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

The following comments concern the ATF proposed rule on Definition of “Engaged in the Business” as a Dealer in Firearms: Federal Register Number 2023-19177, published on September 8, 2023 (the “Proposed Rule”).

Introduction

The proposed rule would expand definitions in the Gun Control Act to require ever-more gun owners to obtain federal dealer licenses. Ordinary gun owners are not required to obtain any kind of license from ATF. To exercise the Second Amendment right to keep and bear arms, a person must be able to obtain firearms, and is free to dispose of firearms without a license as long as the person is not in the gun business. The proposed regulation purports to require many such gun owners to obtain a firearm dealer’s license.

The following demonstrates that the statutory definitions are exclusive. As the legislative history of the Firearm Owners’ Protection Act makes clear, Congress intended to preclude a broad reading of “engaged in the business.” The proposed rule exceeds ATF’s authority. There is an obvious conflict between a “zero-tolerance” policy for revoking licenses and stampeding large numbers of non-business gun owners into getting licenses. Requiring a license for incidental transactions in firearms would violate the Second Amendment. Finally, the GCA is a criminal statute which ATF may not expand, including in civil and administrative matters, and regarding which ATF is entitled to no deference by the courts.

I. The Statutory Definitions are Exclusive

The GCA defines “dealer” as “any person engaged in the business of selling firearms at wholesale or retail.” 18 U.S.C. § 921(a)(11). 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....” But the definition “shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.” § 921(a)(21)(C).

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

“The term ‘to predominantly earn a profit’ means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection ...” § 921(a)(22). That was the same definition that FOPA enacted for “with the principal objective of livelihood and profit.” Given that this definition remained the same, the BSCA amendment must be regarded as stylistic, not substantive. Importantly, the BSCA did not amend or alter the requirements of § 921(a)(21)(C).

The above definitions are all from § 921(a), which begins: “As used in this chapter,” thereby generally precluding any addition to the definitions by regulation. There is a single exception to this rule: “The term ‘collector’ means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define ...” § 921(a)(13). That explicit authorization negates any implied regulatory power to expand definitions for other terms. “When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).” *Bittner v. United States*, 598 U.S. 85, 94 (2023).

In addition to the above, ATF has limited authority to adopt regulations: “The Attorney General may prescribe “*only* such rules and regulations as *are necessary* to carry out the provisions of this chapter” (chapter 44 of title 18). 18 U.S.C. § 926(a) (emphasis added). FOPA deleted the prior language that “the Secretary may prescribe such rules and regulations *as he deems reasonably necessary* to carry out the provisions of this chapter.” FOPA, § 106.

Finally, in enacting FOPA, Congress made its intent clear to narrow the reach of the GCA and of ATF’s authority by declaring:

The Congress finds that –

(1) the rights of citizens –

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments;
require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.

§ 1(b), P.L. 99-308, 100 Stat. 449 (1986).

II. The Legislative History of the Firearm Owners’ Protection Act Shows that Congress Intended to Preclude a Broad Reading of “Engaged in the Business”

The FOPA definitions are so detailed because the original GCA had no definition of “engaged in the business” and numerous gun owners who made only occasional sales were being prosecuted because they didn’t have licenses.

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

In 1984, the Senate Judiciary Committee noted witness testimony showing “the urgent need for changes in current law to prevent the recurrence of abuses documented in detail” *Federal Firearms Owners Protection Act, Report 98-583, Sen. Jud. Com., 98th Cong., 2d Sess., at 3 (1984).* It explained: “Many firearm hobbyists sell or trade firearms from their collections, and hearings have repeatedly established that many such hobbyists have been charged and convicted for technically violating the broad reading which courts had given this phrase.” *Id.* at 8. One of those vague tests applied to “anyone who ‘has guns on hand’ or can obtain them and is willing to sell” *Id.* The FOPA bill “would substantially narrow these broad parameters by requiring that the person undertake such activities as part of a ‘regular course of trade or business with the principal objective of livelihood and profit.’” *Id.*

In debate in the Senate in 1985, Sen. Abnhor noted “tremendous confusion over who should possess a FFL license” 131 Cong. Rec. S9111 (1985). According to Sen. Laxalt, “Current law is ambiguous in its requirements, ensnaring many people who have neither the desire nor the intent to violate the law.” *Id.* at H9113. Sen. Hatch, the bill’s floor manager, noted

“a hodgepodge of definitional interpretations found in court rulings” which “has led to many collectors being convicted for just a few sales which were made during the regular and normal course of their collecting or hobby activities.” *Id.* at S9125.

Without a specific definition, courts had held that “there is no minimum profit, no requirement of advertising, employment of others, or premises used for business,” according to Sen. Sasser, who added: “One court has even claimed that the display of a firearms collection in a glass case is listed among the characteristics associated with a ‘firearms business venture,’ so that a normal collector’s display at a gun show is itself evidence of violation.” *Id.* at S9127, citing *United States v. Jackson*, 352 F. Supp. 672 (D. Ohio 1972), *aff’d*, 480 F.2d 927 (6th Cir. 1973).

In House debate, Rep. Volkmer, chief sponsor of the bill, detailed specific cases of abuse. R.C. Lindsey, a witness in one of the hearings, had a license: “BATF sought to revoke it, not upon the grounds that he had ever done wrong, but on the grounds that he was not selling enough guns to merit the license. He had sold three, at a time when the Bureau was prosecuting unlicensed persons selling three or four guns for dealing without a license.” 132 Cong. Rec. H1651 (1986). By contrast, Patrick Mulcahey was arrested for dealing without a license “after he sold three firearms from his personal collection over the period of 1 year.” *Id.* at H1652.

In response to comments about the large number of licensees, Rep. Marlenee asked, “Has anybody ever thought that perhaps the reason that we have 225,000 licensed gun dealers is because of the harassment of the BATF and the requirements that are placed on them? ... You cannot clean a gun hardly without having a license.” *Id.* at H1691. If the proposed rule is adopted, that situation will be repeated.

A bill in opposition to FOPA, sponsored by Rep. Hughes, defined “engaged in the business” as “devoting time, attention, and labor to that activity on a recurring basis, and for that purpose maintaining firearms on hand or being willing and able to procure firearms,” excluding sale of a personal collection “in connection with liquidation of that collection.” H1682. As Rep. Hughes explained his bill, for a license to be required “a person must maintain guns on hand or be ready and able to obtain them for sale.” *Id.* at H1694. That sounds curiously like the proposed rule.

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

III. The Proposed Rule Exceeds ATF’s Authority

The proposed ATF regulations here purport to make law by expanding the reach of the GCA beyond what Congress enacted. The rule states that a person “shall be presumed to be engaged in the business of dealing in firearms in civil and administrative proceedings” if the person does something on a *non-exhaustive* list that ATF invented, such as “offers for sale

firearms, and also ... demonstrates a willingness and ability to purchase and sell additional firearms.” A single firearm need not even be sold if the person expresses a willingness to sell firearms, even if the person is merely boasting and has not firearms to sell. That’s not how Congress defined the terms.

The reference to “civil and administrative proceedings” includes actions like forfeitures. ATF can supposedly seize and forfeit firearms based on “presumptions” it invented and is not limited to the grounds for forfeiture set forth in 18 U.S.C. § 924(d), under which many forfeitures require a showing of intent “by clear and convincing evidence” – the opposite of a *presumed* violation.

The proposal concedes that the above presumption does not apply to a criminal case, but “may be useful to courts in criminal cases ... when instructing juries regarding permissible inferences.” But jury instructions are written based on the language of the statute, which sets out the elements of the offense, and the applicable judicial decisions that interpret the law. The agency involved in the prosecution of a case doesn’t get to tell the judge how to draft the jury instructions.

As noted, the GCA defines the terms “to predominantly earn a profit” to mean a predominant intent to obtain pecuniary gain, not other intents, such as improving or liquidating a personal firearms collection. ATF makes up a list of actions that create a presumption that this definition is met, such as “rents ... temporary physical space to display ... firearms they offer for sale, including ... a table or space at a gun show.” The GCA makes no such presumption, and in fact many who display at gun shows are there to improve a collection, or just to talk with persons who happen by about guns and political issues.

The new rule purports to narrow the term “personal collection,” which Congress did not limit, to “personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby.” Somehow “self-defense” didn’t make the cut, although that’s a predominant reason to acquire firearms. As the Supreme Court stated in *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), “the inherent right of self-defense has been central to the Second Amendment right,” and handguns are “overwhelmingly chosen by American society for that lawful purpose.”

The rule adds that the term “personal collection” “shall not include any firearm purchased for the purpose of resale or made with the predominant intent to earn a profit.” But collectors in general buy guns with the purpose of eventual resale when they locate and can afford guns of ever-higher quality and rarity, and they certainly intend to sell guns for more than they paid as the collection moves up the ladder. And any gun owner would hope that the value of his or her firearms will increase in value, even if only to be sold by the heirs at a profit.

Next comes the inevitable list of activities for which a person is “presumed to have the intent to predominantly earn a profit from the sale or disposition of firearms.” In compiling this list, the proposed rule has conveniently deleted the following italicized words from the statutory

term: “a *regular course* of trade or business to predominantly earn a profit through the *repetitive* purchase and resale of firearms.” § 921(a)(21)(C).

The list includes activities like “advertises or posts firearms for sale, including on any website,” terms that apply if you’re just trying to sell a single, rare gun on GunBroker.com; “makes available business cards,” which would apply to a card a collector gives out with the intent to help find rare firearms; rents a “temporary physical space to display ... firearms they offer for sale, including ... [a] table or space at a gun show,” something countless collectors do; and “maintains records, in any form, to document ... profits and losses from firearms purchases and sales,” something many gun owners keep track of without being in the gun business.

IV. Conflict between “Zero-Tolerance” and Stamping Non-Business Gun Owners into Getting Licenses

The proposed rule is calculated to require potentially hundreds of thousands of gun owners who occasionally buy and sell firearms to obtain dealer licenses from ATF. The complaint used to be that there are more licensed gun dealers than gas stations in the U.S. Currently, the Biden Administration pursues a “zero-tolerance” policy of revoking as many dealer licenses as possible for even a single violation.¹ Since license revocation requires “willful” violations, 18 U.S.C. § 923(e), a track record of almost total compliance indicates that a violation was *not* willful.

The policies of “zero-tolerance” and frightening non-dealers into obtaining licenses are diametrically in conflict. Why are both being supported? First, putting actual dealers out of business reduces the availability of firearms in the community, a goal of the anti-gun movement. A large store that sells numerous firearms also generates thousands of records, and under zero tolerance, a single inadvertent error may give rise to a revocation of the license. Second, the anti-gun movement has not been successful in persuading Congress to pass universal background checks. By requiring more persons who only occasionally buy and sell firearms to obtain licenses, all persons who buy guns from them will be required to have a check under the National Instant Criminal Background System.

Under the proposed rule, ATF will find itself deluged with countless numbers of new licensees, but will be spread too thin to conduct inspections over more than a tiny percentage. Keeping track of non-compliant licensees, much less enforcing a “zero-tolerance” policy, will be illusory.

¹ Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety, June 23, 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/>.

V. Requiring a License for Incidental Transactions in Firearms Would Violate the Second Amendment

Exercise of the right to keep and bear arms requires the incidental acquisition and disposition of firearms. The proposed rule expands “engaging in the business” so broadly that it essentially requires a license merely to exercise Second Amendment rights, thereby infringing on the right.

“[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, ... the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). No such demonstration can be made here.

Acquisition and disposition of firearms are ancillary to and necessary for exercise of the right. While the Second Amendment explicitly protects the right to “keep and bear arms,” the only way to exercise the right “is to get one, either through sale, rental, or gift.” *Maryland Shall Issue, Inc. v. Moore*, 2023 WL 8043827, *4 (4th Cir. 2023). Therefore, if a person’s ability to acquire and dispose of firearms is restricted, that person’s right to keep and bear arms is infringed – i.e., hindered. *See id.* at *5 n.8.

The Supreme Court said in *Heller* that “nothing in our opinion should be taken to cast doubt on longstanding ... laws imposing conditions and qualifications on the commercial sale of arms,” which are “presumptively lawful regulatory measures.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). But this language in *Heller* was dicta, and it does not even apply in the non-commercial context. And if anything, by singling out conditions on the commercial sale of arms, this language in *Heller* indicates that conditions on non-commercial sale of firearms are constitutionally suspect.

The GCA requires a license to be a dealer in firearms, and a dealer is obliged to fulfil various requirements. The dealer waives Fourth Amendment rights to the extent the GCA authorizes unannounced ATF inspections during business hours on the licensed premises to examine required records and firearm inventory. 18 U.S.C. § 923(g). The dealer waives the Fifth Amendment privilege against self-incrimination to the extent the GCA requires the keeping of records of firearm transactions and making them available for ATF inspection. *Id.* As the proposed regulations attempt to push more of the people into the dealer category, rights under several provisions of the Bill of Rights are at stake. Recall that FOIA cited concerns under the Second, Fourth, and Fifth Amendments in narrowing the scope of the GCA. § 1(b), FOIA.

Congress has regularly rejected bills to require registration of firearms, and by implication requiring recordkeeping by gun owners, which having a license requires. ATF is prohibited from adopting any rule to establish “any system of registration of firearms, firearms

owners, or firearms transactions or dispositions” 18 U.S.C. § 926(a). The proposed rule wanders too far in that direction by pushing persons who superficially transact in firearms to obtain licenses.

Finally, Congress based the GCA’s requirement of dealer licensing on its power to regulate commerce among the states. Gun owners who buy and sell firearms occasionally are not involved in commerce, much less interstate commerce. Pushing them into the licensing category pretends that they are. That is beyond the federal government’s power under the Commerce Clause, U.S. Const., Art. I, § 8, and the Tenth Amendment, another provision cited in § 1(b), FOPA.

VI. The GCA Is a Criminal Statute Which ATF May Not Expand and Regarding Which ATF Is Entitled to No Deference by the Courts

The GCA is a criminal statute which ATF is not entitled to expand and the interpretation of which ATF is not entitled to any deference. That is the case regardless of whether an issue arises in a civil or administrative situation, as the GCA’s terms mean the same in all contexts, criminal or not.

As the Supreme Court has reiterated, “we have never held that the Government’s reading of a criminal statute is entitled to any deference.” *United States v. Apel*, 571 U.S. 359, 369 (2014) (also noting that executive branch “views may reflect overly cautious legal advice Or they may reflect legal error.”). *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (Attorney General not entitled to deference in interpretation of criminal law); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (“we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”).

Abramski v. United States, 573 U.S. 169, 191 (2014), rejected ATF’s interpretation of a GCA provision with this explanation: “The critical point is that criminal laws are for courts, not for the Government, to construe.... We think ATF’s old position no more relevant than its current one – which is to say, not relevant at all.”

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

That principle was applied in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), which rejected ATF’s interpretation of the application of a certain definition in the National Firearms Act. The Court concluded that “although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. ... It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center’s favor.” *Id.* at 517. *See Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n. 8 (2004) (if a

statute has criminal applications, “we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context”).

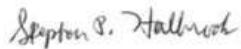
Thompson/Center was thus a civil case involving a statute that is also criminal. The proposed rule’s “rebuttable presumptions” applicable to civil and administrative matters, but not criminal cases, is thus based on a false dilemma. Indeed, ATF has cited no authority authorizing it to adopt regulations that create presumptions applicable to the statutory terms at all for any purposes, civil or criminal.

In sum, the GCA is a criminal statute the definitions of which may not be expanded by ATF, regardless of whether the issue arises in a criminal or civil context.

Conclusion

The proposed Definition of “Engaged in the Business” as a Dealer in Firearms, Docket No. ATF 2022R-17, should be rejected.

Sincerely,

A handwritten signature in cursive script that reads "Stephen P. Halbrook".

Stephen P. Halbrook