

# United States Senate

WASHINGTON, DC 20510

November 30, 2023

Helen Koppe  
Enforcement Programs and Services  
Office of Regulatory Affairs  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
United States Department of Justice  
99 New York Avenue NE, Mail Stop 6N-518  
Washington, DC 220226

RE: Docket Number: ATF 2022R-17  
Comment Letter: Notice of Proposed Rulemaking: Definition of “Engaged in the Business” as a Dealer in Firearms

Dear Ms. Koppe:

On August 31, 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) proposed a new rule—Definition of “Engaged in the Business” as a Dealer in Firearms—to interpret Section 12002 of the Bipartisan Safer Communities Act (BSCA) that Congress passed with bipartisan support and that President Biden signed into law in June 2022. We, the undersigned Members of the Senate, submit this comment in strong support of the proposed rule, which will strengthen our background check system to keep firearms out of the hands of individuals who are prohibited from purchasing or possessing them.

BSCA was drafted and debated following terrible tragedies in Buffalo, New York, where 10 Black Americans were shot and killed in a Tops Friendly Market on May 14, 2022; and in Uvalde, Texas, where, 10 days later, 19 students and two educators were shot and killed—and another 17 were shot and wounded—at Robb Elementary School. Through BSCA, Congress intended to respond to the gun violence crisis in America. For the first time in almost 30 years, Congress came together on a bipartisan basis to make historic investments in gun violence prevention efforts, mental health services, and school safety programs, as well as to provide federal law enforcement with new tools to bolster our background check system.

To do so, BSCA—among other things—revised the definition of “engaged in the business” as applied to firearms dealers under 18 U.S.C. § 921(a)(21)(C). For more than 50 years, gun sellers who are “engaged in the business” of dealing in firearms have been required to become licensed dealers—or Federal Firearms Licensees (FFLs). And, since the 1990s, FFLs have been required to conduct background checks on prospective purchasers to prevent persons prohibited under existing law from purchasing and possessing firearms.

For decades, however, gun sellers have sold firearms without background checks because the term “engaged in the business” has never been clearly defined—a flaw which has allowed sellers to avoid and evade licensing requirements and to sell guns in commercial marketplaces like gun shows and online without running background checks. For example, between 2018 and 2020, investigators from Everytown for Gun Safety collected over nine million posts on Armslist.com, which describes itself as the “largest free gun classifieds on the web.” Sixty-eight percent of those posts listed firearms for sale. Of those, 78 percent were from unlicensed sellers.<sup>1</sup>

Between 1986 and the passage of BSCA, the term “engaged in the business” meant “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.” BSCA struck the condition that, to be “engaged in the business” of dealing in firearms, a person had to do so “with the principal objective of livelihood and profit,” and replaced it with a new one. Now, to be “engaged in the business” of dealing in firearms, a person must do so “to predominantly earn a profit.” BSCA also defined the term “to predominantly earn a profit” to mean “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.” These changes were intended—as Senator Murphy explained on the Senate floor at the time—to “clarify . . . who needs to register as a . . . licensed dealer . . . and . . . perform background checks.”<sup>2</sup>

These are the same changes that ATF has interpreted in its proposed rule, pursuant to the authority that Congress has long and consistently delegated to the Department of Justice and ATF to enforce our federal firearms laws, including the Gun Control Act of 1968 and now BSCA. The proposed rule is appropriately based on investigative efforts and regulatory action that ATF has undertaken for decades and Congress’ recognition that ATF can, and must, address the modern firearms marketplace, including the conditions under which guns are bought and sold. Claims that ATF has overstepped or even usurped Congress’ legislative powers are inapposite. ATF has, time and again, implemented the laws that Congress has passed, including those related to licensing requirements and procedures, as well as background checks. ATF’s proposed rule is no different.

ATF’s mission includes reducing violent crime and enhancing public safety through its enforcement of federal laws regulating firearms. Without BSCA and the ATF’s proposed rule, too often, firearms have ended up in the hands of dangerous individuals due to gaps in the current background check system; been obtained by traffickers through straw purchasers who buy them from rogue sellers; and included a growing number of untraceable ghost guns, because of industry “innovations” that are intended to flout existing laws and regulations. To that end, the proposed rule is critically important. As a whole, the proposed rule, in practice, will expand background checks to more gun sales than ever before—keeping more firearms out of the hands of individuals who are not permitted to purchase or possess them. It addresses legal loopholes on both the seller and purchaser sides to prevent sellers from transferring firearms to prohibited purchasers and prohibited purchasers from receiving them.

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<sup>1</sup> <https://bit.ly/3dUshWo>

<sup>2</sup> <https://www.congress.gov/117/crec/2022/06/21/168/105/CREC-2022-06-21-pt1-PgS3023-4.pdf>

To do so, the proposed rule covers conduct and activities through rebuttable presumptions applicable in civil and administrative proceedings that indicate that a gun seller is “engaged in the business” of dealing in firearms and has demonstrated the intent “to predominantly earn a profit.” Gun sellers engaged in this conduct and these activities are required to become licensed dealers through the same process by which current FFLs become licensed. They are subject to all the same responsibilities required of current FFLs, such as recordkeeping and reporting, passing compliance inspections, and conducting background checks on prospective purchasers. The proposed rule also contains detailed explanations for these presumptions and reflects the modern reality that firearms dealing can occur in any location and through any medium. The latter reflects “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).”<sup>3</sup>

These presumptions are based on prior civil, administrative, and criminal proceedings and enforcement actions, including FFL compliance inspections, criminal investigations and prosecutions for dealing in firearms without a license, civil seizure and forfeiture actions, cease and desist letters, and license revocations and denials. In addition, the proposed rule roots these presumptions in case law and precedent, including pre-BSCA case law and precedent.

The presumptions included in the proposed rule capture the business-like conduct that we, in Congress, intended to cover in BSCA. This conduct includes repetitively selling or offering for sale firearms of the same or similar kind and type. It also includes advertising or marketing a firearms business, or purchasing, renting, or securing physical space to display and store firearms offered for sale.

It is our view that these presumptions, among others included in the proposed rule, are essential and must be present in the final rule for the rule to be effective and to give the intended effect to the changes in the law that we made in BSCA. The proposed rule also makes important distinctions between business inventories and personal collections and the obligations that FFLs and former FFLs have when it comes to firearms in their inventories and firearms in their personal collections.

The proposed rule is clear: when guns are offered for sale in commercial marketplaces—whether at a gun show or online—there is business, and those selling them are engaged in that business and required to become licensed dealers and conduct background checks. The proposed rule also makes clear that, while no minimum number of transactions is determinative, “even a single firearm transaction or offer to engage in a transaction, when combined with other evidence, may be sufficient.” ATF’s dual approach—1) rebuttable presumptions for when a person is “engaged in the business” of dealing in firearms, and 2) for conduct and activities not covered in those presumptions, determinations based on the totality of the circumstances—will help close the loopholes that have allowed individuals engaged in the business of selling guns to do so without getting licensed and without running background checks for decades.

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<sup>3</sup> Federal Register, Volume 88, No. 173, NPRM on Definition of “Engaged in the Business” as a Dealer in Firearms (Sept. 8, 2023), online at <https://www.govinfo.gov/content/pkg/FR-2023-09-08/pdf/2023-19177.pdf>.

Neither Section 12002 of BSCA nor ATF's proposed rule should be read in isolation. Congress did more in BSCA than just revise the definition of "engaged in the business." Congress took other substantial steps demonstrating our clear intent to strengthen our background check system. For example, Congress created an enhanced background check process for prospective purchasers under the age of 21 and appropriated \$200 million to the Department of Justice to make grants to states to help implement these enhanced checks. As of June 14, the Federal Bureau of Investigation had conducted more than 100,000 enhanced checks, which have resulted in almost 1,000 denials—including over 200 attempted transactions denied due to the changes made in BSCA.<sup>4</sup> Congress also narrowed a loophole in the background check system that allowed dating partners convicted of misdemeanor crimes of domestic violence to purchase and possess firearms. Prior to BSCA, the misdemeanor crime of domestic violence prohibitor applied only to individuals who were married, lived with, or had a child with the victim. And Congress established new federal criminal offenses for both firearms trafficking and straw purchasing—acts that have long undermined the background check system and funneled firearms to prohibited persons who cannot pass a background check.

These additional changes would make little sense had Congress intended Section 12002 to be interpreted and implemented in a narrow manner, and their impact on gun violence would be diminished. In fact, to continue to allow unlicensed sellers to sell guns at gun shows and online without background checks undermines the entire background check system. For example, prospective buyers under 21 who would be denied under BSCA's enhanced background check process could still get their hands on guns from unlicensed sellers, as could abusive dating partners who are now prohibited from purchasing and possessing firearms under BSCA. To that end, it is critical that ATF interprets and implements Section 12002 fully, robustly, and comprehensively, to strengthen our background check system—as a whole—as Congress intended. That is what the proposed rule would do, and what ATF's final rule must do as well.

As discussed above, with BSCA, Congress intended to take significant action to prevent gun violence. But we recognize that BSCA did not come about overnight. It was three decades in the making—30 years over which hundreds of thousands of lives have been stolen and communities all across the United States have been ravaged due to gun violence. ATF's proposed rule honors those lives and those communities with action. It is a simple solution, the need for which was demonstrated when seven people were shot and killed and another 25 were shot and wounded by a single shooter between Midland and Odessa, Texas. The shooter had attempted to purchase a firearm from a licensed dealer, but—as required by law—the dealer ran a background check and the background check system denied the sale. So the shooter found another seller—unlicensed and online—who chose not to run a background check and who sold him the AR-15 style rifle he later used.<sup>5</sup>

As Senator Cornyn explained on the Senate floor in September 2019: "It is clearly Congress's intent to make sure that if you are in the business of buying and selling firearms in a commercial enterprise, you should be licensed. . . . I believe Congress has a role—and there is a pretty clear

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<sup>4</sup> <https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence>

<sup>5</sup> <https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms>

path forward—to clarify existing law so that . . . more people in the business of selling firearms will become federally licensed firearms dealers, and, thus, by definition, end up doing more background checks.”<sup>6</sup> Four years later, Congress followed that path forward in BSCA, and Senator Cornyn helped lead Congress down it as one of BSCA’s main authors. Another lead author, Senator Murphy, made the same case—noting on the floor that, in BSCA, “[w]e clarify . . . the definition of a federally licensed gun dealer to make sure that everybody who should be licensed . . . is.”<sup>7</sup>

Other Members of Congress echoed Senator Murphy during the BSCA debate. Representative Nadler, then-Chair of the House Committee on the Judiciary, explained that BSCA “makes more sellers responsible for conducting background checks.”<sup>8</sup> Representative Sheila Jackson Lee, at that time the Chair of the House Subcommittee on Crime, Terrorism, and Homeland Security, reiterated that BSCA “further strengthen[s] 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.”<sup>9</sup> Senator Heinrich noted that “[BSCA] also makes clear who the Federal firearms licensing requirements apply to, leading to more firearm sales that require a background check.”<sup>10</sup> Senator Reed, too, remarked that BSCA “will strengthen requirements for gun sellers to obtain a Federal firearms license.”<sup>11</sup>

This is exactly what ATF’s proposed rule will help do. And it will do so in a manner consistent with the statutory changes that Congress made in BSCA to the definition of “engaged in the business” of dealing in firearms, and pursuant to the authority that Congress has long delegated to ATF to interpret and implement the laws that Congress has passed. ATF’s proposed Definition of “Engaged in the Business” as a Dealer in Firearms rule will save lives and make our communities safer. For all these reasons, we submit this comment in support of ATF’s proposed rule and encourage ATF to finalize it.

Sincerely,



Richard J. Durbin  
United States Senator



Charles E. Schumer  
United States Senator

<sup>6</sup> <https://www.congress.gov/116/crec/2019/09/18/CREC-2019-09-18-pt1-PgS5553-2.pdf>

<sup>7</sup> <https://www.congress.gov/117/crec/2022/06/22/168/106/CREC-2022-06-22-pt1-PgS3053.pdf>

<sup>8</sup> <https://www.congress.gov/117/crec/2022/06/24/168/108/CREC-2022-06-24-pt1-PgH5895.pdf>

<sup>9</sup> <https://www.congress.gov/117/crec/2022/06/24/168/108/CREC-2022-06-24-pt1-PgH5895.pdf>

<sup>10</sup> <https://www.congress.gov/117/crec/2022/06/23/168/107/CREC-2022-06-23-pt1-PgS3104-2.pdf>

<sup>11</sup> <https://www.congress.gov/117/crec/2022/06/23/168/107/CREC-2022-06-23-pt1-PgS3110.pdf>



Sheldon Whitehouse  
United States Senator



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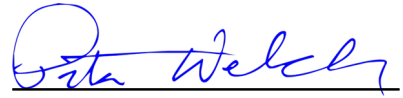
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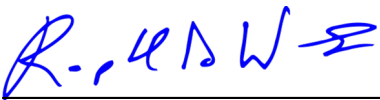
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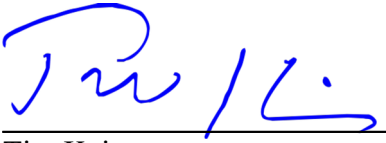
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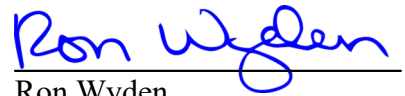


Robert P. Casey, Jr.  
United States Senator



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Tim Kaine  
United States Senator



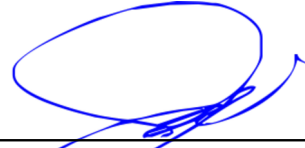
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Ron Wyden  
United States Senator



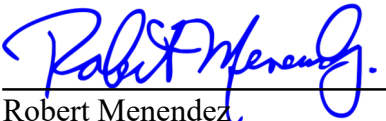
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United States Senator



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