



December 7, 2023

*Via Federal eRulemaking Portal*

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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

**RE: Definition of “Engaged in the Business” as a Dealer in Firearms;  
ATF 2022R-17. 88 Fed. Reg. 61,993 (Sept. 8, 2023) (“Proposed  
Rule”).**

Dear Department of Justice & Bureau of Alcohol, Tobacco, Firearms and Explosives:

The following comments are submitted on behalf of Firearms Policy Coalition, Inc.; FPC Action Foundation; and their numerous members across the country. The regulatory changes contemplated in the Proposed Rule are deeply troubling and demonstrate a profound disrespect for the People of the United States and peaceable gun owners across our Nation. At base, the Proposed Rule demonstrates either a complete failure to understand the natural, unalienable, fundamental rights of the People or, more insidiously, an intentional effort to undermine those very rights. While commentors will provide a thorough demonstration of the inherent flaws with the regulatory changes offered in the Proposed Rule, our comments can be described with a single word: **NO**.

## **BACKGROUND**

In 1968, Congress enacted the Gun Control Act (“GCA”), which superseded the prior Federal Firearms Act (“FFA”) and amended portions of the National Firearms Act (“NFA”). 18 U.S.C. § 921, *et seq.* In relevant part, the GCA makes it unlawful for unlicensed persons “to engage in the business of importing, manufacturing, or dealing in firearms.” 18 U.S.C. § 922(a)(1)(A).

Violations of the GCA carry criminal penalties, including a fine and up to five years' imprisonment. 18 U.S.C. § 924(a)(1)(D) (“[W]hoever . . . willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.”). In addition, any firearms or ammunition involved or used in violation of Section 922(a)(1)(A) are subject to forfeiture. 18 U.S.C. § 924(d)(3)(C). Finally, if an individual is convicted of unlawfully being engaged in the business of dealing in firearms, that individual is forever prohibited from possessing a firearm or ammunition for the remainder of their life. 18 U.S.C. § 922(g)(1) (“It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]”).

In 2022, Congress enacted the Bipartisan Safer Communities Act (“BSCA”), Pub. L. 117-159, 136 Stat. 1313, which amended one portion of the GCA’s definition of “engaged in the business,” in relevant part, as follows:

The term “engaged in the business” means—

...

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), 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~~ 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 his personal collection of firearms[.]

18 U.S.C. § 921(a)(21)(C).

Congress also added a corresponding definition of “predominantly earn a profit,” defining that term to mean:

[T]hat 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 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.

18 U.S.C. § 921(a)(22).

## **IDENTITY AND INTEREST OF COMMENTORS**

Firearms Policy Coalition, Inc. (“FPC”) is a nonprofit membership organization incorporated in Delaware with a primary place of business in Clark County, Nevada. FPC works to create a world of maximal human liberty and freedom and to promote and protect individual liberty, private property, and economic freedoms. FPC seeks to: protect, defend, and advance the People’s rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms; protect, defend, and advance the means and methods by which individuals may exercise their rights, including but not limited to the acquisition, collection, transportation, exhibition, carry, care, use, and disposition of arms; foster and promote the shooting sports and all lawful uses of arms; and, foster and promote awareness of, and public engagement in, all of the above. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs.

FPC Action Foundation (“FPCAF”) is a 501(c)(3) nonprofit organization dedicated to fighting for and preserving the rights and liberties protected by the United States Constitution, especially the Right to Keep and Bear Arms. FPCAF focuses on research, education, scholarly publications, and legal efforts—including overseeing FPC Law, the nation’s first and largest public interest legal program focused on the People’s natural and constitutionally protected Right to Keep and Bear Arms—to ensure that the freedoms protected and guaranteed by the Constitution are secured for future generations.

FPC and FPCAF are the leaders in the Second Amendment litigation and research space, responsible for invalidating scores of unconstitutional restrictions across the Nation.

## **COMMENTS**

Under the guise of implementing the alterations to the GCA introduced by the BSCA, this Proposed Rule, in truth, seeks to expand ATF’s regulatory authority—an issue not new to this Agency. To be sure, the amendments to the GCA established by the BSCA are not surplusage, but they do not stretch nearly as far as the Proposed Rule seeks to stretch ATF’s regulatory reach. While the Proposed Rule purports to merely interpret these terms and others in the GCA and BSCA, it actually goes far beyond the plain meaning of the same.

Among other issues, the Proposed Rule fails to provide any bright-line rules for individuals to ascertain whether they are actually “engaged in the business” and instead claims that ATF will conduct a “fact-specific inquiry” under which “even a single firearm transaction” may suffice. 88 Fed. Reg. at 62,021 (to be codified at 27 C.F.R. § 478.11). This is not a rule, nor is it knowable to the average, reasonable

person. And yet, this Proposed Rule suggests alterations to federal regulation that will bear the full force of criminal law. More, the Proposed Rule leaves complete and total discretion in the hands of ATF. When even a single sale can qualify a person as “engaged in the business,” ATF is clearly empowered to both “say what the law is” and to enforce said law.

Additionally, the Proposed Rule creates a set of rebuttable presumptions that will cause ATF to presume that a person is “engaged in the business of dealing in firearms in civil and administrative proceedings, absent reliable evidence to the contrary.” *Id.*; see also *id.* at 62,021–22 (similar presumptions for “intent to predominantly earn a profit”). In other words, under the proposed regulatory changes, an individual is guilty until proven innocent. It should not require public comment to demonstrate that is a deep perversion of this Nation’s formulation of justice.

## **I. The Proposed Rule’s Planned Application Of The Definition of “Engaged In The Business” Is Unlawful**

Contrary to the character and spirit of the Proposed Rule, the GCA, even as amended by the BSCA, explicitly and inherently recognizes a basic dichotomy: the sale of personal firearms does not require licensure; only “repetitive” transactions designed “to predominantly earn a profit” require licensure. That is, those who “make[] occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sell[] all or part of [their] personal collection of firearms” need not be licensed. 18 U.S.C. § 921(a)(21)(C). Instead, only those who deal in firearms “as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms” must be licensed. *Id.*

Indeed, the distinction drawn by the GCA is a plain one—only those who seek to sell firearms as a business are required to be licensed by the federal government. Those who merely buy and sell firearms as a means of limiting or expanding their personal possessions are, by definition (and indeed under common sense), not “engaged in the business.”

But the Proposed Rule seeks to turn federal law (and common sense) on its head. The Proposed Rule directly contradicts the scheme established by Congress in the GCA and BSCA, specifically Congress’s choice to exempt from licensure “occasional” gun sales and gun sales from a “personal collection.” Under the Proposed Rule, any sale—even the sale of a single firearm—may trigger liability for an unlicensed transaction based on an amorphous, ill-defined “totality of the

circumstances” test.<sup>1</sup> 88 Fed. Reg. at 62,000; *see also id.* at 62,021 (“[E]ven a single firearm transaction or offer to engage in a transaction . . . may require a license.”).

Congress’s alterations to the GCA via the BSCA do not go nearly as far. In fact, the 177th Congress explicitly recognized the dichotomy established by their predecessors over half a century earlier in the GCA and defined to “predominantly earn a profit” to mean “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) (emphases added). The sole exception provided by Congress? “[C]riminal purposes or terrorism.” *Id.* It is clear that even the BSCA’s alterations do not empower ATF to impose a discretion-laden inquiry on nearly every private transaction that can result in even a single sale amounting to an individual being “engaged in the business.”<sup>2</sup>

Compounding the error, the Proposed Rule would allow—no, force—ATF to *presume* that a wide range of occasional and personal sales require a license. For example, a gun owner who “posts” on a “website” two “similar” “firearms for sale” from his personal collection, *see* 88 Fed. Reg. at 62,021, must, under the Proposed Rule, be presumed to have unlawfully engaged in the business of dealing firearms to predominantly earn a profit. He will then have the burden of providing ATF with “reliable evidence to the contrary” to show that he did not violate federal law. *Id.* By contrast, ATF’s presumptions that one is *not* engaged in the business are wildly underinclusive and extend only to a person who “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.” *Id.*

This proposal flips federal law on its head. Congress affirmatively exempted from licensure *all* sales to expand or liquidate a private collection and occasional transactions—even with some profit motive—to enhance a collection or for a hobby. But ATF now seeks to presume the opposite for a wide array of transactions.

Congress did not give ATF the authority to presume that the mine-run of individual gun transactions are unlawful and then to use “uncertainty” as a “Sword of Damocles” to prevent “law-abiding Americans” from engaging in other lawful transactions, merely because they do not have a federal license. *VanDerStok v.*

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<sup>1</sup> Additionally, this standard is excessively vague and fails to notify individuals and regulated parties alike of what behavior is being criminalized.

<sup>2</sup> In fact, as a matter of pure textual interpretation, both the GCA and BSCA consistently and exclusively refer to the sale of “firearms,” in relevant part. Congress did not use the singular. If Congress wished to regulate a single sale of a single firearm, it would have said as much, as it would not have “hid[den] elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

*Garland*, No. 23-10718, 2023 WL 7403413, at \*12 (5th Cir. Nov. 9, 2023) (Oldham, J., concurring). Such a rule would reject “the ordinary meaning and structure of the law itself,” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019), which allows individuals to sell their personal firearms without the onus of federal compliance.

## **II. The Proposed Rule’s Rebuttable Presumptions Of Liability Are Unlawful**

The Proposed Rule also specifically sets forth a set of “rebuttable presumptions” that “would apply in civil administrative proceedings.” 88 Fed. Reg. at 62,000. The Proposed Rule claims that these presumptions “shall not apply to criminal cases,” but that they “may be useful to courts in criminal cases when instructing juries regarding permissible inferences.” 88 Fed. Reg. at 62,001.

These “presumptions” are extensive, spanning two pages of the Proposed Rule and encompassing a vast number of different activities. 88 Fed. Reg. at 62,000–01.<sup>3</sup> And, of course, the Proposed Rule indicates that these “presumptions” are illustrative, but not exhaustive. 88 Fed. Reg. at 62,001 (“The activities set forth in the rebuttable presumptions in paragraphs (c)(3)(i) through (vi) of this definition 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.”). For example, under these “presumptions” if an individual sells a firearm to another person and tells that person he has another firearm he is willing to sell, then ATF will presume that the initial seller is “engaged in the business,” regardless of actual intent. Then, the burden would rest on that initial seller to provide ATF with “reliable evidence to the contrary” to show that he did not violate federal law. *See* 88 Fed. Reg. at 62,021. More, even if the initial seller indicates he simply wants to *buy* another firearm at the same time as the sale, that is also subject to a presumption that he is “engaged in the business.” In other words, under the Proposed Rule, downsizing your personal collection by a single firearm, while expressing a desire to continue downsizing, would immediately require ATF to *presume* that you are “engaged in the business”—and unlawfully so if you do not have a federal license. And selling one firearm while offering to buy another, thereby functionally trading one arm for another in one’s collection, *also* requires ATF to presume that the individual is unlawfully engaged in the business.

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<sup>3</sup> “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:

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

(2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross in[c]ome [*sic*] during the applicable period of time;

(3) 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:

(i) stolen firearms (18 U.S.C. 922(j));

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

(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));

(4) repetitively sells or offers 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 (*i.e.*, make/manufacturer, model, caliber/gauge, and action) and type (*i.e.*, the classification of a firearm as a rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm);

(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

First and foremost, it is undisputed that ATF may not require such a rebuttable presumption of liability in criminal applications of the GCA. *See Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). The GCA is a criminal statute, violations of which bear criminal penalties. It is a basic tenant of our legal system that those charged with a crime are presumed innocent until found guilty beyond a reasonable doubt, but the Proposed Rule would flip that longstanding presumption on its head if applied in a criminal context. More, the Proposed Rule fails to adequately explain how, in any instance, such a presumption would be “useful”—or in any way appropriate—to a criminal proceeding, whether considered by the judge or the jury.<sup>4</sup>

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

88 Fed. Reg. at 62,000–01.

<sup>4</sup> In fact, the Proposed Rule’s own citations directly conflict with this point. While noting that these presumptions should be limited to the civil context, the Proposed Rule states that the same could somehow magically transform into permissive inferences, which are permissible in jury instructions. *See* 88 Fed. Reg. at 62,000 n.60 (citing *Patton v. Mullin*, 425 F.3d 788 (10th Cir. 2005) (upholding jury instruction that created a permissive inference rather than a rebuttable presumption)). The Proposed Rule fails to offer any justification as to how these presumptions, which are defined as such in the Proposed Rule, become permissive inferences.



Second, the Proposed Rule’s approach mandating a presumption in the civil context, while allegedly prohibiting it in the criminal context, is blatantly unlawful, given it would require the government to interpret the same statutory text differently in civil and criminal settings. As the Supreme Court explained in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a statute with “both criminal and noncriminal applications” must be interpreted “consistently, whether [courts] encounter its application in a criminal or noncriminal context.” *Id.* at 11 n.8. Given ATF is legally prohibited from imposing a presumption of guilt in the criminal context it also may not, under *Leocal*, employ a rebuttable presumption of liability in “noncriminal applications,” 543 U.S. at 11.n.8; *see also United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality) (applying substantive canon normally reserved for criminal statutes “in a civil setting” to ensure consistent application of the NFA).

Additionally, even if the text of the GCA, as amended by the BSCA, somehow allowed for the content of the Proposed Rule with its attendant criminal penalties (it does not), the rule of lenity would operate to nullify the terms of the Proposed Rule. “[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cargill v. Garland*, 57 F.4th 447, 469 (5th Cir. 2023) (*en banc*). A statute is ambiguous if, after a court has “availed [itself] of all traditional tools of statutory construction,” the court is left to “guess at its definitive meaning” among several options. *Id.* (cleaned up). In those circumstances involving ambiguous criminal statutes, the court is “bound to apply the rule of lenity.” *Id.* at 471. So even if a court were to find that the statutory definition of “engaged in the business” is ambiguous enough to allow for presumptions of guilt based on a single transaction, that is far from the most obvious reading of the statute, which interpretation would thus be resolved in favor of lenity.

Finally, the Proposed Rule is deeply problematic, because it provides very few alternative options for individuals to exercise their right not just to keep and bear arms, but to sell and acquire arms, as well as their fundamental property rights, which include the right to acquire and dispose of property. The Proposed Rule, in effect, would require the vast majority of individuals who privately buy and sell firearms to either acquire a federal license, and thus expose them to the onerous requirements of that license (including but not limited to a waiver of their right to not be subject to warrantless search and seizure), or to buy and sell every firearm in their collection through a licensee. Not only is this a pure and blatant violation of the rights of the People, it also clearly chills the exercise of the same, forcing many to simply not exercise their rights out of fear of criminal prosecution.

### **III. ATF Should Relax The Proposed Rule's Requirements For Firearms On A Licensee's Business Premises**

The Proposed Rule also seeks to alter how ATF treats personal firearms that are possessed on the premises of a federal firearms licensee. In effect, ATF now seeks to define the term “personal collection” to include a licensee’s (or responsible person’s) personal firearms *only* if they are “[s]tored 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.” 88 Fed. Reg. at 62,021.

While this may seem to be a straightforward requirement, it is far from it. Complete segregation of personal firearms from business inventory would be difficult to operationalize and could cause compliance issues which could directly impact not just licensees, but also the individuals who work for those business. For example, if an employee that carries a firearm concealed temporarily secures his personal firearm in a work bench or desk drawer, the business could potentially be cited for a violation—thus also jeopardizing the employee’s work. More, the proposed tagging requirement, in this example, also proves difficult, given the employee would also have to then tag his personal firearm when securing it to avoid potential liability.

Beyond just the difficulties inherent in this approach, this requirement is functionally useless given each of these firearms can be identified by serial number and every firearm owned by the licensee is recorded in its legally mandated business records. Such a requirement is thus the definition of arbitrary.

Accordingly, ATF should remove the requirement for licensees to store separately guns on the business premises from the definition of “personal collection.”

### **IV. The Proposed Rule Fails To Consider Several Important Sources**

In promulgating the Proposed Rule, ATF appears to either misunderstand the structure of our government and the state of firearms law in this country, or to intentionally misinterpret the same. As such, ATF should augment its analysis with the following to ensure a complete and total grasp on the People’s natural, unalienable, fundamental rights along with the plain meaning of Congress’s relevant enactments:

- 1) THE DECLARATION OF INDEPENDENCE (U.S. 1776) (founding our Republic based upon a philosophical idea and grounded in a recognition of the natural, unalienable rights of the People);
- 2) U.S. CONST. AMEND. II (established the protection of the People’s preexisting right to keep and bear arms);

- 3) THE FEDERALIST NOS. 29 (Alexander Hamilton), 46 (James Madison) (discussing the Framers' view of the extent and importance of the right to keep and bear arms);
- 4) Nicholas J. Johnson, *et al.*, FIREARMS LAW AND THE SECOND AMENDMENT (3d ed. 2022) (providing analysis of the foundations of the natural, unalienable right to keep and bear arms, the limited historical regulation of that right, and the unconstitutional and illegal treatment of the right in the modern era);
- 5) Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) (examining the Founders and Framers understanding of and reasoning for proposing and ratifying Second Amendment); and
- 6) Stephen P. Halbrook, FIREARMS LAW DESKBOOK (2023) (analyzing laws and issues concerning firearms offenses, including licensing and sales).

## **V. The Agency's Requirement That Individuals Include Their Name And Address To Comment Violates Their First Amendment Protected Rights And Chills Public Participation**

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, requires government agencies to allow the public to submit "written data, views, or arguments" regarding a proposed rule. 5 U.S.C. § 553(c). Here, however, ATF has placed, among other things, strict self-identification requirements on public comments to the Proposed Rule, which severely limit both the degree and amount of public participation.

The Supreme Court has long recognized that the right to anonymous speech is protected by the First Amendment.<sup>5</sup> Courts have consistently held that restrictions on anonymous speech are subject to "exacting scrutiny" under the First Amendment, where the government must show a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest justifying the ban on anonymous speech.<sup>6</sup>

Unlike those instances where the government's interest was held to be sufficient to prohibit anonymous speech, ATF cannot here meet that burden. Many

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<sup>5</sup> See, e.g., *Talley v. California*, 362 U.S. 60 (1960) (striking down ban on anonymous handbills); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down ban on anonymous campaign literature).

<sup>6</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (interest in deterring corruption and avoiding appearance of corruption sufficient to uphold disclosure of campaign contributors); *Doe v. Reed*, 561 U.S. 186 (2010) (interest in integrity of electoral process sufficient to uphold disclosure of signatories to state referendum).

government agencies accept anonymous comments in identical circumstances.<sup>7</sup> Further, the APA does not require that agencies authenticate comments. Indeed, the focus of agency review of public comments under the APA is on the substance of comments.<sup>8</sup> The identity of the commenters has nothing to do with the concerns raised in comments, and thus ATF has no important interest in obtaining it.

Compounding this problem, ATF is doubtlessly aware of the tumultuous relationship between itself and American gun owners. It is not controversial to observe that peaceable gun owners have a perfectly rational fear of retaliation by ATF for innocent acts or omissions. In light of this, it seems ATF's requirement that the public provide a complete first and last name and contact information, 88 Fed. Reg. 62,019, in order to submit a comment is predictably likely to chill the gun owning public from weighing in and exercising their right to participate. Indeed, this requirement will sharply discourage members of the public who may be uncertain of how the new regulations would apply to them, and hence have the most relevant comments concerning proper line-drawing and the like from commenting. Indeed, even the stoutest of commenters likely would not be foolhardy enough to raise any issues close to the line lest they flag themselves for investigation by ATF when it later ignores their concerns and adopts a broad and vague definition of "engaged in the business."

Because ATF, in this Proposed Rule, discouraged the submission of anonymous comments, we have no way of knowing what information would have been presented absent the speech restriction. Thus, ATF should re-open the comment period, making it clear that anonymous comments will be accepted and considered in developing any final rule.

## **VI. ATF Erred In Failing To Prepare A Federalism Summary Impact Statement For The Proposed Rule Pursuant To Section 6 Of Executive Order 13132**

Executive Order 13132 requires agencies to analyze policies or rulemakings that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,255 (Aug. 4, 1999). Section 3(b) notes:

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<sup>7</sup> See U.S. Gov't Accountability Office, *Selected Agencies Should Clearly Communicate Practices Associated with Identity Information in the Public Comment Process*, at 18–19. (GAO-19-483, June 2019).

<sup>8</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment").

National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

Exec. Order No. 13,132, 64 Fed. Reg. at 43,256.

The Proposed Rule fails to account for the impacts that will be caused by completely altering the legal landscape for those individuals that privately buy and sell firearms. By dictating what constitutes a “business” to the states, the Proposed Rule presents a potential conflict where an individual may be engaged in a business operation requiring a license under federal law, but which may not be treated as such under state law. This creates potential problems for individuals who are legally required to hold a federal firearms license, but then may be prohibited from operating or possessing such a license under local ordinances, especially if the individual’s practices do not necessitate licensure under local/state law.

More, ATF is seeking to broadly regulate a field that the states have already chosen to address in different manners. While some states have chosen to not regulate transfers more strictly than existing federal law, others have decided to impose significantly more stringent requirements for the transfer of firearms between even private parties. *See, e.g.,* CAL. PENAL CODE § 27545 (“Where neither party to the transaction holds a dealer’s license issued pursuant to Sections 26700 to 26915, inclusive, the parties to the transaction shall complete the sale, loan, or transfer of that firearm through a licensed firearms dealer . . .”). Accordingly, there is a clear indication that, in addition to the Proposed Rule’s suspect constitutionality and legality, that this action is not appropriate on the national level.

As such, ATF should have prepared a federalism summary impact statement for the Proposed Rule.

## CONCLUSION

For the foregoing reasons, it is evident that the Proposed Rule is deeply flawed. In present form the Proposed Rule fails to account for the clear charge of Congress and, instead, greatly expands ATF’s regulatory reach—while bearing criminal implications. More, the Proposed Rule unlawfully mandates different interpretations in civil and criminal case, foolishly imposes restrictions on personal arms possessed at an FFL’s location, fails to consider important sources, unconstitutionally prohibits

anonymous comments, and fails to include a federalism summary impact statement. As a result, ATF must either abandon the current rulemaking or, at minimum, undergo significant revision of the Proposed Rule and allow for additional public review and comment.

Respectfully submitted by,

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