoked or denied due to willful GCA violations) to potentially prohibited persons without any ability to trace those firearms if later used in crime.<sup>103</sup>

For this reason, the proposed rule also would revise the regulation’s sections on discontinuing business, 27 CFR 478.57 and 478.78, to clarify statutory requirements regarding firearms that remain in the possession of a former licensee (or a responsible person of the former licensee) at the time the license is terminated. Again, firearms that were in the business inventory of a former licensee at the time the license was terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license) and that remain in the possession of the licensee (or a responsible person acting

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<sup>102</sup> The problem of licensees liquidating a former licensee’s business firearms as firearms from their “personal collections” without background checks or recordkeeping has been referred to by some advocacy groups and members of Congress as the “fire-sale loophole.” See Dan McCue, *Booker Bill Takes Aim at Gun Fire Sale Loophole*, The Well News (Sept. 9, 2022), <https://www.thewellnews.com/guns/booker-bill-takes-aim-at-gun-fire-sale-loophole/>; Shira Toeplitz, *Ackerman proposes gun-control bill to close ‘firesale loophole’*, Politico (Jan. 12, 2011), <https://www.politico.com/blogs/on-congress/2011/01/ackerman-proposes-gun-control-bill-to-close-firesale-loophole-032289>; Annie Linskey, *Closed store is a source of guns*, The Baltimore Sun (Apr. 15, 2008), <https://www.baltimoresun.com/news/bs-xpm-2008-04-15-0804150118-story.html> (after revocation of license, a dealer transferred around 700 guns to his “personal collection” and continued to sell them without recordkeeping).

<sup>103</sup> See, e.g., *Dettra*, 238 F.3d 424, at \*2 (defendant continued to deal in firearms after license revocation); Press Release OPA, *Gunsmoke Gun Shop Owner and Former Discovery Channel Star Indicted and Arrested for Conspiracy, Dealing in Firearms without a License and Tax Related Charges* (Feb. 11, 2016), <https://www.justice.gov/opa/pr/gunsmoke-gun-shop-owner-and-former-discovery-channel-star-indicted-and-arrested-conspiracy> (defendant continued to deal in firearms at a different address after he surrendered his FFL due to his violations of the federal firearms laws and regulations); *Kish*, 424 F. App’x at 405 (defendant continued to sell firearms after revocation of license); *Gilbert v. Bangs*, 813 F. Supp. 2d 669, 672 (D. Md. 2011), *aff’d* 481 F. App’x 52 (4th Cir. 2012) (license denied to applicant who willfully engaged in the business after license revocation); ATF Letter to AUSA (Mar. 13, 1998) (advising that seized firearms offered for sale were not deemed to be part of a “personal collection” after surrender of license).



on behalf of the former licensee), are not part of a “personal collection.” While 18 U.S.C. 921(a)(21)(C) allows an unlicensed person to “sell all or part of his personal collection” without being considered “engaged in the business,” in this context, these firearms were purchased by the former licensee as business inventory and were not accumulated by that person for study, comparison, exhibition, or for a hobby.

Also, firearms that were transferred by a former licensee to a personal collection prior to the time the license was terminated cannot be considered part of a personal collection unless one year has passed from the date the firearm was transferred into the personal collection before the license was terminated. This gives effect to 18 U.S.C. 923(c), which requires that all firearms acquired by a licensee be maintained as part of a personal collection for a period of at least one year before they lose their status as business firearms.

Under amended 27 CFR 478.57 (discontinuance of business) and 27 CFR 478.78 (operations by licensee after notice), as proposed, once a license has been terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee will have 30 days, or such additional period designated by the Director for good cause, to either: (1) liquidate any remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or (2) transfer the remaining business inventory to a personal collection of the former licensee (or a responsible person of the former licensee), provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional

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

The 30-day period from license termination for a former licensee to transfer the firearms to either another licensee or to a personal collection is derived from the disposition of records requirement in the GCA, 18 U.S.C. 923(g)(4), which is a reasonable period for that person to wind down operations after discontinuance of business without acquiring new firearms.<sup>104</sup> That period of liquidation may be extended by the Director for good cause, such as to allow pawn redemptions if required by State, local, or Tribal law. However, former licensees (or responsible persons of such licensees) who choose not to sell the remaining business inventory to a licensee within the 30-day period (or designated additional period), and who continue to sell those firearms, are not permitted under the GCA to engage in the business of dealing in firearms without a license. Former licensees (or responsible person) who sell business inventory after that period (or within that period to unlicensed persons), or within one year from transfer to a personal collection, have no special legal exemptions that give them greater privileges to conduct business than a licensee.

Moreover, a former licensee is not permitted to continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing

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<sup>104</sup> See also 27 CFR 478.57 (requiring the owner of a discontinued or succeeded business to notify ATF of such discontinuance or succession within 30 days), and 478.127 (requiring discontinued businesses to turn in records within 30 days).

additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, “restocking”) without a license. Therefore, a former licensee (or responsible person) is subject to the same presumptions in 27 CFR 478.11 (definition of “engaged in the business” as a dealer other than a gunsmith or pawnbroker) that apply to persons who sell firearms that were repetitively purchased with the predominant intent to earn a profit and any sales by such a person will be closely scrutinized by ATF on a case-by-case basis.

#### *I. Transfer of Firearms between FFLs and Form 4473*

Finally, to ensure the traceability of all firearms acquired by licensees from other licensees, the proposed rule would make clear that licensees cannot satisfy their obligations under 18 U.S.C. 923(g)(1)(A) by completing a Form 4473 when selling or otherwise disposing of firearms to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor licensee who transfers the firearm to their personal collection in accordance with 27 CFR 478.125a.<sup>105</sup> Form 4473 was not intended for use by licensees when transferring firearms to other licensees or by a sole proprietor transferring to their personal collection.

Pursuant to 18 U.S.C. 926(a)(1) and 27 CFR 478.94, when a licensee transfers a firearm to another licensee, the transferor must first verify the recipient’s identity and license status by examining a certified copy of the recipient’s license and recording the transfer as a disposition to that licensee in the bound book record. In turn, the recipient licensee must record the receipt as an acquisition in their bound book record. *See* 27

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<sup>105</sup> *See* ATF FFL Newsletter, Mar. 2006, at 7 (“A dealer who purchases a firearm from another licensee should advise the transferor licensee of his or her licensed status so the transferor licensee’s records may accurately reflect that this is a transaction between licensees. An ATF Form 4473 should not be completed for such a transaction, because this form is used only for a disposition to a nonlicensee.”).

CFR Subpart H. If a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record asserting it is a “personal firearm,” then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime.

However, this clarification that FFLs may not satisfy their obligations by completing a Form 4473 to transfer firearms between themselves would not include dispositions by a licensed legal entity such as a corporation, LLC, or partnership, to the personal collection of a responsible person of such an entity. This is because when an individual responsible person does not acquire a firearm as an employee on behalf of the business entity, it results in a change in dominion or control, or “transfer,” subject to all GCA requirements.<sup>106</sup> Such an entity, including a corporation or partnership, must therefore use a Form 4473, NICS check, and disposition record entry when transferring a firearm to one of its individual officers (or partners, in the case of a partnership) for their personal use.<sup>107</sup>

### **III. Statutory and Executive Order Review**

#### *A. Executive Orders 12866, 13563, and 14094*

Executive Order 12866 (“Regulatory Planning and Review”) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and

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<sup>106</sup> See ATF Ruling 2010-1 (permanently assigning a firearm to a specific employee for personal use is considered a “transfer” that would trigger the recordkeeping and NICS background check requirements).

<sup>107</sup> See ATF Q&A, *Does an officer or employee of an entity that holds a federal firearms license, such as a corporation, have to undergo a NICS check when acquiring a firearm for their own personal collection?*, <https://www.atf.gov/firearms/qa/does-officer-or-employee-entity-holds-federal-firearms-license-such-corporation-have> (May 22, 2020); 2 ATF FFL Newsletter, Sept. 2013, at 4.

equity). Executive Order 13563 (“Improving Regulation and Regulatory Review”) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094 (“Modernizing Regulatory Review”) amends section 3(f) of Executive Order 12866.

The Office of Management and Budget (“OMB”) has determined that this proposed rule is a “significant regulatory action” under Executive Order 12866, as amended by Executive Order 14094, though it is not a section 3(f)(1) significant action. Accordingly, the rule has been reviewed by OMB. While portions of this rule merely incorporate the BSCA’s statutory definitions into ATF’s regulations, this rule, if finalized, may result in additional unlicensed persons becoming FFLs if the unlicensed persons intend to regularly purchase and resell firearms to predominantly earn a profit.

#### *1. Need for Federal Regulation*

This proposed rule would implement the BSCA by incorporating statutory definitions into ATF’s regulations and clarifying the criteria for determining when a person is “engaged in the business” requiring a license to deal in firearms. The rulemaking is necessary to implement a new statutory provision on being engaged in the business as a wholesale or retail dealer; to clarify prior regulatory provisions that relate to that topic; and to codify practices and policies on that issue. In addition to establishing specific, easy-to-follow standards regarding when buying and selling firearms presumptively crosses the threshold into being “engaged in the business,” the rule also would recognize that individuals are allowed by law to occasionally buy and sell firearms for the enhancement of a personal collection or a legitimate hobby without the need to obtain a license.

## 2. Population

This rule implements a statutory requirement that affects persons who repetitively purchase and resell (including bartering) firearms and are required to be, but are not currently, licensed. As described in the preamble of this NPRM, these may be persons who purchase, sell, or transfer firearms from places other than traditional brick-and-mortar stores, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order, or over the Internet; 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. A person may be required to have a license to deal in firearms regardless of where, or the medium through which, they purchase or sell (or barter) firearms, including locations other than a traditional brick and mortar store.

The GCA prohibits ATF from prescribing regulations that establish any “system of registration” of firearms, firearms owners, or firearms transactions or dispositions.<sup>108</sup> Furthermore, because those willfully engaged in the business of dealing in firearms without a license are violating Federal law, these individuals often take steps to avoid detection by law enforcement, making it additionally difficult for ATF to precisely estimate the population. Therefore, for purposes of this analysis, ATF used information gleaned from ArmsList, an online broker website that facilitates the sales or bartering of firearms, as a means of estimating a population of unlicensed persons selling firearms using online resources.<sup>109</sup> ATF focused its efforts on estimating an affected population

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<sup>108</sup> 18 U.S.C. 926(a).

<sup>109</sup> See [www.Armslist.com](http://www.Armslist.com).

using ArmsList since that website is considered to be the largest source for unlicensed persons to sell firearms on the Internet.<sup>110</sup> Out of a total listing of 30,806 entries in the “private party” category (unlicensed users) on ArmsList, ATF viewed a sample of 379 listings, and found that a given seller on ArmsList had an average of three listings per seller.<sup>111</sup> Based on approximately 30,806 “private party” (unlicensed) sales listings on ArmsList, ATF estimates that there are approximately 12,270 unlicensed persons who sell on that website alone, selling an average of three firearms per user.<sup>112</sup> ATF estimates that ArmsList may hold approximately 50 percent of the market share among websites that unlicensed sellers may frequent. This means the 12,270 estimated unlicensed persons on ArmsList would be about half, and the estimated number of unlicensed sellers on all such websites would be approximately 24,540 nationwide. The estimate of ArmsList’s market share is based on ATF Firearms Industry Programs Branch (“FIPB”) subject matter expert (“SME”) opinion, news reports,<sup>113</sup> and public web traffic lists.<sup>114</sup>

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<sup>110</sup> Colin Lecher & Sean Campbell, *The Craigslist of Guns: Inside Armslist, the online ‘gun show that never ends’*, The Verge (Jan. 16, 2020), <https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation> (“Over the years, [Armslist] has become a major destination for firearm buyers and sellers.”); Tasneem Raja, *Semi-Automatics Without A Background Check Can Be A Click Away*, NPR (June 17, 2016), <https://www.npr.org/sections/alltechconsidered/2016/06/17/482483537/semi-automatic-weapons-without-a-background-check-can-be-just-a-click-away> (“Armslist isn’t the only site of its kind, though it is considered to be the biggest and most popular.”).

<sup>111</sup> A sample of 379 listings from an estimated population of 30,806 listings (viewed between Mar. 1 and 2, 2023), using a 95 percent confidence level and a confidence interval of 5. See Sample Size Calculator-Confidence Level, Confidence Interval, Sample Size, Population Size, Relevant Population, <https://www.surveysystem.com/sscalc.htm>.

<sup>112</sup>  $12,270 \text{ unlicensed individuals} = 30,806 \text{ “private party” unlicensed listings on ArmsList} / 2.51 \text{ average listings per user}$ .

<sup>113</sup> See footnote 110, *supra*.

<sup>114</sup> Similar web profile and market share lists are available at <https://www.similarweb.com/website/armslist.com/#overview>.

To better estimate both online and offline sales, ATF assumed, based on best professional judgment of FIPB SMEs and with limited available information, that the national online marketplace estimate above may represent 25 percent of the total national firearms market, which would also include in-person, local, or other offline transactions like flea markets, State-wide exchanges, or websites within each of the 50 States.

While this would bring the total estimated market to approximately 98,160 unlicensed sellers,<sup>115</sup> this figure would need to be reduced by the estimated subset of this population of persons who occasionally sell their firearms without needing to obtain a license (*e.g.*, as part of their hobby or enhancement of their personal collection). Also, based on limited available information, ATF's best, very conservative assessment from FIPB SMEs is that at least 25 percent of the estimated total number of unlicensed sellers may be considered engaged in the business and would subsequently need to become an FFL in order to continue making their repetitive sales of firearms. The actual number may be higher, but ATF does not have data to support a higher number. Using the information gleaned from ArmsList, this means that 24,540 is the estimated number of unlicensed persons that may be considered engaged in the business and affected by this proposed rule.

Because there is no definitive information, the actual number of total unlicensed sellers may be higher. Therefore, ATF also calculated a second possible estimate using information from a published survey by the Russell Sage Foundation regarding a similar,

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<sup>115</sup> The online estimate of 24,540 = at least 25 percent of national firearms market. So, 100 percent of the firearms market would be  $4 * 24,540 = 98,160$ .



but differently sourced estimated population of private sellers of firearms.<sup>116</sup> Based on the 2020 U.S. Census, there are 258.3 million adults (over 18).<sup>117</sup> ATF used the U.S. Census as a basis for the population and also percentages from “The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey,” published by the Russell Sage Foundation.<sup>118</sup> This survey showed that 22 percent of the U.S. adult population owns at least one firearm (56.84 million adults), and of this, five percent transferred firearms (2.84 million). Of the five percent that transferred, 71 percent sold a firearm (2.02 million). Of those that sold a firearm, 51 percent (1.03 million) sold through various mediums (*e.g.*, online, pawnshop, gun shop) other than through or to a family member or friend (which likely would not be affected by this rule).<sup>119</sup> Of the five percent that transferred a firearm, ten percent traded or bartered (284,178). Thus, taking the 51 percent that sold (1.03 million) and the ten percent (284,178) that transferred by trading or bartering, the total number of unlicensed persons that may transfer a firearm,

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<sup>116</sup> Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey. *The Russell Sage Foundation Journal of the Social Sciences*, 3(5), pp 38-57 (pp. 39 and 51). <https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02?seq=1>

<sup>117</sup> U.S. Census, Stella U. Ogunwole, *et al.*, U.S. Adult Population Grew Faster Than Nation’s Total Population From 2010 to 2020, U.S. Census (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html>.

<sup>118</sup> Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey. *The Russell Sage Foundation Journal of the Social Sciences*, 3(5), pp 38-57 (pp. 39 and 51). <https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02?seq=1>

<sup>119</sup> The Russell Sage Foundation Survey did not divide those who sold to family or friends on a recurring basis from those who made an occasional sale, or between those who did so with intent to earn a profit and those who did not. As noted earlier in the preamble, a person who makes only occasional firearms transfers, such as gifts, to immediate family (without the intent to earn a profit or circumvent requirements placed on licensees), generally does not qualify as a dealer engaged in the business. Although it is possible that some portion of the Russell Sage set of family and friend transferors might qualify as dealers if they engage in actions such as recurring transfers, transfers to others in addition to immediate family, or transfers with intent to profit, ATF was not in a position to make that determination from the Survey. Therefore, ATF erred on the side of assuming, for the purpose of this analysis, that the Russell Sage Foundation data on transfers to family and friends would likely not be affected by this rule, since, in general, such transfers are less likely to be recurring or for profit.

based on this survey, in any given timeframe is 1.31 million. Of the 1.31 million unlicensed persons selling, trading, or bartering firearms, 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. In sum, based on these limited sources of information, ATF estimates either 24,540 or 328,296 could represent an estimate of unlicensed persons that may be engaged in the business and affected by this proposed rule.

ATF requests public comments on what sources ATF should look to for accurate estimates of the percentage of the population that would need to obtain a license because they are “engaged in the business” of dealing in firearms, compared to those who make occasional sales of firearms (e.g., enhancement of a personal collection or for a hobby) and would not need to obtain a license.

### *3. Costs for Unlicensed Persons Becoming FFLs*

As stated earlier, consistent with the statutory changes in the BSCA, this rule implements a new statutory provision that requires individuals to become licensed dealers if they intend predominantly to earn a profit through the repetitive purchase and resale of firearms (which includes benefits from bartering). Costs to become an FFL include an initial application on a Form 7, along with fingerprints and photographs, and a qualification inspection. This application would require fingerprints and photographs, not only from the person applying, but also, in the case of a corporation, partnership, or association, from any other individual who is a responsible person of that business entity.

For purposes of this analysis, ATF assumes that most, if not all unlicensed persons may be operating alone as sole proprietors because this new requirement would

likely affect persons who have other sources of income and do not currently view licensing as a requirement. Besides the initial cost of becoming an FFL, there are recurring costs to maintain a license. These costs include renewing the license on a Federal Firearms License Renewal Application, ATF Form 8 (5310.11) (“Form 8”) every three years, maintaining acquisition and disposition (“A&D”) records, maintaining ATF Forms 4473, and undergoing periodic compliance inspections.

The proposed rule, which further implements the statutory changes in the BSCA, would affect unlicensed persons who purchase and resell firearms with the intent to predominantly earn a profit (as defined), not those who are already licensed. Because affected unlicensed persons would now need a license to continue to purchase and resell firearms, ATF estimates that the opportunity costs of acquiring a license would be based on their free time or “leisure time.” Based on the Department of Transportation’s (“DOT’s”) guidance on the costs for leisure time, ATF attempted to update the leisure wage below based on the methodology outlined in the guidance.<sup>120</sup> The DOT uses median household income as the base for income from the U.S. Census. ATF used the latest median income of a household from the U.S. Census, published September 2021.<sup>121</sup> Table 1 outlines the leisure wage.

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<sup>120</sup> Department of Transportation, The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update), <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf>.

<sup>121</sup> U.S. Census, Income and Poverty in the United States: 2020, <https://www.census.gov/library/publications/2021/demo/p60-273.html>.

Table 1. Leisure Wage Rate for Individuals

<b>Inputs for Leisure Wage Rate</b>	<b>Numerical Inputs</b>
Median Household Income	\$67,521
DOT Travel Time	2080
DOT's Value of Travel Time Savings	50 percent
Leisure Wage Rate	\$16.23
Rounded Leisure Wage Rate	\$16

Based on DOT's methodology for leisure time, ATF attributes a rounded value of \$16 per hour for time spent buying and reselling (including bartering) firearms on a repetitive basis. The same hourly cost applies to persons who would now become licensed as a firearms dealer who would not have become licensed without the clarifications provided by this rule. This could include persons who begin selling firearms after the final rule's effective date and understand from the rule that they qualify as firearms dealers (as defined by the statute and regulations), or persons who were previously selling without a license and now realize they must acquire one to continue selling because their firearms transactions qualify them as dealers.

In addition to the cost of time, there are other costs associated with applying to become an FFL. To become an FFL, persons need to apply on a Form 7 and submit payment to ATF for fees associated with the Form 7 application. Furthermore, these unlicensed persons would need to obtain documentation, including fingerprints and photographs, undergo a background investigation, and submit all paperwork via mail. While not a cost attributed towards their first-year application to become an FFL, an FFL will need to reapply to renew their license every three years on a Form 8 renewal application to ensure that that they can continue to sell firearms thereafter. Table 2

outlines the costs to become an FFL and costs to maintain a license.

Table 2. Cost Inputs to Become an FFL and Maintain a License

<b>Item</b>	<b>Cost Item</b>	<b>Source</b>
Form 7 Application Accompanying Licensing Fees	\$200.00	Application for Federal Firearms License, ATF, <a href="https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download">https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download</a>
Fingerprint Cards	\$0.00	Distribution Center Order Form, ATF, <a href="https://www.atf.gov/distribution-center-order-form">https://www.atf.gov/distribution-center-order-form</a> (Apr. 20, 2023)
Fingerprint Cards (Commercial)	\$23.70	Various Sources
Average Cost for Fingerprint Cards	\$12	See above
Postage	\$0.63	Mailing and Shipping Prices, USPS, <a href="https://www.usps.com/business/prices.htm">https://www.usps.com/business/prices.htm</a> (last visited Aug. 17, 2023)
Photograph	\$16.99	Passport Photos, CVS, <a href="https://www.cvs.com/photo/passport-photos">https://www.cvs.com/photo/passport-photos</a> (last visited Aug. 17, 2023)
FFL Renewal Application Licensing Fees (Form 8) every three years	\$90.00	Federal Firearms Licensing Center (“FFLC”)

For purposes of this rule, ATF assumes that unlicensed persons applying for a license as a result of this rule are likely to file for a Type 01 Dealer license.<sup>122</sup> This license costs \$200 and uses a Form 7 application (and every three years thereafter, costs \$90 to renew the license using Form 8). Applicants also need to obtain and submit fingerprints in paper format. The unlicensed person can obtain fingerprint cards for free from ATF and travel to select law enforcement offices that perform fingerprinting services (usually also for free). Or the unlicensed person may pay a fee to various market

<sup>122</sup> The cost for a Type 01 Dealer is used because this license is used to purchase and resell firearms at wholesale or retail.

entities that offer fingerprinting services in paper format. The average cost found for market services for fingerprinting on paper cards is \$24 (rounded).

Because it is not clear whether an unlicensed person would choose to obtain fingerprint cards from ATF and go to a local law enforcement office that provides fingerprinting services or use commercial services both to obtain cards and fingerprinting services, an average cost of \$12 was used. In addition to paper fingerprint cards, the unlicensed person must also submit a photograph appropriate for obtaining passports. The cost for a passport photo is \$17 (rounded). Once they complete the application and gather the documentation, unlicensed persons must submit the Form 7 package by mail. ATF rounds the first-class stamp rate of \$0.63 to \$1 for calculating the estimated mailing cost.

In addition to costs associated with compiling documentation for a Form 7 application, ATF estimates time burdens related to obtaining and maintaining a Federal firearms license. Table 3 outlines the hourly burdens to apply, obtain, and maintain a license.

Table 3. Hourly Burdens to Apply, Obtain, and Maintain a License

Activity Type	Hourly Burden	Source
Form 7 Application	1	Application for Federal Firearms License, ATF, <a href="https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download">https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download</a>
Time to Travel to and Obtain Photograph	0.5	N/A
Time to Travel to and Obtain Fingerprints	1	N/A
A&D Records	0.05	OMB 1140-0032
Form 4473	0.5	OMB 1140-0020
Inspection Times (Qualification or Compliance)	3	Field Operations and OMB 1140-0032

As stated above, hourly burdens include one hour to complete a Form 7 license application and the time spent to obtain the required documentation. For purposes of this analysis, ATF assumes that places that offer passport photograph services are more readily available than places that provide fingerprinting services; therefore, ATF estimates that it may take 30 minutes (0.5 hours) to travel to and obtain a passport photograph and estimates up to one hour to travel to and obtain fingerprinting services. Other time burdens may range from 0.05 hours (three minutes) to enter and maintain A&D records for each firearm transaction and 0.5 hours for maintaining a Form 4473, to three hours for an inspection (qualification or compliance).

ATF then multiplied the hourly burdens by the \$16 leisure wage rate to account for the value of time spent applying for and obtaining a license using a Form 7 (including any other actions related to obtaining a license), then added the cost per item to determine a cost per action taken. Table 4 outlines the first-year costs to apply for an FFL.

Table 4. First-Year Costs to Obtain a Type 01 FFL

<b>Cost Item</b>	<b>Hourly Burden</b>	<b>Hourly Wage Rate</b>	<b>Hourly Cost</b>	<b>Cost Item</b>	<b>Rounded Cost for Each Activity</b>
<b>Form 7</b>	1	\$16	\$16	\$200	\$216
<b>Fingerprints</b>	1	\$16	\$16	\$12	\$28
<b>Passport Photograph</b>	0.5	\$16	\$8	\$17	\$25
<b>Postage</b>	N/A	\$16	N/A	\$0.63	\$1
<b>Qualification Inspection</b>	3	\$16	\$48	N/A	\$48
<b>Initial Cost</b>					\$318

Overall, ATF estimates that it would cost an unlicensed person \$318 in terms of time spent and fees paid to apply under a Form 7 to become a Type 01 FFL. ATF considers the \$318 as an unlicensed person’s initial cost. In addition to their initial cost, the newly created FFL would need to maintain a Form 4473 (for each firearm sale), A&D records (two entries per firearm: one entry to purchase and one entry to sell) for every firearms transaction, undergo periodic compliance inspections, and renew their license every three years (ATF Form 8 application). Table 5 outlines the cost per recurring activity to maintain an FFL.



Table 5. Recurring Costs to Maintain an FFL

<b>Item</b>	<b>Number of Entries or Applications</b>	<b>Hourly Burden</b>	<b>Hourly Wage Rate</b>	<b>Hourly Cost per Activity</b>	<b>Cost Item</b>	<b>Rounded Cost for Each Activity</b>
<b>Form 8 Renewal Application</b>	1 (every three years)	0.5	\$16.00	\$8.00	\$90	\$98
<b>Form 4473</b>	3 (firearm sales every year)	0.5	\$16.00	\$24.00	N/A	\$24
<b>A&amp;D Records</b>	6 (two entries per firearm every year)	0.05	\$16.00	\$4.80	N/A	\$5
<b>Compliance Inspections</b>	1 (periodically)	3	\$16.00	\$48.00	N/A	\$48

While renewing a license under a Form 8 application occurs every three years, there are additional costs associated with Form 4473 and A&D records that may occur more often. There are also costs from compliance inspections that may occur periodically. ATF notes that the actual number of firearms sales may range from zero sales to more than three per year, but for purposes of this economic analysis only, ATF uses three firearms (six A&D entries) per year to illustrate the potential costs that a person may incur based on information gleaned from ArmsList. Although a person might not resell a given firearm in the same year they purchase it, for the purposes of these estimates, this analysis includes both ends of the firearm transaction because they could buy and sell the same firearm or buy one and sell a different one in a given year.

As for compliance inspections, based on information gathered from ATF's Office of Field Operations, the frequency of such inspections varies depending on the size of the area of operations and the number of FFLs per area of operations. Overall, ATF estimates that it inspects approximately eight percent of all existing FFLs in any given

year. ATF has indicated the cost of an inspection, which would normally not occur more than once in a given year per FFL. ATF performs compliance inspections annually, so while the FFL would not necessarily incur a compliance inspection every year, this analysis includes an annual cost for inspections to account for a subset of the total number of affected FFLs that would be inspected in any given year.

In summary, ATF estimates that it would cost an individual \$318 in the first year to become licensed. Furthermore, this individual would incur annually recurring costs that could range from \$29 a year to complete Forms 4473 and maintain A&D records to \$175 to include Form 8 renewal costs and compliance inspections.<sup>123</sup> In addition, ATF estimates that annual costs would range from \$805,884 to \$7.8 million, with the \$7.8 million being the highest annual cost, occurring in the first year, using the SME estimates. Using the alternative inputs from the Russell Sage Foundation Survey results in annual costs ranging from \$10.8 million to \$104.4 million. Tables 6 and 7 illustrate the 10-year period of analysis.

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<sup>123</sup> ATF notes that the high \$175 may be higher than actual costs since this high cost assumes that an FFL would simultaneously renew their license (which occurs every three years) in the same year that they perform a compliance inspection, which occurs periodically.

Table 6. 10-year Private Costs to the Proposed Rule Using SME Estimate

Year	Undiscounted	Discounted at 3 Percent	Discounted at 7 Percent
1	\$7,803,720	\$7,576,427	\$7,293,196
2	\$805,884	\$759,623	\$703,890
3	\$805,884	\$737,498	\$657,841
4	\$3,210,804	\$2,852,758	\$2,449,507
5	\$805,884	\$695,163	\$574,584
6	\$805,884	\$674,915	\$536,995
7	\$3,210,804	\$2,610,677	\$1,999,527
8	\$805,884	\$636,172	\$469,032
9	\$805,884	\$617,643	\$438,348
10	\$3,210,804	\$2,389,140	\$1,632,210
Total	\$22,271,436	\$19,550,016	\$16,755,130
Annualized		\$2,291,858	\$2,385,554

Overall, the annualized private cost of this proposed rule using SME estimates is \$2.3 million at three percent and \$2.4 million at seven percent.

Table 7. 10-year Private Costs to the Proposed Rule Using the Russell Sage Foundation Survey

Year	Undiscounted	Discounted at 3 Percent	Discounted at 7 Percent
1	\$104,398,128	\$101,357,406	\$97,568,344
2	\$10,781,256	\$10,162,368	\$9,416,767
3	\$10,781,256	\$9,866,377	\$8,800,716
4	\$42,954,264	\$38,164,307	\$32,769,602
5	\$10,781,256	\$9,300,006	\$7,686,887
6	\$10,781,256	\$9,029,132	\$7,184,006
7	\$42,954,264	\$34,925,747	\$26,749,757
8	\$10,781,256	\$8,510,823	\$6,274,789
9	\$10,781,256	\$8,262,935	\$5,864,289
10	\$42,954,264	\$31,962,006	\$21,835,770
Total	\$297,948,456	\$261,541,108	\$224,150,926
Annualized		\$30,660,597	\$31,914,049

Overall, the annualized private cost of this proposed rule, based on alternate inputs from the Russell Sage Foundation Survey, is \$30.7 million at three percent and \$31.9 million at seven percent.

#### *4. Costs for FFLs After Termination of License*

The proposed rule is also designed to enhance compliance by former FFLs who no longer hold their licenses due to license revocation, denial of license renewal, license expiration, or surrender of license but nonetheless engage in the business of dealing in firearms. Such persons sometimes, under existing standards, transfer their inventory to their personal collections instead of selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption. The proposed rule would clarify that such former licensees must sell to other licensees or transfer their personal collection within 30 days, but they may not treat a business firearm that they have transferred to their personal collection as a personal firearm until the firearm has been in their personal collection for a period of one year. Former FFLs who sell any such firearm within one year of the transfer date as a personal firearm may be in violation of existing statutory and regulatory restrictions (18 U.S.C. 922(a)(1)(A) and 923(a),(c)) on unlicensed dealers, and may be deemed to be “engaged in the business.”

ATF license revocation, denial of license renewal, license expiration, or surrender of license realistically present two categories of affected populations. Group 1, comprising license revocations and denial of license renewals, could be described as former FFLs who have failed to comply with existing regulations and requirements to a degree which resulted in the revocation or denial of their licenses. The proposed rule is

likely to have a qualitative impact on this group because a revocation or denial may not provide ample opportunity for an orderly and planned liquidation or transfer of inventory before losing the license, which may therefore be disruptive. Based on data from the FFLC, the number of such FFL license revocations are rare, with an average of 37 licenses revoked by ATF over the past 5 years (with a range between 8 and 79), or a de minimis percentage of 0.05 percent of all active FFLs. Furthermore, the economic impact of transferring inventory to another FFL instead of the former FFL holder retaining the inventory is unclear, as the underlying market value of the inventory is unchanged by this proposed rule's requirements. Additional factors surrounding the potential cost of no longer being able to transfer one's inventory to oneself are also unknown and presumed to similarly be de minimis. Therefore, ATF believes there are no quantitative impacts associated with this population. However, ATF welcomes public comments on these assumptions in general and on the potential impacts on former FFLs with revoked licenses.

Group 2, comprising license expiration or surrender of license, captures those who no longer have a license for discretionary or lawful reasons. This group comprises former FFLs that choose to close or to sell the business to another party. They are similarly excluded from expected impacts attributable to the proposed rule because of the likelihood that, because the closure is planned, the FFL will include reasonable considerations for orderly, lawful liquidation or inventory transfer as part of closing or selling their enterprise. Such considerations are also likely to occur ahead of, rather than subsequent to, the expiration or surrender of their license. As a result, ATF assumes that the options of transfer to the licensee's personal collection or sale to another FFL that

exist under current standards would similarly be freely available to Group 2 FFLs over their expected course of action under the proposed rule. As a result, we are excluding both groups from the affected population.

## 5. Government Costs

In addition to the private costs to unlicensed persons, ATF would incur additional work due to the increase in Form 7 and Form 8 applications for unlicensed persons who become an FFL which would be offset by the fees incurred with FFL applications (\$200) and renewals (\$90). Based on information gathered from FFLC, which processes and collects the fees for FFL applications, various contractors and Federal Government employees process Form 7 and 8 applications, verify and correct applications, and further process them for background checks and approval.

Based on information provided by FFLC, the average hourly rate for contracting staff, to include benefits, is \$13.29.<sup>124</sup> To determine the wage rates for Federal employees, ATF used the wage rates according to the General Schedule (“GS”) level, step 5 as an average wage rate per activity. Government processing activities range from an entry level Federal employee between a GS-5/7, upwards to a GS-13.<sup>125</sup> To account for fringe benefits such as insurance, ATF estimated a Federal load rate. ATF estimated the Federal load rate using the methodology outlined in the Congressional Budget Office’s report comparing Federal benefits to private sector benefits. It states that Federal benefits are 17 percent more than private sector benefits (or a multiplier factor of

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<sup>124</sup> ATF notes that because the contracting salary is a loaded wage rate, a base wage rate (not including benefits) was not included in Table 8 below.

<sup>125</sup> Office of Personnel Management, Salary Table 2023-DCB, [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf).

1.17).<sup>126</sup> ATF calculated private sector benefits from the Bureau of Labor Statistics (in 2022) and determined that the overall private sector benefits are 41.9 percent in addition to an hourly wage, or a load rate of 1.419. This makes the Federal load rate 1.66 above the hourly wage rate (after applying the 1.17 multiplier).<sup>127</sup> Table 8 outlines the government costs to process a Form 7 application to become an FFL.

Table 8. Hourly Burden and Cost to Process a New Application for an FFL

<b>Government Cost to Process New FFL Applications</b>	<b>Hourly Burden</b>	<b>Staffing Level</b>	<b>Hourly Wage</b>	<b>Loaded Hourly Wage</b>	<b>Rounded Cost</b>
<b>Average Contracting Time to Prepare and Enter Application</b>	0.5	Contracting Staff	13.29	\$13.29	\$7
<b>Processing Time for New Applications</b>	1	GS 10	\$38.85	\$64.49	\$64
<b>Processing Time for Fingerprint Cards</b>	2	GS 12	\$51.15	\$84.91	\$170
<b>Qualification Inspection Time (Includes Travel)</b>	5	GS 5/7 to GS 13	\$37.65	\$62.50	\$312
<b>Subtotal</b>					\$553
<b>Fees Incurred from New Application</b>					-\$200
<b>Total</b>					\$353

Based on the hourly burdens and the hourly wage rates for various contract and Federal employees, ATF estimates that it would take on average 8.5 hours to process a Form 7 application, at a cost of \$553 per application, offset by the new application fee

<sup>126</sup> Congressional Budget Office, Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015, <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf>.

<sup>127</sup>  $1.66 \text{ Federal load rate} = 1.419 \text{ private industry load rate} * 1.17 \text{ multiplier factor}$ . BLS Series ID CMU201000000000D, CMU201000000000P (Private Industry Compensation = \$39.34) / BLS Series ID CMU202000000000D, CMU202000000000P (Private Industry Wages and Salaries = \$27.73) = 1.419. BLS average 2022. U.S. Bureau of Labor Statistics, Database for Employee Compensation, <https://data.bls.gov/cgi-bin/srgate>.

(Form 7) of \$200, for an overall net cost to the government for this rule of \$353. Form 8 application renewals are estimated to cost \$71 every three years (or \$553 less the \$312 inspection time and the \$170 fingerprint costs). However, the cost to review a Form 8 application (\$71) is offset by the renewal fee of \$90, making the net cost or overall savings to government for this rule -\$19 per FFL renewal.

In addition to processing Form 7 applications, ATF Industry Operations Investigators (“IOIs”) would need to perform qualification and compliance inspections. The qualification inspection occurs once during the application process and is accounted for in Table 7 above. But, as discussed above, there is a recurring compliance inspection after the person becomes a licensee. For either the qualification or compliance inspection, ATF notes that the estimated five-hour inspection time for the government is more than the inspection time for the private sector, as discussed above, because ATF is including travel time for an IOI to travel to the person’s location. Table 9 outlines the recurring government cost to inspect an FFL.

Table 9. Recurring Government Costs to Inspect an FFL

<b>Activity</b>	<b>Hourly Burden</b>	<b>Staffing Level</b>	<b>Hourly Wage</b>	<b>Loaded Hourly Wage</b>	<b>Rounded Cost</b>
<b>Compliance Inspection (Includes Travel)</b>	5	GS 5/7 to GS 13	\$37.65	\$62.50	\$312

Based on the hourly burdens and wage rates of IOIs, ATF anticipates that it costs ATF \$312 to perform a compliance inspection. To summarize the overall government costs, Table 10 outlines the government costs to process Form 7 applications, process Form 8 renewal applications, and conduct FFL compliance inspections.



Table 10. Summary of Government Cost per Listed Action

<b>Government Cost per Unlicensed Person</b>	<b>Cost</b>
<b>Per Application Cost (including qualification inspection)</b>	\$353
<b>Per Renewal Cost</b>	-\$19
<b>Per Compliance Inspection Cost</b>	\$312

ATF estimates that the government costs of this proposed rule include the initial application cost that occurs in the first year (including the qualification inspection), renewal costs that occur every three years after the first year, and the cost for the government to conduct a compliance inspection of an FFL in a given year (the government currently conducts compliance inspections of approximately eight percent of FFLs per year). Table 11 illustrates the 10-year government costs this proposed rule.

Table 11. Total Government Costs of Proposed Rule

<b>Year</b>	<b>Undiscounted</b>	<b>3 Percent Discount Rate</b>	<b>7 Percent Discount Rate</b>
<b>Year</b>	Undiscounted	3%	7%
<b>1</b>	\$8,662,620	\$8,662,620	\$8,662,620
<b>2</b>	\$612,456	\$612,456	\$612,456
<b>3</b>	\$612,456	\$612,456	\$612,456
<b>4</b>	\$146,196	\$146,196	\$146,196
<b>5</b>	\$612,456	\$612,456	\$612,456
<b>6</b>	\$612,456	\$612,456	\$612,456
<b>7</b>	\$146,196	\$146,196	\$146,196
<b>8</b>	\$612,456	\$612,456	\$612,456
<b>9</b>	\$612,456	\$612,456	\$612,456
<b>10</b>	\$146,196	\$146,196	\$146,196
<b>Total</b>	\$12,775,944	\$12,775,944	\$12,775,944
<b>Annualized</b>		\$1,497,730	\$1,819,007

Overall, the annualized government cost of this rule is \$1.5 million at three percent and \$1.8 million at seven percent.

6. Total Cost

The total costs, therefore, take into account the private and government costs of the proposed rule, as described in sections 3 and 5 above. ATF estimates that the initial application cost (Form 7 and initial inspection) occurs in the first year, renewal costs (Form 8 renewals) occur every three years after the first year, and completion and maintenance of Forms 4473 and A&D records, and compliance inspection costs (for a subset of FFLs affected by this rule), occur annually. Tables 12 and 13 illustrate the 10-year private and government costs of this proposed rule.

Table 12. Total Private and Government Costs of Proposed Rule Based on SME Estimates<sup>128</sup>

<b>Year</b>	<b>Undiscounted</b>	<b>3 Percent Discount Rate</b>	<b>7 Percent Discount Rate</b>
<b>1</b>	\$16,466,340	\$15,986,738	\$15,389,103
<b>2</b>	\$1,418,340	\$1,336,921	\$1,238,833
<b>3</b>	\$1,418,340	\$1,297,982	\$1,157,788
<b>4</b>	\$3,357,000	\$2,982,651	\$2,561,039
<b>5</b>	\$1,418,340	\$1,223,473	\$1,011,257
<b>6</b>	\$1,418,340	\$1,187,837	\$945,100
<b>7</b>	\$3,357,000	\$2,729,548	\$2,090,571
<b>8</b>	\$1,418,340	\$1,119,651	\$825,487
<b>9</b>	\$1,418,340	\$1,087,040	\$771,483
<b>10</b>	\$3,357,000	\$2,497,923	\$1,706,529
<b>Total</b>	\$35,047,380	\$31,449,764	\$27,697,189
<b>Annualized</b>		\$3,686,872	\$3,943,457

Overall, the total annualized cost of this rule is \$3.7 million at three percent and \$3.9 million at seven percent using information based off of SME estimates.

<sup>128</sup> The “Undiscounted” column represents totals from the underlying private and government cost tables. Consistent with guidance provided by OMB in Circular A-4, the “3 Percent Discount Rate” and “7 Percent Discount Rate” columns result from applying an economic formula to the number in each row of this “Undiscounted” column to show how these future costs over time would be valued today; they do not contain totals from other tables.

Table 13. Total Private and Government Costs of Proposed Rule Based on Russell Sage Foundation Survey and SME Estimates<sup>129</sup>

Year	Undiscounted	Discounted at 3 Percent	Discounted at 7 Percent
1	\$113,060,748	\$109,767,717	\$105,664,250
2	\$11,393,712	\$10,739,666	\$9,951,709
3	\$11,393,712	\$10,426,861	\$9,300,663
4	\$43,100,460	\$38,294,200	\$32,881,135
5	\$11,393,712	\$9,828,316	\$8,123,559
6	\$11,393,712	\$9,542,054	\$7,592,111
7	\$43,100,460	\$35,044,618	\$26,840,800
8	\$11,393,712	\$8,994,301	\$6,631,244
9	\$11,393,712	\$8,732,332	\$6,197,424
10	\$43,100,460	\$32,070,790	\$21,910,088
Total	\$310,724,400	\$273,440,855	\$235,092,985
Annualized		\$32,055,610	\$33,471,952

Overall, using the information from the Russell Sage Foundation Survey and FIPB SME estimates, Table 13 represents the upper bound estimate in which the total annualized cost of this rule is \$32 million at three percent and \$33.4 million at seven percent.

## 7. Benefits

These proposed revisions will have significant public safety benefits by ensuring that ATF’s regulatory definitions conform to the BSCA’s statutory changes and can be relied upon by the public, and by clarifying that persons who intend to predominantly earn a profit from the repetitive purchase and resale of firearms are engaged in the business of dealing in firearms and must be licensed, even if they make few or no sales,

<sup>129</sup> The “Undiscounted” column represents totals from the underlying private and government cost tables. Consistent with guidance provided by OMB in Circular A-4, the “3 Percent Discount Rate” and “7 Percent Discount Rate” columns result from applying an economic formula to the number in each row of this “Undiscounted” column to show how these future costs over time would be valued today; they do not contain totals from other tables.

or if they are conducting such transactions on the Internet or through other mediums or forums. As part of the license application, those dealers will undergo a background check. This increases the ability to ensure that persons purchasing and selling (including bartering) firearms with the intent to earn a profit are lawfully able to do so and reduces the risk that they could pose a danger to others by trafficking in illicit firearm sales or otherwise engaging in criminal activities. Additionally, these licensed dealers must take steps to help determine that they are not selling firearms to persons prohibited from receiving or possessing such firearms under Federal, State, local, or Tribal law.

The U.S. Sentencing Commission reports that “88.8 percent of firearm offenders sentenced under §2K2.1<sup>130</sup> [of the United States Sentencing Commission *Guidelines Manual* (Nov. 2021)] were [already] prohibited from possessing a firearm” under 18 U.S.C. 922(g). These individuals would thus have been flagged in a background check, would have therefore been prohibited from buying a firearm from a licensed dealer after their first offense, and would not have been able to commit the subsequent firearms offense(s) if their seller had been licensed. In addition, the Commission reports that such offenders “have criminal histories that are more extensive and more serious than other offenders”<sup>131</sup> and that they are “more than twice as likely to have a prior conviction for a violent offense compared to all other offenders.”<sup>132</sup>

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<sup>130</sup> Section 2K2.1 provides sentencing guidelines for “Unlawful Receipt, Possessions, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.”

<sup>131</sup> *What do Federal Firearms Offenses Really Look Like?*, United States Sentencing Commission Report at 2 (July 14, 2022), <https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-really-look>.

<sup>132</sup> *Id.*

In another report, on “armed career criminals” (those who have three or more convictions for violent offenses, serious drug offenses, or both), the Commission reports that a substantial share of “armed career criminals” (83 percent in fiscal year 2019) had prior convictions for at least one violent offense (as opposed to solely serious drug offense convictions). This includes “57.7 percent who had three or more [prior violent] convictions.”<sup>133</sup> In other words, persons who prohibited by law from possessing firearms, as well as the more serious “armed career criminals” who are also prohibited, were able to obtain guns and continued to commit more violent offenses after they would have been flagged by a background check and denied a firearm if purchasing from a licensed dealer.

Such violence has a significant adverse effect on public safety. Because licensed dealers are required to conduct background checks on unlicensed transferees, another benefit of this rule is to aid in preventing firearms being sold to felons or other prohibited persons, who may commit crimes and acts of violence or themselves become sources of firearms trafficking. Furthermore, these licensed dealers must also maintain firearms transaction records, which will help with criminal investigations and tracing firearms subsequently used in crimes.

In 2016, ATF distributed and discussed the above-mentioned “engaged in the business” guidance at gun shows to ensure that unlicensed dealers operating at gun shows became licensed, and portions of that previous guidance are incorporated in this proposed rule. This guidance was particularly directed at unlicensed persons who sell firearms as a

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<sup>133</sup> *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, United States Sentencing Commission, at 9 (March 2021), [https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303\\_ACCA-Report.pdf](https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf).

secondary source of income to allow them to continue to sell firearms, but as licensed dealers. Based on the FFLC, ATF found that there was an increase of approximately 567 ATF Form 7 applications to account for these unlicensed persons selling at gun shows. This prior outcome demonstrates the market response to clarifying licensing requirements and that such a response both increases the likelihood that persons engaged in the business comply with Federal licensing requirements and enhance public safety by denying persons prohibited from purchasing firearms through completion of ATF Forms 4473 and running background checks on prospective purchasers.

Finally, providing a clear option for FFLs to transfer their business inventory to another FFL when their license is terminated helps to ensure that these business inventories of firearms are traceable and do not become sources of trafficked firearms.

## 8. Alternatives

In addition to the requirements outlined in this rule, ATF considered the following alternative approaches:

Alternative 1. *A rulemaking that focuses on a bright-line numerical threshold of what constitutes being engaged in the business as a dealer in firearms.* As discussed above, in the past, it has been proposed to ATF that a rulemaking should set a specific threshold or number of sales per year to define “engaged in the business.” ATF considered this alternative in the past and again as part of developing this proposed rulemaking.<sup>134</sup> However, ATF chose not to adopt this alternative for a number of reasons stated in detail above. In summary: courts have held even before the passage of

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<sup>134</sup> See discussion *supra* under Section I.A. “Advance Notice of Proposed Rulemaking (1979)” and in more detail in Section II.D. “Presumptions that a Person is “Engaged in the Business.”

the BCSA that the sale of or attempt to sell even one firearm is sufficient to show that a person is “engaged in the business” if that person represents to others that they are willing and able to purchase more firearms for resale; a person could structure their transactions to avoid the minimum threshold by spreading out sales over time; and firearms could be sold by unlicensed persons below the threshold number without records, making those firearms unable to be traced when they are subsequently used in a crime. Finally, the Department does not believe there is a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered “engaged in the business.”

The costs of implementing a specific threshold would be lower than in the primary analysis proposed in this rule. However, the Department believes it would not appropriately address the language regarding the requisite intent predominantly to earn a profit (which can include bartering) and would have unintended effects such as those summarized in the previous paragraph that would impact personal firearms transactions and decrease public safety and law enforcement’s ability to trace firearms used in crimes.

Alternative 2. Publishing guidance instead of revising the regulations. Under this alternative, rather than publishing regulations further defining “engaged in the business,” ATF would publish only guidance documents to clarify the topics included in this proposed rule. Although ATF has determined that in addition to revising its regulations, it will also update existing guidance documents to answer any questions that the firearms industry may have, the Department has determined that issuing only guidance would be insufficient to address the issues discussed above. ATF did not select the alternative to publish only guidance documents in lieu of regulations because

guidance would be insufficient as a means to inform the public in general, rather than solely the currently regulated community; guidance would not have the same legal effect and applicability as a regulation; it would not benefit from the input of public review and comment to aid in accounting for possible unintended impacts or interpretations; and it would not be able to change existing regulatory provisions on the subject of “engaged in the business” or impact intersecting regulatory provisions. In addition, ATF can incorporate existing guidance in a proposed rule based on its experience or in response to comments. When an agency establishes or revises legally binding requirements, it must do so through a regulation issued under the Administrative Procedure Act and executive order provisions flowing from it. Guidance does not meet these requirements. Therefore, although the Department considered this alternative, it determined it was not in the best interest of the public.

Alternative 3. *No action.* Rather than promulgating a regulation, ATF could instead take no action to further clarify the BSCA’s amendments to the GCA. However, the Department considered this alternative and decided against it for a number of reasons. First, as the various enforcement actions and court decisions cited above demonstrate, ATF has observed a significant level of noncompliance with the GCA’s licensing requirements even prior to the BSCA. Second, on March 14, 2023, President Biden issued Executive Order 14092, requiring the Attorney General to report on agency efforts to implement the BSCA, develop and implement a plan to clarify the definition of who is engaged in the business of dealing in firearms, “including by considering a rulemaking,” and prevent former FFLs whose licenses have been revoked or surrendered from



continuing to engage in the business of dealing in firearms.<sup>135</sup> Third, Congress, through the BSCA, determined that there was a need to revise the definition of “engaged in the business” for the first time in almost 40 years. While that by itself does not preclude ATF from using its discretion not to promulgate a formal rule, it indicates an important change to the landscape of who must have a license to deal in firearms and warrants consideration of what that means to persons who have been operating under the previous definition. It has potential effects on those who have not considered themselves to fall under the definition before and now would have to have a license. The change to the definition removed any intent to obtain “livelihood,” and it is reasonable to expect that those who transact in firearms would have questions about how to interpret and apply this change. This would include how it affects other aspects of existing laws and regulatory provisions that govern such transactions, as well as how other BSCA amendments, such as the new international trafficking provisions, might apply to the dealer requirements. For these reasons, the Department determined this was not a viable alternative.

Although the Department considered this alternative, it does not generate direct monetary costs because it leaves the regulatory situation as it is. Because the costs and benefits of this alternative arise from the statute itself, ATF did not include an assessment of them in this proposed rulemaking.

#### *B. Executive Order 13132*

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance

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<sup>135</sup> 88 FR at 16528.

with section 6 of Executive Order 13132 (“Federalism”), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*C. Executive Order 12988*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (“Civil Justice Reform”).

*D. Regulatory Flexibility Act (“RFA”)*

ATF performed an initial regulatory flexibility analysis of the impacts on small businesses and other entities on this proposed rule. Based on the information from this analysis, ATF has determined that this rule would impact unlicensed persons who would now have to become licensed dealers to lawfully operate as a small business. Because some of these unlicensed persons may transact in low-volume firearms sales to predominantly earn a profit, the costs to become an FFL could have an impact on their overall profit from firearms transactions.

*Initial Regulatory Flexibility Analysis*

The RFA establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” Pub. L. 96–354, section 2(b), 94 Stat. 1164, 1165 (1980) (codified at 5 U.S.C. 601, *et seq.*).

Under the RFA, the agency is required to consider whether this rule would have a significant economic impact on a substantial number of small entities. Agencies must perform a review to determine whether a rule would have such an impact. If the agency determines that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA.

The RFA covers a wide range of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). ATF determined that the rule affects a variety of large and small businesses (see the “Description of the Potential Number of Small Entities” section below). Based on the requirements above, ATF prepared the following initial regulatory flexibility analysis assessing the impact on small entities from the rule.

1. A description of the reasons why action by the agency is being considered.

Congress passed the BSCA, which amended the definition of engaged in the business from a person seeking to transact in firearms for livelihood and profit to a person intending predominantly to earn a profit. Moreover, on March 14, 2023, the President ordered the Attorney General to report on efforts to implement the BSCA and to develop and implement a plan to clarify the definition of “engaged in the business” of dealing in firearms and prevent FFLs from continuing to deal after license revocation or surrender.

2. A succinct statement of the objectives of, and legal basis for, the proposed rule.

The Attorney General is responsible for enforcing, among other statutes, the GCA, as amended. The BSCA redefined who is a regulated dealer under the GCA. This proposed rule updates the regulations to ensure the language conforms with the amended statutory provisions, and clarifies for the public how to understand and implement the statutory change and also implements Executive Order 14092.

3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

This rule implements a statutory requirement that affects unlicensed persons who purchase and sell firearms, with the intent to profit (including barter), on a recurring basis. As persons who engage in higher-frequency firearms transactions meeting these requirements are typically already licensed as dealers, the persons impacted by this rule will primarily be those who transact in low volume repetitive firearms sales. These persons likely either already are, or would become, small entities.

4. A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

ATF estimates that this proposed rule would affect at least 24,540 unlicensed persons who, as a result of changes enacted in the BSCA, are now required to obtain a Federal firearms license. Such persons would need to file a Form 7 application, pay a licensing fee, undergo a qualification inspection, maintain Form 4473 and A&D records for every firearm transaction, and undergo periodic compliance inspections. If they

continue in business after three years, they would need to file a Form 8 renewal application and pay a renewal licensing fee. No professional skills are necessary to prepare or perform application or recordkeeping activities.

5. An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

This proposed rule does not duplicate or conflict with other Federal rules.

6. Descriptions of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

ATF did not find any suitable alternatives that would meet the objectives of this rule that would minimize the economic impact that this rule would have on small entities.

*E. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is likely to have a significant economic impact on a substantial number of small entities under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.* Accordingly, the Department prepared an initial regulatory flexibility analysis.

*F. Unfunded Mandates Reform Act of 1995*

This rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, 109 Stat. 48. *See* 2 U.S.C. 1532(a).

*G. Paperwork Reduction Act of 1995*

Under the Paperwork Reduction Act of 1995 (“PRA”), 44 U.S.C. 3501–21, and its implementing regulations, 5 CFR part 1320, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The collections of information contained in this proposed rule are collections of information which have been reviewed and approved by OMB in accordance with the requirements of the PRA and have been assigned an OMB Control Number.

As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The collections of information in this rule are mandatory. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering, and maintaining the data needed, and completing and reviewing the collection.

*Title:* Application for a Federal Firearms License -- ATF Form 7(5310.12)/ 7CR (5310.16)

*OMB Control Number:* OMB 1140-0018

*Summary of the Collection of Information:* 18 U.S.C. 922 specifies a number of unlawful activities involving firearms in interstate and foreign commerce. Some of these activities cease to be unlawful when persons are licensed under the provisions of 18 U.S.C. 923. Some examples of activities that are no longer unlawful once a person becomes licensed include: engaging in the business of selling, shipping, receiving, and transporting firearms in interstate or foreign commerce, including the acquisition of curio or relic firearms acquired by collectors from out-of-state for personal collections. This

collection of information is necessary to ensure that anyone who wishes to be licensed as required by 18 U.S.C. 923 meets the requirements to obtain the desired license.

*Need for Information:* Less frequent collection of this information would pose a threat to public safety. Without this information collection, ATF would not be able to issue licenses to persons required by law to have a license to engage in the business of dealing in firearms or shipping or transporting firearms in interstate or foreign commerce in support of that business, or acquire curio and relic firearms from out of state.

*Proposed Use of Information:* ATF personnel will analyze the submitted application to determine the applicant's eligibility to receive the requested license.

*Description of the Respondents:* Individuals or entities wishing to engage in the business of selling, shipping, receiving, and transporting firearms in interstate or foreign commerce, as well as acquiring firearms classified as curios and relics for personal collections.

*Number of Respondents:* 13,000 existing. New respondents due to the rule 24,540

*Frequency of Response:* one time

*Burden of Response:* one hour

*Estimate of Total Annual Burden:* 24,540 hours (incremental change)

*Title:* Application for a Federal Firearms License -- Renewal Application ATF Form 8 (5310.11)

*OMB Control Number:* OMB 1140-0019

*Summary of the Collection of Information:* 18 U.S.C. Chapter 44 provides that no person may engage in the business of importing, manufacturing, or dealing in either firearms, or ammunition, without first obtaining a license to do so. These activities are

licensed for a specific period. The benefit of a collector's license is also provided for in the statute. In order to continue to engage in the aforementioned firearms activities without interruption, licensees must renew their FFL by filing Federal Firearms License ("FFL") RENEWAL Application-ATF F 8 (5310.11) Part II, prior to its expiration.

*Need for Information:* Less frequent use of this information collection would pose a threat to public safety, since the collected information helps ATF to ensure that the applicants remain eligible to renew their licenses.

*Proposed Use of Information:* ATF F 8 (5310.11) Part II, is used to identify the applicant and determine their eligibility to retain the license.

*Description of the Respondents:* Respondents desiring to update the responsible person (RP) information on an existing license must submit a letter in this regard, along with the completed FFL renewal application to ATF.

*Number of Respondents:* 34,000 existing. New respondents due to the rule 24,540

*Frequency of Response:* every three years and periodically

*Burden of Response:* 0.5 hours

*Estimate of Total Annual Burden:* 12,270 hours (incremental change)

*Title:* Firearms Transaction Record -- ATF Form 4473 (5300.9) and Firearms Transaction Record Continuation Sheet

*OMB Control Number:* OMB 1140-0020

*Summary of the Collection of Information:* The subject form is required under the authority of 18 U.S.C. 922 and 923 and 27 CFR 478.124. These sections of the GCA prohibit certain persons from shipping, transporting, receiving, or possessing firearms. All persons, including FFLs, are prohibited from transferring firearms to such persons.



FFLs are also subject to additional restrictions regarding the disposition of a firearm to an unlicensed person under the GCA. For example, age and State of residence also determine whether a person may lawfully receive a firearm. The information and certification on the Form 4473 are designed so that a person licensed under 18 U.S.C. 923 may determine if the licensee may lawfully sell or deliver a firearm to the person identified in Section B, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The Form 4473 should only be used for sales or transfers of firearms where the seller is licensed under 18 U.S.C. 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction.

*Need for Information:* The consequences of not conducting this collection of information, or conducting it less frequently, are that the licensee might transfer a firearm to a person who is prohibited from possessing firearms under Federal law. The collection of this information is necessary for compliance with the statutory requirements to verify the eligibility of a person receiving or possessing firearms under the GCA. There is no discretionary authority on the part of ATF to waive these requirements. Respondents are required to supply this information as often as necessary to comply with statutory provisions. The form is critical to the prevention of criminal diversion of firearms and enhances law enforcement's ability to trace firearms that are recovered in crimes.

*Proposed Use of Information:* A person purchasing a firearm from an FFL must complete Section B of the Form 4473. The buyer's answers to the questions determine if the potential transferee is eligible to receive the firearm. If those answers indicate that the buyer is not prohibited from receiving a firearm, the licensee completes Section C of

the Form 4473 and contacts the FBI's NICS system or the State point of contact to determine if the firearm can legally be transferred to the purchaser.

*Description of the Respondents:* Unlicensed persons wishing to purchase a firearm.

*Number of Respondents:* 17,189,101 existing. New respondents due to the rule 24,540

*Frequency of Response:* periodically

*Burden of Response:* 0.5 hours

*Estimate of Total Annual Burden:* 12,270 hours (incremental change)

*Title:* Records of Acquisition and Disposition, Dealers of Type 01/02 Firearms, and Collectors of Type 03 Firearms [Records of Acquisition and Disposition, Collectors of Firearms]

*OMB Control Number:* OMB 1140-0032

*Summary of the Collection of Information:* The recordkeeping requirements as authorized by the GCA, 18 U.S.C. 923, are for the purpose of allowing ATF to inquire into the disposition of any firearm received by a licensee in the course of a criminal investigation.

*Need for Information:* Less frequent collection of this information would pose a threat to public safety as the information is routinely used to assist law enforcement by allowing them to trace firearms in criminal investigations.

*Proposed Use of Information:* This collection of information grants ATF Officers the authority to examine a collector's records for firearms traces or compliance inspections, per 27 CFR 478.23(c)(1), (2).

*Description of the Respondents:* Federal Firearms Licensees

*Number of Respondents:* 60,790 existing. New respondents due to the rule 24,540

*Frequency of Response:* annually recurring

*Burden of Response:* three minutes to maintain A&D records and one hour to perform an inspection.

*Estimate of Total Annual Burden:* 24,540 hours in inspection time (incremental change) and 3,681 hours maintaining in A&D records (incremental change)

ATF asks for public comment on the proposed collection of information to help determine how useful the information is; whether the public can help perform ATF's functions better; whether the information is readily available elsewhere; how accurate ATF's estimate of the burden of collection is; how valid the methods for determining burden are; how to improve the quality, usefulness, and clarity of the information; and how to minimize the burden of collection.

If you submit comments on the collection of information, submit them following the "Public Participation" section under the SUPPLEMENTARY INFORMATION heading. You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, ATF will publish a notice in the *Federal Register* of OMB's decision to approve, modify, or disapprove the proposed collection.

#### **IV. Public Participation**

##### **A. Comments Sought**

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on:

(1) the clarity of this proposed rule, and how easy it is to understand;

(2) the various definitions and rebuttable presumptions relevant to determining when a person is “engaged in the business” of dealing in firearms at wholesale or retail, as described in Section II.D of this preamble, and when a person acts with the intent to “predominantly earn a profit” from the sale or disposition of firearms, as described in Section II.G of this preamble.

(3) whether the rule should use inferences, factors, or some other method of determining when a person is “engaged in the business” of dealing in firearms or acting with the intent to “predominantly earn a profit”, instead of, or in addition to, using presumptions of any kind, including (a) whether the criteria should function as rebuttable presumptions or permissive inferences in the administrative and civil contexts, and (b) whether and how the criteria should function differently in different types of proceedings;

(4) whether there is additional specific conduct that would provide indicia of whether or when a person is or is not “engaged in the business” of dealing in firearms, or acts with the intent to “predominantly to earn a profit” from the sale or disposition of firearms;

(5) when and how any presumptions, inferences, or factors can or should be rebutted;

(6) whether the rule should define “occasional” as that term is used in the definition of “engaged in the business” under 18 U.S.C. 921(a)(21)(C), and if so, how the term should be defined; and

(7) the costs or benefits of the proposed rule, and appropriate methodology and data for calculating those costs and benefits, including what sources ATF should look to,

beyond ATF's own expertise, for accurate estimates of the percentage of this population that would need to obtain a license because they are "engaged in the business" of dealing in firearms compared to those who make occasional sales of firearms (*e.g.*, enhancement of a personal collection or for a hobby) and would not need to obtain a license.

All comments must reference this document's docket number, ATF 2022R-17, and be legible. Commenters must also include the commenter's complete first and last name and contact information. If submitting a comment through the Federal eRulemaking portal, as described in Section IV.C of this preamble, commenters should carefully review and follow the website's instructions on submitting comments. If submitting as an individual, any information provided for city, state, zip code, and phone will not be publicly viewable when ATF publishes the comment on *regulations.gov*. If submitting a comment by mail, commenters should review Section IV.B of this preamble regarding proper submission of PII. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity or threatening or abusive language. ATF will retain anonymous comments and those containing excessive profanity as part of this rulemaking's administrative record but will not publish such documents on *www.regulations.gov*. ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if your comment cannot be read due to technical difficulties and ATF cannot contact you for clarification, ATF may not be able to consider your comment.

ATF will carefully consider all comments, as appropriate, received on or before the closing date, and will give comments after that date the same consideration if

practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

*B. Confidentiality*

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at [www.ATF.gov](http://www.ATF.gov), on the Internet through the Federal eRulemaking Portal, and through the Freedom of Information Act (5 U.S.C. 552). Commenters who submit by mail and who do not want their name or other PII posted on the Internet should submit their comments by mail along with a separate cover sheet containing their PII. Both the cover sheet and comment must reference this docket number (ATF 2022R-17). For comments submitted by mail, information contained on the cover sheet will not appear when posted on the Internet, but any PII that appears within the body of a comment will not be redacted by ATF and it will appear on the Internet. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the Internet should omit such PII from the body of their comment or in any uploaded attachments.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter must place any portion of a comment that is proprietary or confidential business information under law on pages that are separated from the balance of the comment, with each page prominently marked “PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION” at the top of each page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it

received, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal process.

#### *C. Submitting Comments*

Submit comments using either of the two methods described below (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

- *Federal eRulemaking Portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov) and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.
- *Mail:* Send written comments to the address listed in the ADDRESSES section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's first and last name and full mailing address, be signed, and may be of any length. See also Section IV.B of this preamble.

#### *D. Request for Hearing*

In accordance with 18 U.S.C. 926(b), any interested person who desires an opportunity to comment orally at a public hearing should submit a request, in writing, to

the Director of ATF within the notice period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

### **Disclosure**

Copies of this proposed rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for RIN 1140-58), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E-063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648-8740.

### **Severability**

Consistent with the Administrative Procedure Act, the issues raised in this proposed rule may be finalized, or not, independently of each other, after consideration of comments received. The Department intends separate aspects of any final rule that results from this proposed rule to be severable from each other, as demonstrated by the rule's structure. In the event any provision of this rule as finalized is held to be invalid or unenforceable by its terms, the remainder shall not be affected and shall be construed so as to give remaining provisions the maximum effect permitted by law.

### List of Subjects

### **27 CFR Part 478**

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

### **Authority and Issuance**



For the reasons discussed in the preamble, the Department proposes to amend 27 CFR part 478 as follows:

**PART 478--COMMERCE IN FIREARMS AND AMMUNITION**

1. The authority citation for 27 CFR part 478 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 18 U.S.C. 847, 921-931; 44 U.S.C. 3504(h).

2. Amend § 478.11 by:

- a. Revising the definition of “Dealer”;
- b. Revising paragraph (c) of the definition of “Engaged in the business”;
- c. Adding a definition of “Personal collection, personal collection of firearms, or personal firearms collection”;
- d. Adding a definition of “Predominantly earn a profit”;
- e. Revising the definition of “Principal objective of livelihood and profit”;
- f. Adding a definition of “Responsible person”; and
- g. Adding a definition of “Terrorism”.

The additions and revisions read as follows:

**§ 478.11 Meaning of terms.**

\* \* \* \* \*

*Dealer.* Any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term shall include any person who engages in such business or occupation on a part-time basis. The term shall include such activities wherever, or through whatever medium, they 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.

\* \* \* \* \*

*Engaged in the business—*

\* \* \* \* \*

(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. The term shall not include an auctioneer who provides only auction services on commission by assisting in liquidating a personal collection of firearms at an estate-type auction, provided the auctioneer does not purchase the firearms, take possession of the firearms prior to the auction, or consign the firearms for sale.

(2) For purposes of this definition—

(i) The term “purchase” (and derivative terms thereof) means the act of obtaining a firearm in exchange for something of value;

(ii) The term “sale” (and derivative terms thereof, including “resale”) means the act of providing a firearm in exchange for something of value; and

(iii) The term “something of value” includes money, credit, personal property (*e.g.*, another firearm or ammunition), a service, a controlled substance, or any other medium of exchange or valuable consideration.

(3) 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—

(i) 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;

(ii) 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;

(iii) Repetitively purchases for the purpose of resale, or sells or offers for sale, firearms—

(A) Through straw or sham businesses, or individual straw purchasers or sellers; or

(B) That cannot lawfully be purchased or possessed, including:

(1) Stolen firearms (18 U.S.C. 922(j));

(2) Firearms with the licensee's serial number removed, obliterated, or altered (18 U.S.C. 922(k), 26 U.S.C. 5861(i));

(3) Firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(4) Machineguns or other weapons defined as firearms under 26 U.S.C. 5845(b) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d));

(iv) 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 (*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);

(v) Who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal inventory in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or

(vi) Who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were transferred to the personal inventory of such former licensee or responsible person prior to the time the license was terminated, unless:

(A) The firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, United States Code; and (B) One year has passed from the date of transfer to the personal collection.

(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.

(5) The activities set forth in the rebuttable presumptions in paragraphs (c)(3)(i) through (vi) of this section are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms.

(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.

\* \* \* \* \*

*Personal collection, personal collection of firearms, or personal firearms collection.* (a) 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). The term shall not include any firearm purchased for the purpose of resale or made with the predominant intent to earn a profit.

(b) In the case of a firearm imported, manufactured, or otherwise acquired by a licensed manufacturer, licensed importer, or licensed dealer, the term shall include only a firearm described in paragraph (a) of this definition that was—

(1) Acquired or transferred without the intent to willfully evade the restrictions placed upon licensees under chapter 44, title 18, United States Code;

(2) Recorded by the licensee as an acquisition in the licensee’s acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);

(3) Recorded as a disposition from the licensee’s business inventory to the individual’s personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e);

(4) Stored separately from, and not commingled with the business inventory, and appropriately identified as “not for sale” (*e.g.*, by attaching a tag), if on the business premises; and

(5) Maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a.

\* \* \* \* \*

*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.

(b) 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.

(c) 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.

(d) 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.

\* \* \* \* \*



*Responsible person.* Any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and business practices of a corporation, partnership, or association, insofar as they pertain to firearms.

\* \* \* \* \*

*Terrorism.* For purposes of the definitions “predominantly earn a profit,” and “principal objective of livelihood and profit,” the term “terrorism” means activity, directed against United States persons, which—

(a) Is committed by an individual who is not a national or permanent resident alien of the United States;

(b) Involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(c) Is intended—

(1) To intimidate or coerce a civilian population;

(2) To influence the policy of a government by intimidation or coercion; or

(3) To affect the conduct of a government by assassination or kidnapping.

3. In § 478.57, redesignate the existing text as paragraph “(a)” and add a new paragraph (b) to read as follows:

**§ 478.57 Discontinuance of business.**

\* \* \* \* \*

(b) Upon termination of a license (*i.e.*, license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee shall within 30 days, or such additional period designated by the Director for good cause:

(1) Liquidate the remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the remaining business inventory to a personal inventory of the former licensee, or a responsible person of the former licensee, provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee or responsible person of such licensee who resells any such inventory, including business inventory transferred to a personal inventory, is subject to the presumptions in 27 CFR 478.11 (definition of “engaged in the business” as a dealer in firearms other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale. In addition, the former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, “restocking”).

4. In § 478.78, redesignate the existing text as paragraph “(a)” and add a new paragraph (b) to read as follows:

**§ 478.78 Operations by licensee after notice.**

\* \* \* \* \*

(b) Upon final disposition of license proceedings to disapprove or terminate a license (*i.e.*, by revocation or denial of renewal), the former licensee shall within 30 days, or such additional period designated by the Director for good cause, either:

(1) Liquidate the remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the remaining business inventory to a personal inventory of the former licensee, or a responsible person of the former licensee provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee or responsible person of such former licensee, who resells any such inventory, including business inventory transferred to a personal inventory, is subject to the presumptions in 27 CFR 478.11 (definition of “engaged in the business” as a dealer in firearms other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale. In addition, the former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.*, “restocking”).

5. Revise § 478.124(a) to read as follows:

**§ 478.124(a) Firearms transaction record.**

A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearm transaction record, Form 4473: *Provided*, that a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement firearm is returned

to the person from whom received; *provided further*, that a firearms transaction record, Form 4473, shall not be used if the sale or other disposition is being made to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor who transfers a firearm to their personal collection in accordance with 27 CFR 478.125a. When a licensee transfers a firearm to another licensee, the licensee shall comply with the verification and recordkeeping requirements in 27 CFR 478.94 and Subpart Hof part 478.

\* \* \* \* \*

6. In§ 478.125a, amend paragraphs (a)(2) and (a)(3) by removing the term"§ 478.125(e)" and adding in its place"§§ 478.122(a), 478.123(a), or 478.125(e)".

August 30, 2023

Date

\_\_\_\_\_  
Merrick B. Garland  
Attorney General