Gun Owners of America
The Only No-Compromise Gun Lobby in Washington

RE: Comments on ATF's "Engaged in the Business" NPRM

ADDRESSED TO

Office of Regulatory Affairs
Bureau of Alcohol, Tobacco, Firearms and Explosives
U.S. Department of Justice
Washington, DC 20226

SUBMITTED BY

Gun Owners of America
Gun Owners Foundation

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Submitted by Gun Owners of America & Gun Owners Foundation.

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COMMENT LETTER
RIN 1140-AB01
June 26, 2026

GOA & GOF COMMENTS TO ATF ON THE "ENGAGED IN THE BUSINESS" NPRM

FORMAL COMMENTS ON RIN 1140-AB01 · 91 FED. REG. 24424 (MAY 6, 2026)

Re: *Revising Regulations Defining "Engaged in the Business" as a Dealer in Firearms (RIN 1140–AB01)*

DOJ RULEMAKING

On May 6, 2026, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") published a notice of proposed rulemaking to "revise regulations implementing the 'engaged in the business' definition from the Bipartisan Safer Communities Act ('BSCA')." 91 Fed. Reg. 24424, 24424 (May 6, 2026) ("NPRM").[1] Prior to this NPRM, former President Biden's ATF had promulgated a different rule entitled Definition of "Engaged in the Business" as a Dealer in Firearms, 89 Fed. Reg. 28968 (Apr. 19, 2024).[2] As the NPRM acknowledges, this Biden-era "engaged in the business" rule ("Biden rule") "attempted to implement policy changes that went far beyond the regulatory changes necessary to implement BSCA." NPRM at 24426. Indeed, the Biden rule "approach[ed] a system of universal background checks" by presuming nearly all private sales of firearms were evidence of unlicensed "dealing," which is a felony under the Gun Control Act ("GCA"). *Id.* Thus, the Biden rule sought to require ordinary gun owners to obtain a Federal Firearms License ("FFL") to engage in private, noncommercial sales of their personal firearms, including complying with federal background-check and documentation requirements. Those who did not wish to obtain FFLs under the Biden rule were discouraged from engaging in private sales altogether – threatened with imprisonment for selling one or two personally owned firearms from their private collection.

Unsurprisingly, as it was with all ATF rulemakings during Biden's presidency, "many provisions of the [Biden] rule were – and are – at odds with the statutory text" (NPRM at 24426) which does not criminalize but in fact expressly *protects* from licensure the private sale of firearms. Thus, the NPRM correctly concedes that "the [Biden] rule is replete with procedural and substantive problems." *Id.* Accordingly, the NPRM proposes "repealing those sections of the [Biden] rule that do not correctly implement the GCA and BSCA," including 1) the Biden rule's various presumptions that a person was "engaged in the business" or had "intent to predominantly earn a profit," 2) the Biden rule's overly narrow definition of "personal collection," a term contained in one of the statutory safe harbors from licensure, and 3) the Biden rule's novel definition of "former licensee inventory," a term existing nowhere in the statute. *Id.*

But while that is *a start*, it is far from good enough. Indeed, the NPRM does not propose repealing *all* of the admittedly unlawful Biden rule. Rather, the NPRM warns that "[s]ome sections of the [Biden] rule will be retained," such as "those providing for the discontinuance of business operations" for FFLs. NPRM at

[1] See https://www.govinfo.gov/content/pkg/FR-2026-05-06/pdf/2026-08919.pdf.
[2] Definition of "Engaged in the Business" as a Dealer in Firearms, 89 Fed. Reg. 28968 (Apr. 19, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-19/pdf/2024-07838.pdf.

24426. Moreover, and highly problematically, the NPRM explicitly *endorses* many of the flawed legal theories underlying the Biden rule.

Worse still, in contrast to other proposed ATF rules that have sought public comment on "all aspects of the interpretive analysis and how to best implement the statutory text,"[3] this NPRM seeks public comment by August 4, 2026 *only* on "the clarity of this proposed rule," "how it may be made easier to understand," and "the costs or benefits of the proposed rule and ... the appropriate methodology and data for calculating those costs and benefits." NPRM at 24434-35. In other words, it appears that ATF already has decided that its approach is correct, and is wholly uninterested in any substantive input that gun owners have to offer. But APA notice-and-comment requires that the public have notice and a "meaningful opportunity" to comment on agency rules, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009), and so Commenters will offer ATF their perspective nonetheless. Sorry, not sorry.

IDENTITY OF COMMENTERS

Gun Owners of America, Inc. ("GOA") is a California non-stock corporation headquartered in Springfield, Virginia. Organized as a nonprofit membership organization under Section 501(c)(4) of the Internal Revenue Code, GOA was founded in 1976 with the mission to preserve, protect, and defend the Second Amendment rights of gun owners. Today, GOA represents the interests of more than two million members and supporters nationwide, and routinely lobbies and litigates to vindicate the right to keep and bear arms throughout the country.

Gun Owners Foundation ("GOF") is a Virginia non-stock corporation headquartered in Springfield, Virginia. GOF is a nonprofit legal defense and educational foundation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Supported by a national donor base, GOF provides essential legal services and educational resources to the firearms community. Its activities include strategic litigation and administrative advocacy, including the submission of comments such as these intended to safeguard the enumerated right of the people to keep and bear arms.

GOA and GOF have a direct interest in this rulemaking, which affects the ability of countless of their individual members and supporters to privately sell firearms without fear of criminal prosecution. Indeed, *the central theory* of the Biden rule – a theory now *seemingly and inexplicably adopted* by the NPRM – was that individuals can be "engaged in the business" without ever selling even one firearm – or, if they do, they can be "engaged in the business" without even turning a profit. Those theories are completely atextual, and were recently rejected by a federal court.

GOA and GOF were plaintiffs in *Texas v. BATFE*, No. 2:24-cv-00089-Z (N.D. Tex.), the first statutory and constitutional challenge filed against the Biden rule, and the first to obtain injunctive relief against its enforcement in 2024. *See Texas v. BATFE*, 2024 U.S. Dist. LEXIS 89647 (N.D. Tex. May 19, 2024) (granting temporary restraining order); *Texas v. BATFE*, 737 F. Supp. 3d 426 (N.D. Tex. 2024) (granting preliminary injunction). Most recently, GOA and GOF obtained universal vacatur of the Biden rule only days ago. *See Texas v. BATFE*, 2026 U.S. Dist. LEXIS 130906 (N.D. Tex. June 12, 2026) (vacating the Biden rule nationwide).

Because the Biden rule is now vacated, but ATF's current NPRM seemingly doubles down on some of its worst legal theories, GOA and GOF submit these comments. First, to guarantee that the Biden ATF's malicious targeting of law-abiding gun owners never occurs again, and second, to ensure that ATF repudiates the underlying legal theories that the federal court expressly rejected in the *Texas* litigation.

[3] Defining "Willfully" for Firearms Violations, 91 Fed. Reg. 25201, 25205 (May 8, 2026), https://www.govinfo.gov/content/pkg/FR-2026-05-08/pdf/2026-09159.pdf.

PRELIMINARY STATEMENT

DOJ's handling of the Biden rule has been an unmitigated disaster – even after President Trump took office, promising gun owners that the Biden rule would die a quick and painful death.[4] Unfortunately, ATF and DOJ did not get the President's message. In fact, they have fought GOA and GOF tooth and nail to protect Biden's infringement. This NPRM is no exception.

When the Biden ATF first promulgated its rule in 2024, gun owners faced mass criminalization for engaging in innocuous, statutorily authorized, and constitutionally protected private sales of firearms. ATF's perverse attack on law-abiding gun owners was obviously unacceptable, and so Commenters were forced to expend precious donor resources litigating to block the Biden rule's enforcement on an emergency basis. Thankfully, a district court agreed that the Biden rule was grossly unlawful, and so the court granted Commenters' request for preliminary relief. Then, when President Trump later campaigned on codifying Commenters' initial victory against the Biden rule, gun owners everywhere breathed a collective sigh of relief.

But rather than work with Commenters to secure a lasting victory against the Biden rule – one that would prevent a future administration from simply targeting gun owners this way again – DOJ fought to preserve maximal institutional power. First, DOJ rebuffed Commenters' repeated attempts to settle their litigation, even though the parties were now – theoretically – on the same side of the issue. Then, DOJ engaged in an inexplicable pattern of obstruction and delay, repeatedly requesting that the courts hearing "engaged in the business" challenges hold off on deciding the merits.

Instead, DOJ promised that it would take matters into its own hands and repeal the Biden rule *itself* – an inherently temporary 'fix' that a future administration could easily reverse at will. But for months, DOJ's promised new rule was nowhere to be seen. And so eventually, after granting DOJ more than a year of stays, the Fifth Circuit denied DOJ's attempt to further delay litigation. But when that happened, DOJ *still* refused to work with Commenters. Instead, it sneakily dismissed its Biden-era appeal of Commenters' preliminary injunction, and then asked the district court for precisely the same delay the Fifth Circuit had just denied. Thankfully, the district court recently denied DOJ this second bite at the apple and vacated the Biden rule in its entirety.

Now, despite waiting more than a year through these repeated DOJ assurances that 'we got this,' DOJ has now unveiled a highly disappointing proposed rule. In fact, DOJ is proposing to replace *Biden's rule* with … more or less … *Biden's rule*. As explained in detail below, the NPRM does nothing to walk back many of the Biden rule's unlawful legal theories – in fact, it only *endorses* them. That is unacceptable – especially so now that the Texas district court has vacated the Biden rule on the merits.

Thus, ATF must withdraw its misguided NPRM immediately, and must comply with the statute as written and as interpreted by the district court in Commenters' *Texas* litigation. Commenters have no problem suing ATF – they have done so time and again. And if ATF promulgates anything remotely resembling the current NPRM, Commenters can virtually guarantee that they will again see ATF in court. ATF must abandon its Biden-era legal theories for good. The Second Amendment is not a policy preference; it is a constitutional command. As the text itself makes clear, the right to keep and bear arms "shall not be infringed." Any regulatory scheme that expands federal control beyond the statute's limits or infringes the exercise of that right cannot be squared with that constitutional limitation.

[4] https://www.youtube.com/shorts/FOrVO-upDFo ("Now Biden is trying to ban all private gun transfers in the United States with the stroke of a pen…. Under a Trump Administration all of those Biden disasters get ripped up and torn out my first week, but maybe my first day, in office.").

HISTORY OF THE "ENGAGED IN THE BUSINESS" ISSUE

A. THE DEALER LICENSING REQUIREMENT.

The federal regulation of firearms "is not … deeply rooted in history…." *United States v. Biswell*, 406 U.S. 311, 315 (1972). Indeed, the notion that one must obtain a license in order to sell firearms commercially, on pain of criminal penalty, is a thoroughly modern invention dating only to 1938, with the current framework dating to 1968. Since the inception of these ahistorical gun control laws, federal law has required that those "engaged in the business" of dealing in firearms first must obtain a Federal Firearms License. Failure to comply with this licensing requirement may be punished civilly or criminally, with current criminal penalties ranging up to five years' imprisonment, a fine of up to $250,000, or both. 18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), 3571(b)(3). Thus, the point at which ATF considers a person to be "engaged in the business" has significant implications for ordinary gun owners who occasionally sell their privately owned firearms.

B. THE FIREARMS OWNERS' PROTECTION ACT.

For the first several decades of this licensing requirement, federal law did not define the phrase "engaged in the business." That determination was left to judicial interpretation, which resulted in varying holdings but ultimately was "adequate for enforcement purposes…." Definition of the Phrase "Engaged in the Business," 44 Fed. Reg. 75186, 75187 (Dec. 19, 1979).[5] Even so, Congress later added a definition for "engaged in the business" as part of the Firearms Owners' Protection Act ("FOPA") of 1986. That definition provided that:

> as applied to a dealer in firearms, … 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, 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…. [Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, 450 (emphasis added).]

The FOPA further defined "principal objective of livelihood and profit" to mean "that the intent underlying the sale or disposition of firearms is predominantly one of *obtaining livelihood and pecuniary gain*, as opposed to other intents, such as improving or liquidating a personal firearms collection." *Id.* (emphasis added). Shortly thereafter, Congress amended the FOPA to clarify 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*." Act of July 8, 1986, Pub. L. No. 99-360, 100 Stat. 766, 766 (emphases added). Thus, the FOPA's definitions narrowed the scope of conduct that required commercial licensure under the GCA.

C. THE BIPARTISAN SAFER COMMUNITIES ACT.

In 2022, Congress revisited the definition of "engaged in the business," enacting the so-called "Bipartisan Safer Communities Act." Seeking to "modest[ly] … expan[d]"[6] the definition as to dealers, the BSCA provided that:

> as applied to a dealer in firearms, … a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business *to predominantly earn a profit* through the repetitive purchase and resale of firearms, but 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

[5] See https://archives.federalregister.gov/issue_slice/1979/12/19/75185-75188.pdf.
[6] 89 Fed. Reg. at 29009.

> collection of firearms.... [18 U.S.C. § 921(a)(21)(C) (emphasis added).]

The BSCA further defined "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...." *Id.* § 921(a)(22) (emphasis added).

Thus, as to dealers in firearms, the BSCA removed references to "livelihood" from the licensing requirement, instead requiring only that one seek "profit" and "pecuniary gain" from dealing in firearms in order for the licensing requirement to attach. Even so, the BSCA left intact all the other conjunctive requirements for "engaging in the business," including that one 1) engage in a "*regular course of trade or business*" and 2) *repetitively purchase and resell* "firearms," in the plural. Likewise, the BSCA left intact the 1986 qualifier 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) (emphases added).

D. THE "ENGAGED IN THE BUSINESS" RULE.

Following the BSCA's enactment, the Biden ATF promulgated the Biden rule, which purported to implement the BSCA's new provisions. To the contrary, the Biden rule "went far beyond the regulatory changes necessary to implement BSCA." NPRM at 24426. For example, rather than simply track the statutory text, the Biden rule adopted various *presumptions* "that a person is engaged in the business as a dealer" and "that a person has intent to predominantly earn a profit." 89 Fed. Reg. at 29091. These "presumptions" captured all manner of innocuous and perfectly legal conduct protected by the statute, such as mere *offers* to sell firearms in certain contexts, or even the mere maintenance of *records* tracking one's profits (or lack thereof) from selling a firearm. *See id.*

The Biden rule's conflicts with the statute did not end there. Denying that licensure is required only when one engages in a "regular course of trade or business ... through the repetitive purchase and resale of firearms" (18 U.S.C. § 921(a)(21)(C)) – *i.e.*, purchasing and reselling *plural* firearms – the Biden rule claimed that one could be "engaged in the business" from "even a *single firearm transaction*," or even an "*offer* to engage in a transaction...." 89 Fed. Reg. at 29091 (emphasis added). Likewise, the Biden rule denied that proof of profit is *required* in the vast majority of cases (*id.* at 29045), even though the statute disclaims proof of profit only in limited contexts – for "criminal purposes" or "terrorism." *See* 18 U.S.C. § 921(a)(22). Moreover, contrary to the statute's broad safe harbor for "occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection," the Biden rule purported to exempt from protection "firearms accumulated primarily for personal protection...." 89 Fed. Reg. at 29090. And finally, the Biden rule created new terms out of whole cloth, claiming that "former licensees" must follow various procedures in order to legally liquidate their inventory upon discontinuation of business. *See id.* at 29092.

For many of these reasons, the U.S. District Court for the Northern District of Texas held that the Biden rule not only "clashes with the text of the BSCA," but also "flip[s] the statute on its head by requiring that firearm owners prove innocence rather than the government prove guilt." *Texas*, 737 F. Supp. 3d at 440, 442. Thus, the court recently "conclude[d] that Plaintiffs have succeeded on the merits of their claims," vacating the Biden rule nationwide. *Texas*, 2026 U.S. Dist. LEXIS 130906, at *6-7.

SUMMARY OF COMMENTS

The NPRM is a case study on DOJ's inability to read the room. When the Biden ATF first promulgated its rule, a district court promptly rejected the rule's underlying legal theories, and preliminarily enjoined enforcement for years. Later, another district court agreed, granting summary judgment on some aspects of the Biden rule. *Butler v. Bondi*, 805 F. Supp. 3d 1175 (N.D. Ala. 2025). When President Trump campaigned for reelection in 2024, he promised gun owners that this "Biden disaster[]" would "get ripped up and torn out" his "first week … in office."[7] And, when President Trump took office in 2025, his White House explained that the Biden rule "attack[ed] gun-owning Americans and undermine[d] the Second Amendment…."[8] And each step along the way, Commenters and gun owners excoriated the Biden rule, highlighting its many legal defects and urging DOJ's involvement to permanently end the rule in court.

One would think that, given the Biden rule's massive unpopularity with gun owners – President Trump's loyal base – it would be easy for this DOJ to repudiate the rule in its entirety, and vow never to enforce such flawed interpretations of law again. Not so. Rather, despite removing the Biden rule's ridiculous presumptions, narrow definition of "personal collection," and some provisions on made-up "former licensees," the NPRM leaves many of the Biden rule's most objectionable legal theories intact. Indeed, rather than agreeing that various statutory provisions operate to *protect* gun owners from criminal liability, the NPRM reserves maximal latitude for a future administration (or even this one) to enforce the law exactly as was done under Biden.

For instance, the NPRM alarmingly claims that the real problem with the Biden rule's presumptions was that they were potentially *confusing* – not that they were legally *wrong*. As detailed below, the NPRM claims that meeting any of the Biden rule's presumptions *is enough for a jury to convict*, despite those presumptions' clear conflicts with the statute. But presumption or not, the NPRM is no different than the Biden rule. Similarly, the NPRM does little (if anything) to correct the Biden rule's atextual restrictions on "former licensee inventory," which would *continue* to prevent business owners from recouping financial losses upon loss of licensure. Nor does the NPRM walk back the Biden rule's asinine claim that one could be "engaged in the business" *without ever selling a single firearm* – one of the Biden rule's most egregious errors that led the *Texas* district court to vacate the rule nationwide. In fact, the NPRM continues to explicitly *endorse* this Biden theory. And if that were not bad enough, the NPRM doubles down, declining to expressly require proof of profit in most "engaged in the business" prosecutions, despite the district court's conclusion otherwise.

All told, the NPRM merely pays lip service to gun owners, while failing to correct many of the Biden rule's grave flaws. Accordingly, Commenters are ready to challenge any final rule that resembles the NPRM, if ATF does not immediately reverse course.

COMMENTS ON PROPOSED RULE

A. THE NPRM PURPORTS TO RESCIND – BUT THEN DOUBLES DOWN ON – THE BIDEN "PRESUMPTIONS."

The NPRM proposes to remove the Biden rule's various presumptions – but not because ATF believes the presumptions were legally wrong. Quite the opposite. The NPRM explains that the "presumptions created a serious risk of abuse," because they "could have been used erroneously to relieve the Government of its burden of proof…." NPRM at 24426-27. But flipping the burden of proof appears to be the only concern the NPRM has with the presumptions. Amazingly, the NPRM claims that "the presumptions already involved facts sufficient to create a *prima facie* case" against a criminal defendant, meaning the presumptions "all involved fact patterns from which a fact finder could find that a person was engaged in the business." *Id.* at 24427; *see also id.* ("discarding the presumptions does not mean that a person who engages in behavior identified by the presumptions will not be found to be engaged in the business"). But if that is the case, then ATF still believes gun owners can be convicted of "engaging in the business" for no reason other than that they have met one of the presumptions. In other words, nothing has changed.

[7] https://www.youtube.com/shorts/FOrVO-upDFo.
[8] Russell T. Vought, Major Discretionary Funding Changes, Exec. Off. of the President (May 2, 2025), https://tinyurl.com/5n86f5vv, at 19.

Consider the absurdity of what that means in practice. One of the Biden rule's presumptions presumed an "intent to predominantly earn a profit" when one "[m]akes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale." 89 Fed. Reg. at 29091. In other words, ATF *still* claims that merely *maintaining a spreadsheet of gun purchases and sales* could be enough – by itself – for a jury to find a person intending to profit, and therefore convict a person for "engaging in the business." That would be news to one of Commenters' members, who explained in the *Texas* litigation that they "keep[] a 'digital spreadsheet of information on their extensive collection,'" including, "'if applicable, the date sold and sale price, with a link to any bill of sale or other documentation evincing a transfer in ownership.'"[9] This member engaged in "recordkeeping … typical for many gun owners" (*id.*), yet was not "engaged in the business" commercially. The NPRM apparently endorses convicting GOA's member of a felony *based on this presumption alone*.

The same is true for "[r]epetitively … offer[ing] for resale" firearms "[w]ithin 30 days after the person purchased the firearms." 89 Fed. Reg. at 29091. This too is a common feature of private gun ownership – one that the Biden rule's NPRM, the Biden rule, and now *this* NPRM all ignore. Indeed, as Commenters originally explained during the Biden NPRM period, "there are any number of reasons a person might want to get rid of a recently acquired firearm – regret of having overspent one's means, a firearm that did not fulfill needs or expectations, the need for the firearm (perhaps a hunting trip) has passed, *etc.*"[10] Moreover, "because of the uniquely personal nature of carrying a firearm for self-defense, gun owners routinely purchase and then resell firearms that do not fit their body type, do not feel good in the hand, [or] do not function reliably…."[11] None of these factual scenarios involves any commercial activity, yet the NPRM insists otherwise: "[t]he presumptions all involved fact patterns from which a fact finder could find that a person was engaged in the business." NPRM at 24427.

Of course, some of the Biden rule's presumptions might have been relevant factors *<u>when coupled with other evidence</u>* demonstrating a "regular course of trade or business." But each presumption *alone* cannot be sufficient for a conviction. Indeed, mere *offers* to sell a firearm do not come anywhere close to the "repetitive purchase and resale" of *actual* firearms – and the *actual* profit – that the statute requires. *See Texas*, 737 F. Supp. 3d at 440-41 (noting "(1) 'firearms,' in the plural; (2) the phrase 'regular course,' clearly contemplating a series of events; (3) 'repetitive,' meaning more than once; and (4) the Section's exemption of 'sales, exchanges, or purchases' in the plural"); *id.* at 441 ("while proof of profit is *not* required 'for criminal purposes or terrorism,' it *is* required for all other cases").

ATF should abandon this atextual theory that meeting one of the Biden rule's presumptions, without additional facts, is sufficient as a matter of law to convict for "engaging in the business." ATF needs to try again.

B. THE NPRM INEXPLICABLY SEEKS TO WHITEWASH ATF'S BIDEN-ERA ABUSES.

The NPRM also contradicts itself on the Biden Administration's motivations in promulgating the Biden rule in the first place. First, the NPRM rightly acknowledges that the "Biden Administration began to approach a system of universal background checks through administrative regulation." NPRM at 24426. Indeed, that is precisely what the Biden Administration *said* was its goal: "to move as close to universal background checks as possible within existing law."[12] But two pages later, the NPRM *denies* what it just admitted, claiming that "[s]ome critics *incorrectly suggested* that the prior Administration used the [Biden] rule to try to establish 'universal background checks'…." NPRM at 24428 (emphasis added). In other words, the

[9] https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.83.1.pdf at APPX.435.
[10] https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.7.3.pdf at 40.
[11] https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.83.1.pdf at APPX.248.
[12] https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/08/31/fact-sheet-biden-harris-administration-takes-another-life-saving-step-to-keep-guns-out-of-dangerous-hands/.

NPRM admits universal background checks (and the resulting paper trail on all gun owners) was the *goal*, but then denies that was what the Biden rule *did*. The logic is lost on gun owners.

C. THE NPRM DOUBLES DOWN ON THE PROBLEMS WITH "FORMER LICENSEE INVENTORY."

Next, the NPRM continues to indulge the Biden-era fantasy that there is such a thing as a "former licensee" – a made-up category of person subject to made-up regulatory requirements found nowhere in the statute. Indeed, the NPRM claims that "some process for addressing the inventory of former licensees is appropriate," even though the statute Congress enacted treats "former licensees" the same as any other person. NPRM at 24430. Nevertheless, the NPRM attempts to head off the supposed "concern[]" about "former licensees attempting to hold 'fire sales' of large swathes of inventory without adhering to recordkeeping and background check requirements." *Id.* Such a scenario, the NPRM claims, is "clearly covered by statutory language." *Id.* Not so.

For starters, the term "former licensee" exists nowhere in federal law. The GCA only distinguishes between two types of individuals: "licensed dealers," and those who are not. *See, e.g.*, 18 U.S.C. § 923(c) ("licensed … dealer" and "licensee"); *id.* § 922(a)(1)(A) ("any person except a … licensed dealer"). These provisions operate in the present tense; those who currently are licensed dealers are subject to certain obligations and may engage in certain activities, while those who are not licensed are free from those obligations but face certain limitations on their conduct. *See, e.g.*, *id.* § 923(g)(1)(A) ("Each … licensed dealer shall maintain such records … of firearms…."); *id.* § 922(a)(1)(A) ("It shall be unlawful[] for any person[] except a … licensed dealer, to engage in the business of … dealing in firearms…."). Nowhere in these statutes did Congress contemplate – much less create – any ongoing obligations for so-called "former licensees."

Even so, the NPRM continues the Biden rule's assertion that "former licensees" would unlawfully "engage in the business" were they to liquidate "large swathes of inventory" originally "acquired as business inventory in repeated transactions…." NPRM at 24430. But if a "former licensee" sells inventory previously acquired *while licensed to do just that*, there can be no crime, because those firearms are merely being "sold" off – not "purchased" and "*resold*," as the statute requires. *See* 18 U.S.C. § 921(a)(21)(C) (emphasis added).

Curiously, the NPRM concedes that the Biden rule treated "former licensees" too harshly, by "limit[ing] a former licensee to disposing of [its] inventory within 30 days after it discontinue[d] business…." NPRM at 24430. Following that 30-day period, the Biden rule "effectively prevent[ed] former licensees from reclassifying inventory … as personal firearms in a 'personal collection'" for purposes of disposition, thereby imposing an "effectively permanent restraint on firearms sales after the 30-day period…." *Id.* This restraint on liquidating "former licensee inventory," the NPRM concedes, was "arguably unlawful." *Id.* Indeed, it resulted in one GOA member and "former FFL whose retirement savings [we]re … frozen in unsellable inventory." *Texas*, 737 F. Supp. 3d at 438. This member, as GOA explained, had a lifetime career as a licensee, amassing over a million dollars of inventory – until Biden's ATF forced him out of business under its spiteful "zero tolerance" regime. And under the Biden rule, he was prohibited from liquidating his collection of firearms – his retirement savings – guns that ATF had told him to transfer to his personal collection when his license was revoked.

The NPRM does nothing to fix the problem. To the contrary, the NPRM contemplates only "an occasional firearm in a private sale years later" as permissible conduct for a "former licensee" – not the sort of "fire sale" that would be necessary to recoup what may be left of one's business investment. NPRM at 24430. Even so, the NPRM claims not to "impose encumbrances on all firearms that were previously part of a business's inventory" – except to the extent that *it does just that*. In other words, the NPRM and the Biden rule are *different*, in that they are exactly the *same*. So it follows that the NPRM's theory of "former licensees" is just as unlawful as the last. The *Texas* district court flatly rejected a world where GOA's former licensee member could not divest his lifetime collection – yet that is precisely the regime the NPRM would enact.

D. THE NPRM EGREGIOUSLY FAILS TO WALK BACK THE CLAIM THAT A PERSON CAN BE "ENGAGED IN THE BUSINESS" WITHOUT EVER SELLING A FIREARM.

Perhaps most alarmingly, the NPRM uncritically parrots the Biden rule's theory that one can be guilty of "engaging in the business" *without ever selling a single firearm*. First, the NPRM claims that "the statute reaches those who *hold themselves out* as retail sources of firearms," citing two decisions from the Ninth Circuit – hardly a sympathetic court towards the Second Amendment. NPRM at 24426 (emphasis added). Then, hidden within a footnote comes the NPRM's knockout punch – "[f]or a person to engage in the business of dealing in firearms, *it is not necessary to prove an actual sale of firearms*." *Id.* at 24427 n.15 (emphasis added). Thus, despite the NPRM's later claim that there is no "magic number of sales that can make a person 'engaged in the business,'" it would seem that, under the NPRM, *zero* will suffice. *Id.* at 24428.

This legal theory is nothing short of nonsense – and has been rejected by more than one court. As the *Texas* district court explained, ATF's "proffered interpretation is severely undercut by Section 921(a)(21)(C)'s use of (1) 'firearms,' in the plural; (2) the phrase 'regular course,' clearly contemplating a series of events; (3) 'repetitive,' meaning more than once; and (4) the Section's exemption of 'sales, exchanges, or purchases' in the plural." *Texas*, 737 F. Supp. 3d at 440-41. And that says nothing of the statutory requirement of "the 'purchase *and* resale' of firearms – a conjunctive requirement that flatly contradicts [the] assertion that 'there is no minimum threshold number of firearms purchased *or* sold that triggers the licensing requirement.'" *Id.* at 441. Likewise, as the *Butler* district court explained, "if the actor's firearms sales do not recur on a continuing basis, he is not 'engaged in the business … of dealing firearms.' … A one-time purchase of one gun with the promise to buy other guns does not establish that the buyer is devoting his time, attention, and labor to regularly dealing firearms as a business." *Butler*, 805 F. Supp. 3d at 1202-03. Yet at no point does the NPRM acknowledge that these federal courts recently (and forcefully) rejected ATF's "no sales" theory, much less explain why ATF might believe these courts to be incorrect.[13] To the contrary, the statute's plural, sequential, and conjunctive language requires *actual* sales of firearms – certainly more than one – to incur liability. The statute creates no "attempt" crime.

E. THE NPRM MINIMIZES THE BROAD STATUTORY "SAFE HARBOR" CONGRESS CREATED.

Commenters appreciate that the NPRM proposes several steps towards restoring the statutory safe harbor that Congress created for "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). However, the NPRM continues to improperly characterize this safe harbor as a "narrow … exception" to an otherwise "general rule." NPRM at 24429. But this view is contrary to the statute's plain text, the clear intent of Congress, the data, and the historical tradition.

The NPRM correctly acknowledges that "the rule improperly attempted to narrow the categories of accumulated firearms that would constitute a collection." NPRM at 24429. To that end, the NPRM agrees that the "personal collection" referenced in 18 U.S.C. § 921(a)(21)(C) is different than the "collector" of curio and relic firearms found in 18 U.S.C. § 921(a)(13). NPRM at 24429. And the NPRM concedes that the existing regulation rests on an absurdly narrow definition of what constitutes a "collection." *Id.* at 24430.

Unfortunately, though, the NPRM does not fully walk back the artificially narrow view of the statutory "safe harbor" that Biden's ATF took when promulgating the current regulation. To the contrary, the NPRM appears to double down, continuing to characterize the safe harbor as a "*narrow*, predetermined exception to the *general rule that applies to all firearms*," and a "*narrow* statutory exception." NPRM at

[13] Nor does the NPRM ever consider what the Second Amendment might have to say about criminalizing merely the attempt to engage in a private sale of a firearm.

24429 (emphases added). But this notion – that the safe harbor is narrow – has been Commenters' criticism of the current regulation all along. For example, in their Motion for Temporary Restraining Order and/or Preliminary Injunction, Commenters explained that "the Rule construes the statutory safe harbors" narrowly "so that they do not apply to most gun owners."[14] As Commenters noted, "in concocting its narrow definition of 'personal collection,' ATF employed the narrowest definition of 'collection' it could find." *Id.*; *see also id.* at 32 ("the Rule adds insult to injury by reducing explicit statutory safe harbors into mere instances where '[a] person shall not be presumed to be engaged in the business,' but only if 'reliable evidence' so indicates"). The Texas court agreed, rejecting "the absurdity that the statute's safe harbor provision provides *no safe harbor at all* for the majority of gun owners." Texas, 737 F. Supp. 3d at 442.

Indeed, there is nothing "narrow" about the statute's express safe harbor. In fact, the concept of being "engaged in the business" was never meant to be, as the NPRM claims, a "general rule that applies to all firearms." To the contrary, the GCA was deliberately limited in scope, as "it is not the purpose … to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms." Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213. Thus, the GCA is entitled "An Act … to provide for better control of the *interstate* traffic in firearms," which the American Bar Association characterized as "leav[ing] to each state the responsibility and authority for control ling the sale and disposition of firearms within its borders."[15] The GCA therefore represents the careful delineation of boundaries between two spheres of firearm transfers, not a "general rule" subject only to a single "narrow … exception."

To be sure, the Gun Control Act regulates all *interstate* transfers of firearms, and all transfers that are *commercial* in nature. *See* 18 U.S.C. § 922. But even so, that leaves an entire swath of *intrastate*, *noncommercial* transfers governed only by the proscription of transfer to prohibited persons. And while there are approximately "127,739 active federal firearms licensees,"[16] ATF estimated in its prior rulemaking that there were "382,018[17] unlicensed persons selling, trading or bartering…." 89 Fed. Reg. at 29072.

Similarly, although older estimates (widely criticized) claimed that as many as 40 percent[18] of transfers took place without utilization of an FFL, a more modern estimate puts that figure at approximately 22 percent.[19] Either way, the lawful, noncommercial, private transfer of firearms is hardly a "narrow" activity.[20] To the contrary, it is a widespread, legitimate – and entirely lawful – practice among American gun owners. And obviously so, since the activity has existed since the Founding era, and before. The regulation of firearms with dealer licensing and background checks is a thoroughly modern invention, having no predicate in this country's historical tradition prior to the 1938 Federal Firearms Act. *See Biswell*, 406 U.S. at 315 (explaining that the federal regulation of firearms "is not … deeply rooted in history").

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[14] https://storage.courtlistener.com/recap/gov.uscourts.txnd.389307/gov.uscourts.txnd.389307.7.2_1.pdf at 23.
[15] https://www.americanbar.org/groups/public_interest/gun_violence/policy/1965a571/.
[16] https://www.atf.gov/resource-center/fact-sheet/facts-and-figures-fiscal-year-2025.
[17] In its prior rule, ATF estimated that approximately 25 percent of these persons were unlawfully engaged in the business. 89 Fed. Reg. at 29072. But even factoring that in, the number of admittedly lawful private sellers dwarfs the number of FFLs by a wide margin (2.25:1).
[18] https://tinyurl.com/3hju8b3v; see https://www.washingtonpost.com/news/fact-checker/wp/2018/02/20/bernie-sanders-resurrects-a-zombie-claim-on-gun-sales-without-background-checks/; https://www.factcheck.org/2018/02/sanders-uses-stale-gun-sales-stat/; https://www.politifact.com/factchecks/2018/feb/20/bernie-s/bernie-sanders-repeats-false-claim-about-backgroun/.
[19] https://www.acpjournals.org/doi/10.7326/M16-1590.
[20] Depending on the size of one's firearm collection, and their level of activity in collecting, one realistically might turn over anywhere from a few, to several, to several dozen – or more – firearms a year, all while seeking to enhance their personal collection. Nor is there any prohibition on selling firearms for more than one paid – a common occurrence for gun owners, since firearms generally retain their value, if not appreciate in value. So long as a person is not engaged in commercial business, predominantly to earn a profit, these activities are perfectly legal.

The NPRM is mistaken that the statutory safe harbor represents only a "narrow … exception." Such language should be sanitized from ATF's thinking. Rather, ATF should affirm that Congress's intentional language created a broad and robust statutory exception for private firearm transfers.

F. THE NPRM BLATANTLY FAILS TO WALK BACK ATF'S ERRONEOUS CLAIMS ABOUT PROOF OF PROFIT.

Continuing its trend of ignoring the district court's reasoned opinions in the *Texas* litigation, the NPRM implicitly denies that proof of profit is required for the vast majority of "engaged in the business" prosecutions. *See* NPRM at 24427 n.15 ("For a person to engage in the business of dealing in firearms, it is not necessary to prove an actual sale of firearms."). Indeed, if the NPRM does not even require an "actual sale" to convict, it is difficult to see how the NPRM would require proof of profit. But proof of profit *is* required outside of the statute's "criminal purposes" and "terrorism" exception, for at least two reasons.

First, the statutory definition of "to predominantly earn a profit" describes "the intent underlying *the sale or disposition* of firearms." 18 U.S.C. § 921(a)(22) (emphasis added). To put it plainly, if there is an intent that underlies a "sale or disposition," then a "sale or disposition" must occur. In other words, if there is no "sale or disposition," then there can be no "intent underlying" it. Indeed, if Congress had meant for "intent" to trump actual purchases and resales, it would have said "the intent underlying the *intended or proposed* sale or disposition." *See United States v. Tyson*, 653 F.3d 192, 200 (3d Cir. 2011) (emphasis added) ("a defendant engages in the business of dealing in firearms when his principal motivation is economic (*i.e.*, 'obtaining livelihood' and 'profit') *and he pursues this objective* through the repetitive purchase and resale of firearms"). It follows that, if the statute requires an actual sale or disposition of firearms for liability to attach, then that sale or disposition must have produced a profit, too. The errors resulting from the Biden rule's legal theories are beginning to compound.

Second, the fact that proof of profit is explicitly not required in "criminal purposes" and "terrorism" cases implies that it is required in all others. As the *Texas* district court explained, "the negative corollary is obvious … [profit] *is* required for all other cases." *Texas*, 737 F. Supp. 3d at 441. Indeed, the fact that the statute discusses intent "does not necessitate – or even suggest – that intent is *all* that is required. … Action is needed, too." *Id.* The *Butler* district court was in accord. *See Butler*, 805 F. Supp. 3d at 1203 ("[T]hat Congress had to exclude 'proof of profit' in cases involving gun sales to criminals and terrorists necessarily shows that 'proof of profit' is baked into proving intent for all other firearms transactions. If the Government must obtain proof of an actor's profit, then the actor necessarily must sell firearms to make that profit. The Final Rule's assumption that the Government can prove intent without profitable sales is therefore flawed.").

A decision by another Texas federal district court further confirms the conclusion that the statute requires actual sales and actual profit, explaining that "[t]he government can only convict a defendant of this offense by showing that he *sold guns* at wholesale or retail *for profit* (or to facilitate crimes)." *United States v. Flores*, 652 F. Supp. 3d 796, 799 n.14 (S.D. Tex. 2023) (emphases added); *see also United States v. Strunk*, 551 F. App'x 245, 245-46 (5th Cir. 2014) ("Strunk … engaged in a regular course of selling firearms," and "retained money collected on the sale of others' firearms."); *Clark v. Scouffas*, 2000 U.S. Dist. LEXIS 633, at *7-8 (N.D. Ill. Jan. 18, 2000) (applicant did not qualify as a dealer when he "'sold' only three pistols … [f]rom the years 1990 to 1999," and "[n]o profit was made").

Notwithstanding this judicial rebuke, the language in the NPRM indicates that ATF continues to believe that a person can be engaged in the business *without ever earning a profit*. For example, ATF speculates that "a person who buys ten models of the same handgun, with the predominant intent to resell for a profit, and then proceeds to sell any number of them repetitively three days later at a flea market is engaged in the business," apparently regardless of whether any actual profit was earned. NPRM at 24426. Likewise, the NPRM continues to claim that it is possible for a fact finder to determine a person to be engaged in the business simply for meeting any of the "presumptions" from the existing regulation. *Id.* at 24427; *see* *also* 27 C.F.R. § 478.13(c). Thus, based on the presence of any one of those factual predicates – and without more – a person could be convicted for being "engaged in the business."

But therein lies the rub – none of the fact patterns in ATF's presumptions involves a showing that the person *profited* from the activity – *or even intended to profit*. For example, under the NPRM, a person who "[r]epetitively resells or offers for resale firearms … [w]ithin 30 days after the person purchased the firearms" could be found – without more – to be "engaged in the business." This completely divorces the notion of being "engaged in the business" from the statutory requirement of profit. In other words, ATF continues to believe that a person can be "engaged in the business" *without ever earning a profit (or even intending to earn a profit)*, even though the statute clearly requires as much.[21] The NPRM thus conflicts with the statutory text, and fails to clear the starting gate on this issue because it parrots the Biden rule's repudiated theory.

G. ATF'S ANALYSIS OF "REGULATORY ALTERNATIVES" CONTAINS SERIOUS FLAWS.

The NPRM considers three "alternatives," including (i) maintaining the status quo, (ii) the proposed rulemaking, and (iii) issuing guidance in lieu of rulemaking.[22] NPRM at 24433. But ATF's analysis with respect to Alternative 2 is flawed, and ATF has entirely failed to consider the best alternative option – what Commenters call "Alternative 4."

First, with respect to Alternative 2, ATF claims that the changes proposed in the NPRM "could conversely 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." NPRM at 24433. But any such concern about the costs of statutory fidelity is entirely misplaced. For example, it is axiomatic in constitutional litigation that it can never be detrimental to the public interest for a court to require the government to adhere to constitutional requirements, and conversely that it never can be in the public interest for an agency to violate constitutional rights. *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) ("It is in the public interest not to perpetuate the unconstitutional application of a statute."); *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the Government does not have an interest in the enforcement of an unconstitutional law"). The same principles apply here. It is Congress that makes the laws – not ATF. ATF simply has no discretion to deviate from the statutory scheme, regardless of any cost-benefit analysis it might perform. Thus, regardless of any purported and entirely speculative "risk" that theoretically might arise from the culmination of private sales – sales for which the statute does not require licensure – ATF must follow the law that Congress enacted. An agency – a creation of Congress – may not even consider whether statutory fidelity carries public safety risks. Even if it did, ATF has no discretion to deviate from the statute.

Second, ATF has failed to consider the numerous benefits associated with an alternative approach – Alternative 4. ATF has failed – refused[23] – to consider this approach at all. Under Alternative 4, ATF would not merely seek to walk back piecemeal the most objectionable parts of the current regulations that have been enjoined and now vacated. Rather, ATF would memorialize the legal analysis contained in the *Texas* district court's opinions in a *new* NPRM – one that actually tracks the statute, requires actual purchases and resales (plural) and proof of profit, and expressly rejects the notion that the

[21] Nor would it make any sense to theorize that a person might have the "intent" to profit but then ultimately fail in the attempt. Unlike climbing a mountain or shooting a three pointer, there is no attempting – but failing – to profit on a sale. There is only cold, hard math. A person either sells a firearm for more than its purchase price, or does not. If ATF's buyer of "ten models of the same handgun" sells them all at a flea market for less than he paid, he definitionally cannot be engaged in the business "to predominantly earn a profit." That might not be a reality that ATF prefers, but that is the statute Congress wrote.

[22] With respect to Alternatives 1 and 3, Commenters agree that maintaining the status quo would cause measurable harms to the public, while issuing guidance without an underlying rule change would not solve the numerous problems inherent in existing regulations.

[23] Of course, this approach is nothing new. Commenters have been urging a faithful reading of the statute for years.

conduct identified in the previous presumptions could allow a jury to convict on that basis alone. Law-abiding gun owners deserve nothing less than statutory fidelity.

CONCLUSION

ATF needs to go back to the drawing board. While purporting to fix its disastrous Biden-era "engaged in the business" rule, the NPRM does precisely the opposite – it puts lipstick on a pig, continuing to peddle many of the Biden rule's worst legal theories. Gun owners expect better. If they don't get it from this ATF, Commenters will see ATF in court (again).

Respectfully submitted,

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