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Third Way Comments on Definition of Engaged in the Business

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Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Avenue NE
Washington, DC 20226

Docket ID: ATF-2023-0002

To Whom It May Concern:

Thank you for the opportunity to offer written comment to the Bureau of Alcohol, Tobacco, Firearms and Explosives regarding its recent Notice of Proposed Rulemaking (NPRM). NPRM 2022R-17 “Definition of ‘Engaged in the Business’ as a Dealer in Firearms” aligns ATF regulations with provisions of the Bipartisan Safer Communities Act (BSCA), administratively closing the gun show and online loophole. Third Way is grateful for this clarification of when a person is deemed to be “engaged in the business” of dealing firearms as it will ensure that bad actors cannot abuse the Second Amendment for criminal purposes.

Central to ATF’s Notice of Proposed Rulemaking is a redefinition of exactly what it means to be “engaged in the business” of selling firearms. The Gun Control Act (GCA) of 1968 first used and defined the phrase “engaged in the business.” Congress later amended its definition through the Firearms Owners’ Protection Act (FOPA) of 1986. As laid out in FOPA, to be “engaged in the business” of dealing firearms means that a seller has the principal objectives of (1) livelihood and (2) profit when transacting. If a seller met these two conditions, then they were deemed to be “engaged in the business” and therefore required to obtain a Federal Firearms License (FFL) and perform background checks on potential buyers. If a seller only met one of the two conditions, i.e. only selling to make a profit and not for their livelihood, they were exempt from federal firearms regulations, including running background checks on buyers.

The two-part definition of who was “engaged in the business” created two pathways to firearm ownership. The first was a regulated marketplace existing in brick-and-mortar gun stores across the country. By virtue of having a physical storefront, these vendors were deemed to be selling for both livelihood and profit and had to meet federal requirements laid out in FOPA. Vendors selling at gun shows, online, or in any other nonphysical store were considered to be selling only for profit and not for livelihood. As a result, these vendors were exempt from federal licensing and background check requirements. This created a loophole and a burgeoning black market for firearms.

Unsurprisingly, the nonregulated pathway to gun ownership became incredibly popular, especially among criminals and gun traffickers. A recent study found that over one million online ads for firearms are posted each year that would not legally require a background check for the purchase to be completed. [1] Among firearms purchased for criminal purposes, 80% come from sellers without a license. [2] Once these weapons are sold at gun shows or online, they are used disproportionately to commit crimes. Of inmates who have been convicted of gun offenses, 96% were prohibited from having a firearm when they acquired their firearm from an unlicensed seller. [3] Put differently, millions of guns available through non-licensed sellers are used inordinately by criminals and traffickers to commit crimes.

In 2022, the United States Senate decided to close this loophole through the passage of the Bipartisan Safer Communities Act (BSCA). Now, the ATF's Notice of Proposed Rulemaking aligns Bureau regulations with language passed in BSCA. The key change is a redefinition of "engaged in the business" from meaning a principal objective of livelihood and profit to just profit. Livelihood is no longer a consideration. The ATF has also provided definitions for what it means to be a dealer and a purchaser, what constitutes a sale, and what it means to predominantly earn a profit when selling firearms.

Third Way strongly supports this NPRM as it brings clarity and precision to the regulation of firearms transactions. The ATF has implemented the language of a bill passed by Congress (BSCA), clarified several critically important terms, and explained the exact circumstances in which someone is *not* subject to licensing and background check requirements. By clarifying who is not considered to be "engaged in the business," the ATF has protected the ability of genuine hobbyists and collectors to transact without fear of breaking the law.

The proposed regulation also makes it harder for criminals to purchase firearms. Currently, there are 20 states with background check requirements and 30 states without them. [4] As a result, states with background check laws are undermined by neighboring states with no such regulation as criminals can simply drive to a different state to purchase a gun. Criminals take advantage of this inconsistency in regulation existing between states. The result is a higher rate of crime and an increased burden on law enforcement agencies. ATF's NPRM fixes these issues, reducing violent crime and preventing bad actors from exploiting the Second Amendment.

ATF's proposed regulation is also in line with popular demand. Over 86% of American adults support background checks for all firearm sales, and Congress met these demands through the BSCA. [5] Furthermore, over 90% of background checks are processed in an average time of 107 seconds and are over 99% accurate. [6] Background checks are fast, accurate and popular. Third Way supports this regulation as it recognizes the efficacy of these checks, the broad popular support they enjoy, and the fact that Congress has asked ATF to regulate in this area through the BSCA.

The absence of a comprehensive background check system means millions of firearms are available to bad actors at the drop of a hat. If you want to buy a firearm, a few clicks on the internet or a quick drive to your local gun show will allow you to obtain a weapon regardless of your criminal history. The ATF's NPRM makes plain the regulations governing firearms transactions, creating a consistent national standard for background checks, thereby closing the gun show and online loophole. We are deeply appreciative of the Bureau's effort to ensure a coherent standard for firearm sales across the country. Thank you for your time and consideration of these comments, and please do not hesitate to contact me should you have any questions.

Sincerely,

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ENDNOTES

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