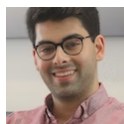




MEMO Published September 25, 2023 • 6 minute read

Bipartisan Safer Communities Act Closes the Gun Show and Online Loophole



Jeremy Odrich

Fellow, Social Policy & Politics

[@TWSocialPol](https://twitter.com/TWSocialPol)

The Bipartisan Safer Communities Act (BSCA) of 2022 broke through 30 years of gun safety gridlock in Congress and delivered commonsense reform. One of its most important provisions clarifies what it means to be “engaged in the business” of selling a firearm. On August 31, 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a notice of proposed rulemaking aligning the ATF’s regulations with the BSCA’s new definition of what it means to be “engaged in the business.” The effect of this proposed regulation is simple: it clarifies who must obtain a license and run background checks when selling

firearms, closing the gun show and online loophole administratively. Rights come with responsibilities, and the Second Amendment right to own and sell firearms does not extend to criminals, terrorists, and others deemed ineligible under existing laws passed by Congress. This proposed regulation ensures bad actors don't abuse the Second Amendment for criminal purposes.

“Engaged in the Business” Has a Long History

The ATF's recent clarification of what it means to be “engaged in the business” of dealing firearms is consequential, but not without precedent. The Gun Control Act (GCA) of 1968 first used the phrase “engaged in the business” and created an initial definition of the term. Eighteen years later, the definition was redefined by Congress through the Firearms Owners' Protection Act (FOPA) of 1986, which passed under President Ronald Reagan. As laid out in FOPA, to be “engaged in the business” of dealing firearms means that a seller is seeking (1) livelihood and (2) profit when selling. 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. But if they only met one of the two conditions, i.e. only selling to make a profit and not for their livelihood, then they were exempt from federal firearms regulations, including running background checks on buyers.

This seemingly harmless approach to defining who was “engaged in the business” created two pathways to firearm ownership. The first was a regulated marketplace in brick-and-mortar gun stores across the country. In 2022, there were 52,910 firearms dealers and 6,740 pawnbrokers who met this distinction. By 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. Predictably, this created a loophole and a growing 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. Among firearms purchased for criminal purposes, 80% come from sellers without a license. Weapons sold through this loophole are disproportionately used to commit crimes. Of inmates who have been convicted of gun offenses, 96% were prohibited from having a firearm when they got it from an unlicensed seller. These data paint a clear picture; millions of guns are available through non-licensed sellers and without background checks. Criminals and traffickers frequently use guns purchased through these loopholes to commit crimes.

What the BSCA/ATF Regulation Change Does

The United States Senate recognized the need to fix this glaring regulatory blind spot. Republicans and Democrats came together in 2022 to pass the Bipartisan Safer Communities Act, which better defines what it means to be “engaged in the business,” effectively closing the unregulated gun show and online loophole.

This was intentional. Whereas FOPA defined “engaged in the business” as having a principal objective of livelihood and profit, the legislation removed the livelihood test, and the ATF’s new regulation removed the livelihood portion entirely. The ATF now defines a person as “engaged in the business” if they consistently devote time and labor to repetitively dealing firearms as a regular course of business with the primary intention of earning a profit. In other words, if you are selling firearms for monetary gain, you are required to apply for and obtain a federal firearms license, and background checks are required for sales, regardless of if you have a physical storefront or not.

The ATF has also clarified 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. By shedding light on who these new regulations apply to, the ATF has also more clearly defined who *is not* required to obtain an FFL and run background checks. Under the ATF's new regulation, a person who only occasionally buys and sells firearms to enhance or liquidate their collection is free to do so unencumbered.

What Does This Change Mean for Owners and Sellers?

While enthusiasts might assume the ATF has only limited their ability to buy and sell firearms, the opposite is true in this case. The ATF's new proposed regulation explicitly protects the ability of genuine hobbyists and collectors to buy and sell without fear of breaking the law. In other words, the ATF has protected the ability of hobbyists to buy firearms while preventing those who wish to do so illegally.

More broadly, the ATF has returned balance to firearm transactions. Fewer people can now conduct off-book sales of firearms which only serve to further burden our law enforcement agencies and are fundamentally unfair to the dealers who have taken the time to follow the law. Some states have passed laws to close the gun show and online loophole, but their efforts are undermined when their neighboring states refuse to follow suit. When neighboring states leave the gun show and online loophole in place, it undermines the efficacy of states who have chosen to close the loophole.

For those selling with the intention of making a profit, conducting a background check is quick and effective. At a minimum, 90% of firearm background checks performed through the National Instant Criminal Background Check System (NICS) are processed in an average time of 107 seconds. Some critique the checks as producing false-positive results, but according to an FBI evaluation they are accurate from 99.3 to 99.8% of the time. And Americans from across the political

spectrum support this regulatory change; a recent survey found that 86% of American adults want Congress to implement background checks for all firearms sales. Few policies enjoy this level of popular support. Licensing and background checks are fast, accurate, and popular.

Conclusion

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. Democrats and Republicans recognize the importance of closing the gun show and online loophole and the ATF's new regulation does just that. Rights come with responsibilities, and the ATF is ensuring that those who exercise their Second Amendment right do so without subverting our background check system.

TOPICS

GUNS 161