



WOODHOUSE RODEN
AMES & BRENNAN, LLC

James O. Bardwell
Associate Attorney
1912 Capitol Avenue, Suite 500
P.O. Box 1888
Cheyenne, WY 82001
T: 307-432-9399
F: 307-432-7522
Email: james@wrablaw.com
Paralegal: nichole@wrablaw.com
Website: www.wrablaw.com
*also licensed in Colorado

December 5, 2023

Helen Koppe, 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.

Greetings:

I am commenting on the above notice of proposed rulemaking on behalf of the National Association for Gun Rights (NAGR), a not-for-profit organization of 4.5 million supporters of the right to keep and bear arms. NAGR opposes the changes in the Notice of Proposed Rule Making 2022R-17 (NPRM) for the reasons outlined below.

In 2022, Congress made a very small change in the Gun Control Act, changing the definition of the term of what it means to be a dealer in firearms, by removing the phrase “with the principal objective of livelihood and profit” from the definition and replacing it with the phrase “to predominantly earn a profit.”

In this rulemaking BATFE has used that one, tiny change, to completely rewrite the rules surrounding when someone must be licensed as a firearms dealer under the Gun Control Act. The change Congress made does not justify the wholesale changes. In hindsight, given how many changes long desired by the gun control political movement are incorporated into this rulemaking, it seems that the statutory change was made as insignificant as possible to get it passed through Congress, with the end goal of using any statutory change to permit BATFE to wholesale rewrite regulations of the firearms business.

Since its enactment in 1968, the Gun Control Act has, generally speaking, required parties who are engaged in the business of dealing in firearms interstate or commercially within a state to be licensed by the Federal Government to do so. There was some regulation prior to that, under the 1938 Federal Firearms Act. That law was repealed and replaced over the course of 1968 with what was and is a much broader statutory scheme. At this point, the regulation of the business of dealing in firearms is extremely comprehensive, with the Federal government regulating the business premises or location itself, the record keeping, to whom a dealer may sell a firearm, what documents are required of the purchaser, steps the dealer must take before delivering a firearm, conducting a background check on the individuals operating the business, requiring certain

accessories be available to customers, requiring certain accessories come with certain firearms, mandating certain signs be posted on the business premises and mandating literature that accompany certain firearms. Federal law prohibits, with criminal penalties, unlicensed commercial dealing in firearms. No other personal property item is subject to more oversight as to its commercial sale under Federal law, except perhaps explosives.

In 1968 Congress was also aware that firearms and collecting firearms are a hobby for many Americans and pursuit of any hobby involves some amount of acquiring and disposing of the object of the hobby. Congress sought to exclude the hobby from regulation under the law. In other words, persons may engage in the purchase and sale of firearms without meaning to make it a way to earn money but meaning it to be a way to pursue their hobby. The hobby can include socializing with other firearms enthusiasts, such as at a gun show or gun club, and developing a collection of progressively finer firearms of all kinds or of a particular kind of firearm that interests that person. Attending gun shows with a table of firearms and/or firearms parts or accessories (or maybe even tools or food or junk or other non-firearm items) is a social activity and hobby for a lot of Americans. BATFE has no authority to require that those persons be licensed as a dealer in firearms to continue to do so. This regulation proposes just that. Even persons who never successfully sell any firearm can be required to be licensed under this rulemaking. Merely holding firearms out for sale can be enough under this rulemaking for BATFE to require a person either get licensed or desist.

Firearms are also a very common and popular item of personal property in America. Persons may sell and buy firearms as they might buy any other item of personal property that they desire, or perhaps that they are tired of and wish to dispose of. Given all these factors, Congress excluded all buying and selling of firearms from the requirements of obtaining a license to deal in firearms. Licensure and the accompanying comprehensive regulatory scheme are reserved for a much narrower class of transactions.

Since 1968, the gun control political movement has had a goal of prohibiting any transfer of firearms between parties when both parties are not licensed under the Gun Control Act. Under this idea, anyone wishing to sell a firearm, or buy a firearm, would have to conduct the purchase or the sale through someone licensed as a dealer under the Gun Control Act. This proposal has not passed through Congress, despite numerous efforts. Unfortunately, BATFE appears to be using this rulemaking to try to accomplish what the gun control political movement has been unable to achieve in Congress.

In general, Federal law, especially tax law, has considered a business to be an activity someone engages in with a significant goal of earning money or otherwise improving one's station in life. On the other hand, a hobby is an activity that has a significant goal of enjoyment of one's time spent pursuing it. For the IRS, a lack of profit can convert a business into a hobby with the resulting loss of expense deductions to otherwise taxable income earned in that pursuit. Making money can be a part of either a hobby or a business.

In the Gun Control Act the original definition of being in the business of dealing in firearms meant that the activity under consideration had a principal objective of making a profit. Under the 2022 change other significant factors can now be involved in motivating a person to pursue an activity (buying and selling firearms in this case), but a predominant one must be trying to earn a profit. A business or trade that one does not enjoy doing will quickly become unpleasant and

avoided, so often people choose a business they also enjoy. Someone dealing in firearms may also enjoy doing so, and elements of hobby and business may overlap for some. The Gun Control Act recognizes this.

In the rulemaking under discussion here, BATFE completely rewrites when a hobby becomes a business to essentially require anyone pursuing their hobby of collecting firearms to be licensed under the Gun Control Act. From a statutory perspective, this change is unsupported by the law. This rulemaking establishes presumptions that certain efforts at buying or selling firearms create a presumption that a person is engaged in the business. The presumptions are not grounded in the law enacted by Congress. Instead they are just a list of activities BATFE feels ought to be regulated or prohibited. There is no consideration about whether the activities generate any actual money or are focused on enhancing one's collection of firearms. While BATFE notes that they cannot by rulemaking bind criminal prosecutions to these presumptions, they do say they will apply them to non criminal situations, such as when they formally advise persons that their activities require a license under the Gun Control Act, or formally advise persons that they must discontinue certain activities or have their conduct referred to the U.S. Attorney's office for possible prosecution.

Some of the presumptions pertain to activities that completely overlap with collecting. Collecting new in the box firearms is a hobby. "New in the box" is a term not just for business inventory but for firearms in their finest, most pristine state, as opposed to used firearms. Someone buying or selling new in the box firearms is not necessarily in a business or trade. Collecting new or newer firearms, whether currently made or made in the past is a legitimate hobby.

In several places BATFE suggests that only firearms classified by BATFE as "curios or relics" may properly be the subject of a firearms hobby. This is both untrue and inconsistent with the Gun Control Act. In general a curio or relic firearm has to meet specific criteria set by Congress and prior rulemaking and is meant to capture the category of firearms that are both of interest to collectors and are less likely to be used as a weapon. Currently the category is predominantly firearms manufactured at least 50 years ago, regardless of their condition or state of use, but can include newer firearms which are recognized by an expert (and also by BATFE) as being especially rare or unusual.

However collecting firearms which are also usable as a weapon is a hobby and a legitimate field. NAGR observes that younger firearms collectors are more inspired by firearms they see in contemporary movies, TV programs or in video games, than they are by older ones perhaps associated with historical events, such as the American Wild West or World War One or World War Two. Firearms from current movies or video games are typically much newer than 50 years old.

Likewise, buying and selling a narrow class of firearms can be enhancing a hobby. Some collectors seek out progressively finer examples of a particular make or model, each perhaps exhibiting a better preservation of finish, a different feature such as sights or barrel length, although the model and caliber of all of the firearms would be the same. A collector may obtain an example of a firearm of the type they collect to help them obtain a rarer or better example from another party later, who may be interested in the example they obtained more for trade than for the collection itself. When dealing with a fellow collector an example of the firearm they both collect

may well be better at getting the fellow collector to part with a firearm the first one wants, than money.

The factors BATFE has selected to apply the presumption of needing a license to deal in firearms bear no consideration of whether or not those factors can also apply to persons who are not in the business or trade of dealing in firearms. For this reason they are inappropriate. The rulemaking says the presumptions are rebuttable, that is once BATFE has applied them, the person whose behavior is under discussion can try to explain why they did the things they did with a reason that does not include being a dealer in firearms. How this would play out in practice is not clear. If it is like the administrative proceedings BATFE conducts to revoke firearm dealer licenses however, the presumptions will be irrebuttable in practice. BATFE's own statistics show it almost never loses the administrative hearings it conducts.

BATFE proposes to bar persons who have either surrendered or non renewed a prior license to deal in firearms, or who have had BATFE take action to revoke a license to deal in firearms, from disposing of their excess or leftover inventory themselves. Under current regulations, if a person has inventory from a prior (lawful) firearms business, they can continue to dispose of that inventory even though their license was revoked or not renewed. BATFE complains that some such persons continue to acquire inventory even after revocation. This type of activity is, NAGR would submit, currently not permitted and a rule change is not needed to bar it. Further, given that trade sources for inventory require buyers have a current federal license, it is unclear how a person with a revoked license could continue to acquire inventory.

Under the new regulations, a person who used to be licensed but no longer is, and has left over inventory would have to either wait a year to sell the inventory after revocation or loss of the license, or dispose of the inventory through a currently licensed dealer, essentially resulting in a sale of the inventory at wholesale rather than retail. This is not justified by the change in law that is the basis for this rulemaking. It imposes financial hardship on a person who at least initially complied with existing law by obtaining a license to deal in firearms, but then had to discontinue the business. The existing allowance for former dealers to dispose of the inventory left over after loss of their license should be maintained.

The rulemaking proposes to completely rewrite when and how a person licensed to deal in firearms may also maintain a personal firearms collection, and when a person may move a firearm from inventory to the collection, or back. Under current regulations a dealer may move a firearm to a personal collection and after a year sell it from the collection if they care to do so. Nothing in the tiny change to the statute justifies the new rules BATFE proposes to put on this process. Nothing in current law imposes any of the conditions or additional qualifications on a dealer maintaining a collection that are proposed. As courts have noted in reviewing other recent changes proposed by BATFE to regulations in place for over 50 years, BATFE cannot unilaterally upset the existing regulatory scheme merely because a new Presidential administration came into office. Nothing in the rulemaking states a basis for these changes. No justification in terms of dealers maintaining a personal collection to enforcement of or evasion of the Gun Control Act is noted.

Indeed much of the apparent justification for these changes are things that Congress did not provide for in 1968 – the registration of firearm to their owners and the background check on purchasers. None of those were in place in 1968 but are more recent changes. Sales of firearms between ordinary persons avoid the process of entry of sales onto records maintained by licensees

(which are now maintained forever, a very recent administrative change from being maintained for 20 years before) and the use of those records as an imperfect gun owner registry. NAGR contends that the use of dealer records for this purpose is prohibited by the Gun Control Act. Certainly that already improper use is not an appropriate justification for these proposed regulations.

Sales of firearms between unlicensed persons also avoid the background check process. Background checks were not required until 1994, although conditions on who was eligible were codified with the Gun Control Act in 1968. Between 1968 and 1994, Federal law required purchasers to essentially self certify that they met the requirements for persons obtaining firearms. The requirement of background checks was enacted by Congress in 1994. Congress did not seek to change the exceptions to this new process by requiring all transfers go through a licensee. Congress did not authorize BATFE to administratively close “loopholes” or exceptions which Congress lacked the votes to enact itself. The fact that the background check process is imperfect is not for BATFE to correct itself. Under our system Congress needs to have the votes to enact such substantial changes, and the fact that it has not passed should mean BATFE cannot enact it either.

Lastly, NAGR also contends that proposed rules are unconstitutional. In the landmark U.S. Supreme Court decision *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the Court decided that the right to keep and bear arms under the Second Amendment to the U.S. Constitution was going to be protected from infringement by the Court based on a test that an infringement needed to be rooted in the historical tradition of the United States, not on balancing the need the government articulates for infringement versus the right asserted by the party claiming infringement. NAGR feels the issue here is BATFE pushing the regulation of commercial sales of firearms onto very non commercial transactions.

It may well be that regulation of parties everyone can agree are trying to engage in the trade of dealing in firearms can be constitutional. This rulemaking does not seek to create that. Instead it tries to impose the most comprehensive Federal regulation of sale of an item of personal property onto as many non-commercial potential or actual transactions involving firearms as possible. It seeks to do this because such transactions avoid the background checks and registration requirements imposed on commercial transactions. Under the regulations the goal is to bar sales or transactions in firearms between parties when one of them is not licensed by the Federal government to be in that trade. This strikes at the heart of the right to keep and bear arms. Regulating true commerce in firearms may be constitutional, given that this is not the goal of the proposed rulemaking NAGR does not comment at this time. Regulating all transactions is clearly inconsistent with what the second amendment has meant, and that is clearly what the rulemaking is trying to do. Federal law has never done this before. It certainly did not do it when the U.S. Constitution was enacted. Given it is Federal action under discussion, the appropriate test would be the state of Federal regulation in 1791, when the second amendment was adopted. Federal regulations have never required what these proposed regulations do.

In summary, NAGR would tell BATFE to abandon these proposed regulations, and instead amend the regulatory definition of engaged in the business of dealing in firearms to match the change that Congress made in the statutory definition. Any other changes must await Congressional enactment.

Sincerely,

James O. Bardwell