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ATF Rulemaking Comments
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

Re: <u>Docket No. ATF–2026–0074; RIN 1140-AB01</u>
<u>Comment on Proposed Rule on "Revising Regulations Defining 'Engaged in the Business' as a Dealer in Firearms"</u>

To Whom It May Concern:

Everytown for Gun Safety Support Fund[1] ("Everytown") submits this comment in response to the notice of proposed rulemaking ("NPRM") issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") amending regulations implementing the "engaged in the business" statutory standard from the Gun Control Act of 1968 ("GCA") as amended by the Bipartisan Safer Communities Act of 2022 ("BSCA"). **For the sake of public safety, we urge ATF to change its proposed rule to: (1) preserve the use of rebuttable presumptions to guide sellers in determining whether behavior qualifies as being "engaged in the business" of firearms dealing; (2) conduct a credible cost-benefit analysis that quantifies the impact of this proposed rule on public safety; and (3) withdraw regulatory changes that risk exacerbating the "fire-sale loophole" through which FFLs that discontinue their licensed business transfer their inventory to their personal collection and then sell guns without background checks.**

<u>Introduction</u>

One of the most important federal firearm laws that ATF enforces is 18 U.S.C. § 922(a)(1)(A), which prohibits a person from engaging in the business of importing, manufacturing, or dealing in firearms unless the person has obtained a federal license. During his Senate confirmation process, Director Cekada was asked, "Do you agree that violations of 18 U.S.C. § 922(a)(1)(A) for unlicensed dealing, manufacturing, or importing should be prosecuted

[1] Everytown for Gun Safety Support Fund is the education, research and litigation arm of Everytown for Gun Safety, the largest gun violence prevention organization in the country with nearly 11 million supporters and more than 700,000 donors. The Everytown Support Fund seeks to improve our understanding of the causes of gun violence and help to reduce it by conducting groundbreaking original research, developing evidence-based policies, communicating this knowledge to the American public, and advancing gun safety and gun violence prevention in communities and the courts.

and that violators should be held accountable?"[2] He responded, "Yes, and ATF is doing exactly that."[3]

Effective enforcement of this "engaged in the business" law is critical for public safety. Those who are "engaged in the business" of dealing in firearms and become federal firearms licensees ("FFLs") must comply with statutory requirements to conduct background checks on prospective purchasers, maintain records of firearm transactions, respond to law enforcement trace requests for firearms recovered in criminal investigations, and report certain information to ATF, such as lost and stolen firearms and multiple sales transactions.[4] These requirements serve the purposes of helping keep firearms out of the hands of those prohibited by law from purchasing and possessing them, helping ATF successfully trace crime guns and combat firearms trafficking, and ensuring that law enforcement can investigate gun crimes and hold bad actors accountable. Many unlicensed gun sellers, however, ignore these requirements.

For decades, firearm sellers who were dealing in firearms for the purpose of profit and who should have been licensed as dealers were able to avoid licensure because of lack of clarity and under-enforcement of the "engaged in the business" standard established by federal law. By not conducting background checks, maintaining inventory or transaction records, or reporting certain information to ATF, unlicensed gun sellers have created more opportunities for prohibited persons to obtain firearms and made it harder for ATF to trace crime guns and combat gun trafficking. Unlicensed gun sellers have become the most common firearms trafficking channel, involved in nearly 41% of trafficking investigations that ATF opened between 2017 and 2021.[5] In that time period, unlicensed gun sellers trafficked more than 68,000 illegal firearms,[6] and approximately 16% of trafficking cases involving unlicensed gun sellers were linked to at least one shooting.[7]

Unlicensed dealing in firearms is also unfair to the many licensed dealers who have followed the law to become licensed as FFLs and meet their legal obligations, including supporting law enforcement efforts to combat trafficking and trace crime guns. Responsible FFLs, especially those that are small businesses, are disadvantaged when they face competition from unlicensed and unregulated dealers who are profiting from off-book sales and evading background check, recordkeeping, and reporting requirements.

Congress enacted BSCA on a strong bipartisan basis in 2022 to, among other things, address the serious harms and inequities that result from unlicensed firearms dealing. Section 12002 of BSCA amended and expanded the statutory definition of "engaged in the business" of

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[2] Robert Cekada, Responses to Questions for the Record, S. Comm. on the Judiciary Hearing (Feb. 2026), response to Senator Padilla question 2, *available at* https://www.judiciary.senate.gov/imo/media/doc/3502d997-daa5-f550-7914-e7d18cc5b59b/2026-02-04_QFR-Responses_Cekada.pdf.
[3] *Id*.
[4] 18 U.S.C. § 922(t); 18 U.S.C. § 923(g)(1)(A); 18 U.S.C. § 923(g)(7); 18 U.S.C. § 923(g)(6); 18 U.S.C. § 923(g)(3)(A).
[5] *See* ATF, National Firearms Commerce and Trafficking Assessment ("NFCTA"), Volume III: Firearms Trafficking Investigations, Part III: Firearm Trafficking Channels and Methods Used at p. 2, Table FTC-02 (Apr. 2024), *available at* https://www.atf.gov/media/20751/download.
[6] ATF, NFCTA, Volume III: Firearms Trafficking Investigations, Part V: Type and Volume of Firearms Trafficked at p. 10, Table TVF-09 (Apr. 2024), *available at* https://www.atf.gov/media/20771/download.
[7] *See* ATF, NFCTA, Volume III: Firearms Trafficking Investigations, Part IX: Investigation Outcomes at p. 5, Table IO-06 (Apr. 2024), *available at* https://www.atf.gov/media/14521/download.

dealing in firearms under 18 U.S.C. § 921(a)(21)(C) in order to bring more unlicensed sellers within the requirements of licensure, background checks, recordkeeping, and reporting. BSCA's change to the GCA's "engaged in the business" provisions meant that ATF's pre-BSCA regulations needed to be updated to make them consistent with the new statutory framework. ATF published an NPRM in September 2023 and a final rule in April 2024 providing those regulatory updates.

ATF now proposes to further change the regulations implementing the statutory "engaged in the business" standard to address what ATF, after conducting a review of the 2024 rule and court decisions involving it, has identified as sections of the 2024 rule "that do not correctly implement the GCA and BSCA."[8] The history of the "engaged in the business" standard leading up to this NPRM is discussed below in Part I of this comment, and several concerns with the NPRM are raised in Part II.

I. <u>Background on the "engaged in the business" standard</u>.

Since the enactment of the GCA in 1968, federal law has made it unlawful for any person to "engage in the business" of dealing in firearms unless that person has obtained a federal firearms license and become an FFL.[9] FFLs are subject to a number of legal obligations that help ensure that individuals prohibited from buying, possessing, or receiving firearms, such as those convicted of a felony, cannot easily obtain them. These include statutory requirements that FFLs conduct background checks through the FBI's National Instant Criminal Background Check System ("NICS") on prospective gun purchasers, maintain records of firearms transactions, promptly respond to law enforcement's trace requests for firearms recovered in criminal investigations, and make required reports to ATF on lost and stolen firearms and multiple sales.[10] The obligations that accompany federal licensure for gun dealers are essential pillars in the law enforcement strategy to ensure that only law-abiding individuals can buy and possess guns and to hold accountable those who illicitly traffic guns to prohibited individuals or use guns in crime.

Although the GCA created the statutory requirement that those who "engage in the business" of firearms dealing obtain a federal license, the GCA did not initially define that term. Congress later added a definition for "engaged in the business" via the Firearms Owners' Protection Act of 1986 ("FOPA"),[11] which was codified at 18 U.S.C. § 921(a)(21)(C). The definition provided that a person was "engaged in the business" of dealing in firearms if the person's "principal objective" of firearms dealing was both "livelihood and profit." This definition was subsequently incorporated into ATF implementing regulations that were published in 1988.[12]

For years after the enactment of FOPA, the standard for when a gun seller was "engaged in the business" was poorly understood and confusion and lack of clarity about the standard and its enforcement enabled unlicensed sellers to use commercial marketplaces, such as gun shows, to turn a profit by selling guns to buyers without conducting background checks and without

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[8] 91 Fed. Reg. 24426.
[9] 18 U.S.C. § 922(a)(1)(A).
[10] 18 U.S.C. § 922(t); 18 U.S.C. § 923(g)(1)(A); 18 U.S.C. § 923(g)(7); 18 U.S.C. § 923(g)(6); 18 U.S.C. § 923(g)(3)(A).
[11] Pub. L. No. 99-308, 100 Stat. 449.
[12] 27 C.F.R. § 478.11; 53 Fed. Reg. 10480, 10491.

maintaining the recordkeeping and reporting that FFLs are obligated to maintain. In the intervening years, the online market for unlicensed gun sales grew in size, and websites such as Armslist.com became an easy avenue for firearms to be sold by unlicensed sellers without background checks to individuals prohibited by law from purchasing and possessing them.[13] This proliferation of online unlicensed sales facilitated horrific crimes, such as the 2019 shooting spree in Midland and Odessa, Texas, in which a gunman who was prohibited from possessing firearms shot 32 people, killing seven. The gunman had initially attempted to buy a firearm from a licensed dealer but was turned away because he failed a background check. The gunman then found an unlicensed seller online who sold him the AR-15-style rifle that he used in his shooting spree without a background check.[14]

Incidents like the Midland-Odessa shooting spree motivated Congress to pass BSCA into law in June 2022.[15] Among its provisions, BSCA amended and expanded the statutory provision that defines when sellers of firearms are "engaged in the business" of firearms dealing.[16] While the pre-BSCA definition of "engaged in the business" of dealing in firearms required that a person's "principal objective" of firearms dealing must include both "livelihood and profit" in order for the person to be considered "engaged in the business," BSCA redefined "engaged in the business" with respect to dealing in firearms to remove the "principal objective" and "livelihood" prongs of the analysis and to instead encompass any person whose purchase and resale of firearms is "to predominantly earn a profit."[17] BSCA also enacted a new statutory definition for the phrase "to predominantly earn a profit," stating that the term means "that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection."[18] These statutory reforms made it necessary for ATF to revise its post-FOPA "engaged in the business" regulations that had been issued in 1988 to reflect the new "engaged in the business" statutory framework that BSCA created.

On April 19, 2024, after a thorough notice-and-comment rulemaking process, ATF published a final rule entitled "Definition of 'Engaged in the Business' as a Firearms Dealer" which made updates to ATF regulations in order to implement the "engaged in the business" reforms that Congress had enacted in BSCA.[19] This regulation became effective on May 20, 2024.

After the 2024 rule was finalized, it was challenged in lawsuits in several federal district courts. In June 2024, the U.S. District Court for the Northern District of Texas considered a

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[13] Everytown researchers collected over 9 million posts from Armslist between 2018 and 2020, of which 68 percent listed firearms for sale. An analysis of the gun sale ads revealed that 78 percent of the listings were from unlicensed sellers. *See* Everytown for Gun Safety Support Fund, "Unchecked: An Investigation of the Online Firearm Marketplace," Feb. 1, 2021, *available at* https://everytownresearch.org/report/unchecked-an-investigation-of-the-online-firearm-marketplace/.

[14] U.S. Attorney's Office, Northern District of Texas Press Release, "Man Who Sold Midland/Odessa Shooter AR-15 Used in Massacre Sentenced for Unlicensed Firearm Dealing," Jan. 7, 2021, *available at* https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms.

[15] Pub. L. 117-159, 136 Stat. 1313.

[16] BSCA Section 12002; 18 U.S.C. § 921(a)(21)(C).

[17] BSCA Section 12002(1), codified at 18 U.S.C. § 921(a)(21)(C).

[18] BSCA Section 12002(3), codified at 18 U.S.C. § 921(a)(22).

[19] 89 Fed. Reg. 28968.

lawsuit raising claims that the 2024 rule violated the Administrative Procedure Act and issued an preliminary injunction blocking ATF from enforcing the rule with respect to the plaintiffs in that lawsuit, which included several states and gun lobby advocacy groups.[20] (Note, however, that the litigation over the implementing rule did not change the fact that the "engaged in the business" standard and the criminal prohibition on unlicensed dealing are both statutory requirements, meaning that ATF and the Justice Department are responsible for enforcing them regardless of the status of the implementing regulation.) On May 6, 2026, ATF published this NPRM, which proposes to amend several regulatory provisions that were updated in the 2024 rule and repeal certain changes made by the 2024 rule but not the rule in its entirety. The NPRM states that "[s]ome sections of the [2024] rule will be retained…although this rule proposes to amend some of those provisions."[21]

On June 12, 2026, the Northern District of Texas court issued an order granting the plaintiffs' motion for summary judgment that had been filed in October 2024 and ordered that the 2024 rule be vacated, stating that ATF "may not apply the Final Rule to anyone - including individuals and organizations who are not parties to this case."[22] On July 10, the Department of Justice filed a motion before the court seeking to limit the scope of the vacatur so that the NPRM could proceed.[23] As of the date of this comment, that motion is still pending.

<u>For purposes of this comment letter, we assume that ATF will proceed with its current NPRM</u>. With that understanding, Part II below evaluates the language proposed in this NPRM, with the expectation that any changes to that language prompted by the Northern District of Texas' orders would be put forward in a superseding NPRM with notice and opportunity to comment.[24]

II. <u>ATF's 2026 "engaged in the business" NPRM has several substantive deficiencies that must be addressed</u>.

This part discusses several substantive concerns with the current NPRM that we urge ATF to address. Specifically, the NPRM: (1) should not have entirely eliminated the 2024 rule's rebuttable presumptions, but rather should have modified them to address deficiencies; (2) must provide a credible cost-benefit analysis, which the current NPRM fails to do; and (3) should not revise regulations involving former licensees' inventory in ways that increase the incentive and opportunity for the "fire-sale loophole" to be used to transfer former business inventory firearms into a personal collection from which the firearms are sold to buyers without background checks.

A. The NPRM's elimination, rather than modification, of the 2024 rule's rebuttable presumptions makes enforcement expectations less clear.

The 2024 rule established a set of rebuttable evidentiary presumptions to provide

[20] *Texas v. ATF*, 737 F. Supp. 3d 426 (N.D.Tex. 2024). Another district court in the District of Kansas considered the merits and denied a motion for a preliminary injunction. *Kansas v. Garland*, 2024 WL 3360533 (D. Kan. 2024).
[21] 89 Fed. Reg. 24426.
[22] *Texas v. ATF*, 737 F. Supp. 3d 426 (N.D.Tex. 2024) final judgment issued June 12, 2026, at p. 3, *available at* https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.176.0.pdf.
[23] *Texas v. ATF*, 737 F. Supp. 3d 426 (N.D.Tex. 2024), opposed motion to alter or amend the judgment, *available at* https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.177.0.pdf.
[24] We recognize that appeals or further litigation developments in the Northern District of Texas case may affect the June 2026 vacatur order, perhaps after submission of this comment.

guidance in civil and administrative proceedings on whether a person was engaged in the business of dealing in firearms and whether the person had the intent to predominantly earn a profit. For example, the 2024 rule established a presumption that a seller who repetitively resells or offers for resale firearms within 30 days after the person purchased the firearms, or within one year if the firearms are still in their original packaging, is presumed to be engaged in the business of firearms dealing.[25] There is clear authority for agencies to establish rebuttable evidentiary presumptions,[26] and ATF provided a detailed basis justifying each presumption in a 2023 NPRM and in the 2024 final rule. Everytown strongly supported the inclusion of such presumptions in the 2024 rule.

In this NPRM, ATF proposes to eliminate all of these presumptions, describing them as "largely unnecessary because the statutory definition is readily comprehensible."[27] ATF expresses concern that the 2024 presumptions could be misconstrued to erroneously relieve the government of its burden of proof,[28] even though ATF had clearly stated in the 2024 final rule that the presumptions were designed to shift the burden of production in civil or administrative proceedings and "do not alleviate the burden of persuasion on the Government."[29] ATF cites the Northern District of Texas court's concerns about the presumptions as well, concluding that "the risk that the presumptions could have been used erroneously to relieve the Government of its burden of proof justifies discarding the presumptions."[30]

We believe that the NPRM is wrong to discard the presumptions altogether. ATF has shown in other contexts that rebuttable presumptions can help clarify and guide civil and administrative processes. For example, ATF's proposal to reform the 18 U.S.C. § 925(c) relief from disability process establishes rebuttable presumptions that certain types of conduct in a person's record are sufficient to "render an applicant presumptively unable to establish to the Attorney General's satisfaction that the applicant will not be likely to act in a manner dangerous to public safety" and thus make the person presumptively ineligible for § 925(c) relief.[31] ATF's use of regulatory presumptions in contexts like these is sensible, because presumptions set enforcement expectations and provide valuable guidance to the affected population. The rebuttable presumptions in the 2024 rule do not actually change whether gun sellers are exposed to civil liability for engaging in the business of dealing without a license — the statutory language determines that. The presumptions just give sellers a much clearer sense of what conduct does and does not require licensure.

Moreover, the rebuttable presumptions do not apply in criminal proceedings. As is the case in any criminal prosecution, the burden of proof falls squarely and only on the government. Neither the 2024 rule nor its rebuttable presumptions displaced or replaced the statutory elements of the federal crime of "unlicensed dealing," including "[engaging] in the business of . . . dealing in firearms" without a license. As ATF pointed out in this NPRM, the proposed rule's elimination of the presumptions "does not mean that a person who engages in the behavior identified by the

[25] 27 C.F.R. § 478.13(c)(3)(i)-(ii).
[26] *See* 89 Fed. Reg. 29007.
[27] 91 Fed. Reg. 24426.
[28] 91 Fed. Reg. 24427.
[29] 89 Fed. Reg. 29007.
[30] 91 Fed. Reg. 24427.
[31] 90 Fed. Reg. 34402.

presumptions will not be found to be engaged in the business."[32] Under this proposed rule, however, it will be less clear to sellers what behavior counts and what does not to qualify them as being engaged in the business.

The concerns ATF cites about the 2024 rule's presumptions do not justify eliminating the use of presumptions entirely. For example, ATF claims in this NPRM that the presumptions in the 2024 rule were not used in proceedings against licensees, pointing to an anecdotal survey of ATF field divisions that found no instances in which the presumptions were cited in civil proceedings since the 2024 rule became effective.[33] But this is not proof that the presumptions were unnecessary; to the contrary, the presumptions were designed to provide clear enforcement expectations that would guide sellers of firearms to know when they should obtain a license in order to <u>avoid</u> an enforcement action. The point of the presumptions was not only to be used in civil enforcement proceedings, but, even more importantly, to make such proceedings unnecessary because gun sellers would already know when they needed to become FFLs.[34] Further, it is unclear why ATF would seek to use the presumptions in proceedings against licensees, as they are designed to provide guidance for becoming licensed.

Also, while ATF claims that the 2024 rule did not create a surge in Type 01 applications in Fiscal Year 2025 after the rule took effect in May 2024, this is not dispositive of the presumptions' value.[35] There are logical explanations for why there was not a surge of FFL applications in Fiscal Year 2025. For example, those engaged in the business of dealing firearms without a license may have stopped such behavior altogether instead of seeking licensure — something the current NPRM contemplates when it states that unlicensed sellers "might resume selling firearms actively without becoming licensed, just as they had prior to publication of the [2024] rule."[36] That fiscal year also ran from October 1, 2024, to September 30, 2025, and Donald Trump won reelection one month into that fiscal year, so it is plausible that firearm sellers who might otherwise have gotten licenses under the 2024 rule may have expected the incoming Trump Administration to dramatically change the rule and thus held off from taking action. That period also marked an unfavorable time to enter the gun dealer business as gun sales declined annually each year from a 2020 high through 2025.[37] None of these reasons, nor the concerns with presumptions expressed by the Northern District of Texas court, foreclose ATF from modifying the 2024 rule's set of presumptions to preserve their use with clearer explanations that they do not shift the burden of proof away from the government.

In short, ATF should seek ways to mend, not end, the rebuttable presumptions in the 2024 rule. This NPRM should consider ways to modify the presumptions to address any concerns about specific presumptions' alignment with the statutory language and to provide clarifications

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[32] 91 Fed. Reg. 24427.
[33] 91 Fed. Reg. 24227.
[34] The 2024 rule also sought to guide sellers by establishing presumptions where a person would be presumed <u>not</u> to be engaged in the business of dealing in firearms, such as when a person is only transferring firearms as bona fide gifts or liquidating inherited firearms. *See* 89 Fed. Reg. 29092. The current NPRM would eliminate these presumptions too.
[35] 91 Fed. Reg. 24429.
[36] 91 Fed. Reg. 24432.
[37] *See* Champe Barton, "Gun Stores Are Struggling Under Trump," The Trace, Oct. 10, 2025, *available at* https://www.thetrace.org/2025/10/gun-sales-down-trump-slump-demand/ (estimating gun sales from FBI background check statistics).

that would alleviate concerns that the presumptions might be misconstrued to relieve the government of its burden of proof. That would be far preferable to disposing of presumptions altogether and losing the public safety benefits that come from the guidance and enforcement expectations they provide.

B. The NPRM's evaluation of costs and benefits is wholly inadequate.

In September 2023, when ATF issued an "engaged in the business" NPRM that later became the final 2024 rule, ATF stated in the NPRM that the proposed rule had been determined by the Office of Management and Budget ("OMB") to be a significant regulatory action that necessitated a regulatory cost-benefit analysis.[38] ATF then spent eight pages in the Federal Register carefully delineating and evaluating costs and benefits for that 2023 proposed rule.[39] Notably, the 2023 NPRM identified "significant public safety benefits" that would be achieved by "ensuring that ATF's regulatory definitions conform to the BSCA's statutory changes and can be relied upon by the public."[40] These benefits included better ensuring that persons purchasing firearms are lawfully able to do so through background checks. The NPRM pointed to studies showing that a majority of prohibited purchasers and armed career criminals "were able to obtain guns and continued to commit more violent offenses after they would have been flagged by a background check and denied a firearm if purchasing from a licensed dealer."[41] The NPRM also noted the public safety benefits that come from greater transaction recordkeeping, stating that such recordkeeping "will help with criminal investigations and tracing firearms subsequently used in crimes."[42]

In the current NPRM, ATF likewise states that the proposed rule has been determined by the Office of Management and Budget to be a significant regulatory action that necessitates a regulatory cost-benefit analysis.[43] However, this NPRM spends less than a third of a page in the Federal Register considering such costs and benefits, and the analysis provided is cursory and unsupported by data analysis. The NPRM identifies no quantifiable benefits or costs at all; it simply declares that the proposed rule "would not have any quantifiable monetary cost savings" and "would not create quantifiable costs or burdens for the public."[44] ATF makes no effort in the NPRM to usefully estimate such quantifiable costs and benefits, even though it is required by Executive Order 12866 to do so.[45]

In the absence of assessing quantitative benefits and costs of the proposed rule, the NPRM spends most of its limited analysis discussing qualitative benefits and costs. ATF states that the proposed rule "would provide qualitative benefits to the public in the form of reduced confusion and reduced concerns about perceived risk of over-enforcement, as well as qualitative costs in the form of potential increase in persons who should be licensed remaining unlicensed."[46] However, ATF did not even attempt to quantify these benefits or costs the

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[38] 88 Fed. Reg. 62007.
[39] 88 Fed. Reg. 62009-62016.
[40] 88 Fed. Reg. 62015.
[41] *Id*.
[42] *Id*.
[43] 91 Fed. Reg. 24432.
[44] *Id*.
[45] Executive Order 12866, Sept. 30, 1993, *available at* https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
[46] 91 Fed. Reg. 24432.

proposed rule would supposedly bring about. Instead, ATF says it "lacks the data necessary to quantify such savings" from reducing confusion and reducing the perceived risk of over-enforcement.[47]

With respect to the costs of the proposed rule, the NPRM concedes that the proposed rule may have "[p]otential qualitative disbenefits (i.e., adverse impacts)" including "a de minimis increase in risk to public safety."[48] But the NPRM provides no explanation of how ATF has determined that this risk is de minimis. In fact, the NPRM indicates that the risks may be significant, explaining that under the proposed rule, individuals who might have refrained from selling because of the 2024 rule "might resume selling firearms actively without becoming licensed, just as they had prior to publication of the [2024] rule."[49]According to ATF, "[t]his could mean that any risks regarding unlicensed sellers that Congress perceived when initially enacting the GCA would not be addressed through regulations clarifying the GCA's requirements."[50] It could also "increase risk from active sellers, who are not licensed, who resume sales and thus do not conduct background checks to ensure that prohibited persons do not acquire firearms on the secondary market."[51] Such unlicensed sellers also would not comply with FFL obligations to keep records, comply with trace requests, and report information to ATF. ATF ultimately concludes that "[a]lthough it is possible that removing the proposed provisions would result in some risk to public safety from persons who would no longer feel constrained in dealing in firearms without a license, such a risk is qualitative and speculative, imposing no quantifiable costs."[52]

There is a deep body of research that ATF could have used to provide quantitative illustrations of the costs or disbenefits to public safety of rolling back the 2024 rule. For example, research shows that in an average year, gun violence kills over 40,000 Americans, wounds more than twice that number, and, according to a 2022 Everytown analysis that was cited in the 2024 final rule,[53] has an economic consequence to our nation of $557 billion annually.[54] This $557 billion represents the immediate costs of gun violence starting at the scenes of shootings, such as police investigations and medical treatment; subsequent costs such as treatment, long-term physical and mental health care, earnings lost to disability or death, and criminal justice costs; and cost estimates of quality of life lost over victims' life spans for pain and suffering of victims and their families.[55] According to the analysis, each gun death costs U.S. taxpayers an average of nearly $274,000 for the initial and long-term repercussions of that incident, and each nonfatal gun injury costs more than $25,000.[56] Other analyses have identified

[47] *Id*. It is surprising that a law enforcement agency would, in a cost-benefit analysis, assign qualitative benefits to efforts to reduce "concerns about perceived risk of over-enforcement" based on no actual data. It appears that ATF is crediting industry complaints about perceived levels of enforcement as justification for changing the rules the agency is tasked with enforcing and assigning those complaints greater weight than the known, quantified risks and detrimental law enforcement impacts that come from unlicensed sales.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] 91 Fed. Reg. 24433.
[52] *Id*.
[53] 89 Fed. Reg. 29062, fn. 246.
[54] Everytown Research and Policy, "The Economic Cost of Gun Violence," July 19, 2022, *available at* https://everytownresearch.org/report/the-economic-cost-of-gun-violence.
[55] *Id*.
[56] *Id*.

further societal costs of gun violence.[57] From quantitative sources of research like these, ATF determined in its 2024 final rule that "even a marginal decrease in firearms violence as a result of this rule would constitute a large enough quantitative benefit from the rule to offset the estimated costs of the rule."[58] ATF makes no effort in this NPRM to explain why the cost-benefit analysis it conducted two years ago in the 2024 rule is now somehow incorrect or deficient.

ATF's refusal to even attempt to quantify the identified "risk to public safety from persons who would no longer feel constrained in dealing in firearms without a license" is an unacceptable deficiency in the NPRM.[59] The agency cannot simultaneously acknowledge that the rule creates public safety risks and decline to assign any cost to those risks in a purported cost-benefit analysis.

C. The NPRM's changes to regulations on former licensees' inventory must not create incentive and opportunity for use of the fire-sale loophole to sell former business inventory from personal collections without background checks.

We are also concerned that the proposed rule amends the regulatory provisions regarding former licensees' inventory in a way that risks exacerbating the "fire-sale loophole" and leading to more sales being made for profit without background checks.

As part of its update of "engaged in the business" regulations after BSCA's statutory changes, including clarifying the "personal collection" exception to the revised "engaged in the business" definition, the 2024 rule also updated and clarified statutory requirements regarding firearms that remain in the possession of a former licensee (or a responsible person of a formerly licensed entity) at the time of license termination. These were sensible and important clarifications. ATF noted in its 2023 NPRM that it had repeatedly encountered situations where formerly licensed persons sold firearms that had been in their business inventory without conducting background checks or maintaining transaction records, claiming that the firearms had been transferred to the person's personal collection after license termination and that 18 U.S.C. § 921(a)(21)(C)'s personal collection exception allows an unlicensed person to sell all or part of his or her personal collection without being considered engaged in the business and without conducting background checks.[60] This is the "fire-sale loophole." The 2024 rule clarified that such firearms could not be considered part of a personal collection and thus could not be sold as part of a personal collection because they were purchased as business inventory and not for study, comparison, exhibition, or for a hobby, as the 2024 rule's definition of "personal collection" required.

However, the current NPRM makes several changes that increase the risk of reopening the fire-sale loophole. The NPRM proposes to amend the regulatory definition of "personal collection" in 27 C.F.R. § 478.11 to remove the first subsection, which had clarified via the 2024

[57] *See, e.g.*, Joint Economic Committee Democrats, "The Economic Toll of Gun Violence," 2022, *available at* https://www.jec.senate.gov/public/_cache/files/69fcc319-b3c9-46ff-b5a6-8666576075fe/the-economic-toll-of-gun-violence-final.pdf (finding that "Exposure to gun violence negatively affects educational attainment, leading to worse outcomes for children;" "Increased school security measures in response to gun violence cost more than $3 billion each year, straining school budgets;" and "Gun violence harms local economies by slowing business development and decreasing housing prices.").

[58] 89 Fed. Reg. 29063.

[59] 91 Fed. Reg. 24433.

[60] 88 Fed. Reg. 62006.

rule that firearms in a personal collection must have been accumulated for study, comparison, exhibition, or for a hobby. The NPRM's change would increase the opportunity for firearms that were accumulated by a licensed dealer as business inventory to be later shifted into the dealer's personal collection. Then, if a licensee discontinues business or has his or her license revoked, the NPRM removes language that the 2024 rule added in 27 C.F.R. § 478.57(b)(2) and (c) that treated sales of business inventory shifted to the licensee's personal collection after 30 days as sales that are presumed to meet the intent standard for being "engaged in the business" and, thus, constitute unlicensed firearms dealing. The NPRM states that while it "recognizes concerns about former licensees attempting to hold 'fire sales' of large swathes of inventory without adhering to recordkeeping and background check requirements," ATF's view is that the statutory language is sufficient to prevent such fire sales and that the statute does not prohibit former licensees selling an occasional firearm in a private sale years later.[61]

The 2024 rule had made clear that under BSCA's revised "engaged in the business" framework, former licensees cannot manipulate the personal collection exception to give them greater privileges to conduct business and sell business inventory than a currently licensed person or entity. The 2024 rule thus provided a bright-line clarification that deterred licensees from strategically discontinuing a license and then asserting that as a former licensee their business inventory can be transferred without background checks and recordkeeping. The NPRM's walking back of this clarification is almost certain to increase incentive and opportunity for those "engaged in the business" under BSCA to avoid the responsibilities that come with licensure by shifting business inventory to personal collections and then making sales for profit.

The NPRM's proposed changes to the 2024 rule's fire-sale loophole provisions are not mandated by court decisions and would not strengthen public safety. These changes should be withdrawn, and at minimum they should not be made without a credible cost-benefit analysis that estimates quantifiable impacts of this change.

III. Conclusion

It is critically important for public safety that ATF enforce the "engaged in the business" law effectively. Unlicensed selling of firearms for the purpose of profit is one of the most dangerous channels for guns to end up in the hands of prohibited persons and traffickers. Director Cekada was correct in his Senate testimony when he said that those who engage in the business of firearms dealing without a license must be held accountable. The BSCA statutory reforms and the 2024 rule that updated ATF's post-FOPA regulations to reflect the BSCA changes were important steps forward to clarify for gun sellers what business activity qualifies as being "engaged in the business" and thus obligates the sellers to obtain a license, conduct background checks, assist crime gun traces, and maintain required records and reports. The BSCA statutory standard was a critical step forward to enhancing public safety, and new regulatory changes must not undermine it.

With respect to this NPRM, we urge ATF: (1) not to wholly eliminate the 2024 rule's rebuttable presumptions but rather to modify any specific presumptions that conflict with statutory language and clarify overall that the presumptions do not and cannot shift the burden of proof from the government; (2) to conduct a credible cost-benefit analysis that provides actual

[61] 91 Fed. Reg. 24430.

quantifiable estimates of the potential public safety risks that the proposed rule would create; and (3) not to amend the regulatory provisions from the 2024 rule that were aimed at clarifying how the fire-sale loophole cannot be used to circumvent the obligations that come with being "engaged in the business" of firearms dealing.

Thank you for your consideration of this comment.

Sincerely,

/s/ Justin Wagner

Justin Wagner
Senior Vice President for Law & Policy
Everytown for Gun Safety Support Fund