



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

Re: Notice of Proposed Rulemaking; Request for Comment; Definition of “Engaged in the Business” as a Dealer in Firearms; ATF 2022R-17. 88 Fed. Reg. 61,993 (September 8, 2023) (“Proposed Rulemaking”)

Dear Department of Justice (DOJ) & Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF):

The following comment is submitted by Mountain States Legal Foundation’s Center to Keep and Bear Arms. We appreciate the invitation to provide a comment. Unfortunately, the proposed rule is deeply flawed. Consequently, we urge you not to promulge any final rule based on the proposed rule. At least, any such rule would likely be set aside under the Administrative Procedure Act as arbitrary and capricious, if it is not reversed sooner by Congress pursuant to the Congressional Review Act.

Rather than continue down its current path, ATF’s time would be better spent evaluating whether the Supreme Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 597 U.S. — (2022), requires it to embark on a broad deregulatory effort, so as to avoid legal exposure to Second Amendment claims under 42 U.S.C. § 1983, and attorney fees under the Equal Access to Justice Act.

COMMENTS

The Agencies’ proposed rulemaking is nothing more than an attempt to limit private firearms transactions to zero, effectively creating a national gun registry by requiring those who wish to sell nearly any firearm, for any reason, to obtain a Federal Firearms License (FFL). The proposed rulemaking seeks to implement rules relating to who is “engaged in the business” of dealing firearms. The ATF says it is doing this to clarify the definitions following the implementation of the Bipartisan Safer Communities Act. But that is not true.

Rather than just clarifying definitions, the document goes further, implementing completely new definitions, and thereby expanding the meaning of the statutes. The many definitions proposed in the document, if implemented, would further limit citizens' abilities to collect firearms for investment purposes, and limit hobbyists' ability to exchange firearms, among other things.

The 108-page document focuses on alleged long-standing interpretations by the ATF. Yet, several of these claims are invalid. For instance, the document claims that the rule is merely expanding the definition of "when a person is considered 'engaged in the business' as a dealer in firearms" under the Gun Control Act of 1968 and the Bipartisan Safer Communities Act. 88 Fed. Reg. at 61,993. Thus, the ATF is effectively creating its own, radically more expansive definition of the term without an adequate statutory basis or legal authority from courts.

Further, the agency claims that these "redefinitions" and new definitions are to be used solely as a rebuttable presumption in civil and administrative proceedings. *See Id* at 62,003. Yet, dealing in firearms without a license carries a felony prison sentence, and hefty fines. There are two main points of concern with the proposed rule: the definitions of (1) "engaged in the business" and (2) "dealer." Each definition has its own substantial problems that we discuss in this comment.

I. THE AGENCIES SHOULD SIGNIFICANTLY ALTER OR ABANDON THEIR REDEFINITION OF "ENGAGED IN THE BUSINESS."

The proposed rule seeks to expand the definition of persons who are "engaged in the business" of dealing firearms by replacing the phrase 'with the principal objective of livelihood and profit' with the phrase 'to predominantly earn a profit.'" *Id.* at 61,996–61,997. Doing so would be detrimental to the American population because in changing the text to "predominantly earn a profit," the new rule encompasses entirely innocent groups, who were never before intended to be the target of 27 CFR § 478.11 such as those who are merely selling from a personal collection or those who are merely renting space at a gun show. Additionally, the agencies claim that the rule is only intended to serve as a rebuttable presumption for civil and administrative proceedings, yet dealing firearms without a license carries a felony prison sentence. And lastly, the factors to determine the rebuttable presumption are baseless and arbitrary. The following sections expand on what persons are unjustly affected by this proposed rule change.

A. The "To Predominantly Earn a Profit" Definition is Overbroad and Arbitrary.

The redefinition of "to predominantly earn a profit" is stated to clarify that "[T]he intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain." 88 Fed. Reg. at 61,994. This reasoning is severely flawed, as there are a vast number of situations not accounted for under the new rule. First, firearms ownership as an investment, second, the sale of firearms through consignment, and third inflation costs when determining firearm value. Failing to make these corrections to the rule would inevitably result in a number of innocent people being either required to obtain an FFL and comply with all of the associated rules, or be subject to the penalties of dealing firearms without a license.

First, persons who purchase firearms as an investment: Hobbyists are purported to be excluded from the rule, yet nowhere in the rule is there consideration given to the incidental value of firearms. The proposed rule states “Also expressly excluded from the definition of ‘personal collection’ is ‘[A]ny firearm purchased for resale or made with the predominant intent to earn a profit’ because of their inherently commercial nature.” *Id* at 62,004 (citation omitted). This language expressly excludes from the definition of hobbyists—persons that collect firearms based on intrinsic value—as an investment item. But this is unreasonable, and the exception threatens to swallow the rule. Firearms collection in this regard is not significantly different than baseball cards, or antique automobiles that hold resale value, yet nobody would consider baseball card collectors or owners of antique automobiles to be anything more than hobbyists. These collectors would be swept under the new rule and be required to obtain an FFL to sell firearms from their collections.

Second, under this proposed redefinition, persons wishing to sell a firearm through consignment would be selling a firearm “to predominantly earn a profit,” and would seemingly be required to obtain an FFL to do so. Consignment is a well-recognized and practiced means for people to sell firearms through someone licensed as an FFL. However, under this proposed rule if a person were to consign an FFL dealer to sell their firearm, the seller is still engaging in behavior that meets the language of the rule. Namely, reselling with the predominant intent to earn a profit. Because the seller would be making a profit, they meet the new definition of being engaged in the business through their intent to earn a profit. Undoubtedly a common scenario that was overlooked by the drafters of the rule.

The standard of “predominantly earn a profit” also fails to take into account inflation, and rampant inflation at that. Such is incredibly relevant when determining if someone is selling for profit as inflation could cause one to nominally profit according to the amount received with inflation, even though there may not have been a true profit received. Put simply, inadvertent arbitrage could lead to a common person who sells a firearm becoming a felon due to lacking an FFL. Also, the proposed rule states that it is intended to clarify that dealing in firearms can occur by any means, which would in turn include trading of firearms. *Id* at 61,997. Yet another way that collectors enhance their collections which would require them to obtain an FFL or be at risk of prison time.

B. The Rule Does Not Solely Function as Civil and Administrative, but also Carries Criminal Penalties, Along with Being a Waste of Resources.

The proposed rule was intended to clarify 18 U.S.C. 921(a)(21)(C). But if it is implemented, its true effect will be to make it nearly impossible for anyone to “sell” a firearm without an FFL. The agencies claim that the purpose of the rule is not to be used in the criminal capacity but merely to be utilized as a rebuttable presumption in administrative and civil proceedings. Even stating examples in footnote 83 on page 62,003 where the so-called rebuttable presumption could be utilized. *See id*. However, even with the claims of use in administrative and civil proceedings, it doesn’t change the fact that 18 U.S.C. § 924(a)(1)(D) exists, making it a criminal act to engage in the business of dealing in firearms without an FFL. Therefore, while it is

possible to use the rule as the agencies describe, it is also clear that it may be used in a criminal context carrying prison time and high fines, despite the intent expressed in the proposed rule.

The agency doesn't explicitly state that this rule is intended to be utilized for criminal enforcement, and in fact expressly claims that it is not. However, the agency also provides that while the rebuttable presumptions would not apply in a criminal case, they anticipate that "the proposed rule may be useful to a court in a criminal case—for example, to inform appropriate jury instructions regarding permissible inferences". 88 Fed. Reg. at 62,000. Additionally, the agency admits that funds for purchasing firearms could be derived from criminal activities. The agency states, "[T]he 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." 88 Fed. Reg. at 62,002. This is clear evidence that the agency admits the repetitive purchase and resale of firearms without an FFL is a criminal act. Therefore, even though it is insisted that this proposed rule is only intended to serve in civil and administrative proceedings, it is apparent that is not true.

With the incredibly broad proposed definition and the scenarios encumbered by the proposed rule, anyone wishing to sell a firearm would need to obtain an FFL. However, the discretion to issue licenses is up to the department. If the department elects that a person is not eligible to obtain a license, for whatever reason, they further limit the freedom of the people. Undoubtedly some of the reasons to limit a person's ability to obtain an FFL are arbitrary. This very scenario happened in *In the Matter of S.E.L.L. Antiques* as well as in *In the Matter of Scott* as cited in the proposed rule in footnote 58. *See Id* at 62,000. In those cases, persons were selling firearms without a license, the agency recognized this and denied the application for an FFL when they attempted to legitimize their business. Therefore, the agency limited their ability to make an authorized and legal firearms business. Even worse, by standing as an example of what happens when trying to legitimize, the decision arguably encouraged those who may consider legitimizing to continue dealing firearms illegally. This rule would give the agency more reasons to not issue a license to those who they deem to be engaged in the business. The consequences of that power would be limiting individual liberty while also promoting criminal activity for persons who simply wish to lawfully transfer their property. If this is the true intent behind the rule, it will be a waste of both power and resources to find people "engaged in the business."

C. The Factors That Declare Persons to be Presumably Engaged in the Business Are Open Ended and Capture Nearly Everyone Who Completes More Than One Firearms Sale.

The Department makes clear that there is no minimum threshold of firearms sold to be considered "engaged in the business." *See* 88 Fed. Reg. at 62,000. Rather, it is expressed that a totality of the circumstances approach will be applied in an effort to gather all of the relevant criteria. The problem with this approach is, because of the extreme inconsistency in the rules, it leaves a gap for collectors to know if they can sell firearms and in fact overall discourages the sale of firearms. It has an unconstitutional chilling effect. If the totality of the circumstances approach is applied, then it is incredibly open ended, vague, and ambiguous, leaving no timeline and no guidance for potential sellers to know if their actions will put them in the bucket of being a dealer.

This method gives unprecedented power to the department to define anyone's actions as being engaged in the business as they seem fit. The department sets this rule up as a rebuttable presumption which in essence handcuffs persons wishing to sell firearms.

Subsection 4 of the factors declares that someone is presumed to be engaged in the business if “[they] repetitively sell[] or offer[] for sale firearms, (A) within 30 days after they were purchased; (B) that are new, or like new in their original packaging; or (C) that are of the same or similar kind...and type...” *Id* at 62,001. This rule automatically puts anyone meeting these specified criteria into a bucket classifying them as a dealer. To begin with, “repetitively,” is open ended and with the amount of weight given to the word it should be defined. This section of the rule was clearly created to capture persons at gun shows and on social media platforms, yet there will be unintended consequences stemming from the language. Numerous people purchase firearms to bolster a collection, and like any collector's items, firearms are more valuable when kept with their original packaging. Penalizing a collector who decides to offload several firearms that are kept within original packaging (and are therefore more valuable) over an undisclosed period is a gross misuse of power. Additionally, it further discourages firearm purchase and sales by collectors for fear of being classified as a dealer. Or, requiring them to obtain an FFL and follow all the rules associated with the license further unconstitutionally discourages them in situations where they want to sell a handful of their collection and make a profit from the sale.

Additionally, classifying someone as a dealer based on their sale of the same or similar types of firearms captures nearly anyone and everyone who sells multiples of the same type of firearm. This will also inadvertently capture unintended persons—for example, an avid waterfowl hunter who owns many shotguns and elects to sell a handful of them to upgrade his personal collection. This person would be selling multiples of the same or similar type of firearm (shotgun) and therefore be presumed to be engaged in the business as a dealer. Therefore, he would be required to obtain an FFL for the simple fact that he elected to sell a handful of his shotguns to gather funds to upgrade his collection. The agency claims that “[B]ona 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.” 88 Fed. Reg. at 62,003. This is an incredibly broad assumption, basically writing off the fact that collectors could purchase and sell common firearms which don't hold antique value. This is an atrocious assumption by the agency, people collect all types of firearms based on their personal preferences. Some collectors may undoubtedly only collect old lever-action rifles from the 1800s; on the other hand, some collectors may be more attracted to semiautomatic rifles manufactured post 1994. Declaring that someone selling more modern firearms of the same type is likely to be a dealer is an overbroad statement carrying unintended consequences, and is nothing short of arbitrary discrimination.

The outlined criteria for presuming the intent to "predominantly earn a profit" from firearm transactions are excessively inclusive and lack the necessary specificity to differentiate between legitimate business activities and casual or incidental actions related to firearms. For instance, the first criterion, which includes actions such as advertising or posting firearms for sale, including on websites or through the use of business cards, is so broad that it could ensnare individuals engaging in isolated or infrequent transactions without any genuine business intent. Similarly, the criteria regarding the securing of physical space for displaying firearms, maintaining records for tracking

profits and losses, or securing merchant services, are not inherently indicative of a business operation. These activities could be part of a hobbyist's routine, a collector's passion, or an individual's prudent management of personal assets. In fact, these criteria are so broad that a seller of popcorn who rents a table at a gun show would presumptively be engaged in the business of selling firearms under the proposed rule.

The rule's failure to distinguish between these differing contexts creates a risk of unfairly presuming business intent in scenarios where none exists. Furthermore, the inclusion of actions such as securing business insurance or applying for a business license as presumptive evidence of a business operation overlooks the nuances and varied motivations behind such actions. This overreach will lead to unwarranted scrutiny and regulatory burden on individuals who are not engaged in the business of selling firearms, thereby infringing upon their lawful activities and interests.

There are a vast number of scenarios in which persons will be unjustly captured under this rule and be presumptively deemed to be dealers in firearms. Even more concerning, the list of factors considered to presume someone is a dealer is “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.” *Id* at 62,001. Therefore, rather than performing its intended function, this rule becomes a catch all for anyone, anywhere, selling any firearm, for any purpose. Effectively making it next to, if not, impossible for a private (non-FFL) person to sell a firearm without running afoul of this proposed rule.

D. The Proposed Rule Would Create Significant Financial and Logistical Hurdles.

As noted above, the proposed rule would capture nearly everyone selling a firearm because nearly everyone who sells a firearm arguably does so with a profit motive. As such, this rule would require virtually anyone who owns a firearm to eventually obtain an FFL if they wish to sell their firearm. This comes with a number of hurdles for both the ATF and the countless individuals needing FFLs. For example, the cost of obtaining an FFL can reach up to \$3,000, varying based on the type of license and additional expenses incurred on an annual basis simply to maintain the license. *See* 18 U.S. Code § 923; 27 CFR § 478.42. These upfront and ongoing costs represent a significant financial barrier for individuals simply wanting to exercise their Second Amendment rights and dispense with their property as needed. This is particularly true of low-income individuals who will feel a disproportionate impact as they are less able to pay these costs. For individuals not previously requiring an FFL, this fee is a new, direct cost associated with the legal sale of a firearm.

Implementing the proposed rule would also create substantial administrative challenges, particularly for the ATF. This significant increase in the volume of FFL applications would strain the ATF's processing capabilities. Under current regulations, the ATF already undertakes a rigorous and detailed process for each FFL application, which includes thorough background checks, verification of compliance with local and state laws, and assessment of the applicant's eligibility under federal law. The influx of new applications from individuals who traditionally would not require an FFL – such as casual or one-time sellers – would exponentially increase the

ATF's workload. This could lead to extended processing times, potentially creating backlogs and delays in issuing licenses. Moreover, the increased administrative demand could stretch the ATF's resources thin, impacting their ability to efficiently oversee and enforce more critical areas of their mandate. The logistical and practical implications of this proposed rule raise concerns about the ATF's capacity to effectively manage the heightened volume of applications while maintaining the integrity and thoroughness of the licensing process.

Not only would the rule create substantial administrative challenges for the ATF, but also it would inevitably lead to increased costs for the agency. The significant rise in the volume of FFL applications would necessitate additional resources for processing, including personnel, technology, and administrative support. This heightened demand could strain the ATF's budget, requiring additional funding to manage the surge in applications efficiently and maintain the high standards of the licensing process. The financial implications of this increased workload are a crucial factor to consider, as they may impact not only the ATF's operational efficiency but also potentially stretch federal resources.

II. THE AGENCIES SHOULD ABANDON OR SIGNIFICANTLY ALTER THEIR PROPOSED REDEFINITION OF “DEALER” AS IT IS VAGUE, OVERBROAD, ARBITRARY, AND CAPRICIOUS.

The agencies, through the proposed rule, attempt to also redefine who is a “dealer” under 27 CFR 478.11, in an effort to comply with their redefinition of who is “engaged in the business.” The agencies claim that the purpose of redefining dealers is to “clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities may be conducted.” 88 Fed. Reg. at 61,997. However, this redefinition is similar to the proposed language of “engaged in the business.” There are two main reasons why this redefinition should be abandoned, or at the very least, significantly altered. First, the proposed definition captures everyone who meets the new “to predominantly earn a profit” definition, which, as discussed above, has a litany of issues. Second, everyone who meets the definition of a dealer is required to obtain an FFL in order to sell firearms. These distinct flaws in the proposed rule would require every person who meets the profit definition to obtain an FFL, and if they fail to do so the penalty is 10 years imprisonment under 18 U.S.C. 924(a)(1)(D).

A. The Definition Captures Everyone Who Meets the “To Predominantly Earn a Profit Definition.”

The proposed rule fails to define the exact language change that will be made to 27 CFR 478.11. Rather, it ambiguously mentions that the purpose of the rule is to “clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities may be conducted.” 88 Fed. Reg. at 61,997. On one hand, this language is very broad, and would allow the agencies to classify whatever persons they feel fit as a dealer. But even if the language is the exact language to be defined in the CFR, it is still overbroad. Either way, the proposed rule would encompass an incredibly large group of law-abiding citizens, everyone who meets the “to predominantly earn a profit” definition. Which, to reiterate, is nearly everyone who wishes to sell a firearm. Therefore, this rule becomes nothing more than a tool to prohibit the American people

from transferring firearms, regardless of the stated exceptions for hobbyists. And further, the proposed rule would not only prohibit transfers, this rule would also require those who wish to sell a firearm to obtain an FFL and follow all of the rules associated with the license. The agency has the sole authority to issue FFLs. In its fundamental nature, this rule would allow the agency the power to determine who, if any American, can sell firearms. Even if FFLs are given out at the rampant rate that this rule will require for compliance, it will effectively create a national gun registry. And ATF would anoint itself the sole arbiter of whether any given seller is protected by the Second Amendment, which is not called for under the Constitution. In the United States, we do not give tyrants such power.

CONCLUSION

Mountain States Legal Foundation's Center to Keep and Bear Arms appreciates the opportunity to submit these comments on the ATF and DOJ's proposed rule, ATF 2022R-17. The proposed rule is deeply flawed. To avoid violating our Constitution and the statutory restraints on unlawful agency action, the ATF should abandon the current rulemaking, and instead focus its time on deregulatory efforts necessary to comply with *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 597 U.S. — (2022).

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