

United States Senate

WASHINGTON, DC 20510-4305

Helen Koppe
Enforcement Programs and Services
Office of Regulatory Affairs
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice
99 New York Avenue NE
Washington, DC 220226

Re: Docket Number: ATF 2022R-17
Comment Letter: Notice of Proposed Rulemaking: Definition of “Engaged in the Business”

The Bipartisan Safer Communities Act (“BSCA”) was a landmark, bipartisan effort to invest in mental health resources, improve school safety, and make updates to our firearms laws to protect our communities. The BSCA has and will continue to save lives. Indeed, we drafted the BSCA to improve school safety and protect our communities while ensuring that the Second Amendment rights of law-abiding Americans would not be infringed.

On August 31, 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) proposed a new rule—Definition of “Engaged in the Business” as a Dealer in Firearms—to interpret Section 12002 of the BSCA (the “proposed rule”).¹ We submit this comment in opposition to the proposed rule.

As chief negotiators and drafters of the BSCA, we can say with certainty that the BSCA would not have passed with Section 12002 had we contemplated this proposed rule or anything remotely similar to it. The proposed rule is a material breach of our agreement and understanding when we negotiated in good faith a bipartisan bill. The proposed rule flagrantly ignores our agreement, the text, and blackletter law in an attempt—or power grab—to usurp our Article I authority. The consequences of this proposed rule are severe and will reverberate across our institutions if the ATF moves forward with this proposed rule. The proposed rule fundamentally undermines our institutions, the democratic process, and the ideas of representative government in the Constitution. It needs to be withdrawn.

Under current law, including well before the BSCA, someone engaged in the business of dealing firearms would need to have or obtain a federal firearms dealers license. Someone with a federal firearms dealers license—commonly referred to as a Federal Firearms Licensee (“FFL”)—is required to run background checks on the National Instant Criminal Background Check System

¹ Definition of “Engaged in the Business” as a Dealer in Firearms, 88 Fed. Reg. 61,993 (Sept. 8, 2023) (to be codified at 27 C.F.R. pt. 478).

(“NICS”). The BSCA did not change this statutory framework. And it most certainly did not give the ATF the authority to “mov[e] as close to universal background checks as possible. . .”²

Democrat members asked for universal background checks and various iterations to be included in the BSCA, but we, the undersigned, rejected that proposal. Proposals to cover all online sales or universal background checks have been considered and rejected on numerous times in the United States Senate.³ In fact, such proposals have even been introduced subsequent to the passage of the BSCA: further evidence that such authority does not exist under current law.⁴ Any attempt to use the federal firearms licensing process to move “as close to universal background checks as possible” is a flagrant violation of the law and our separation of powers.

In Midland and Odessa, Texas, the shooter—who at the time was prohibited from possessing a firearm under federal law—purchased a firearm from an unlicensed firearms dealer. The shooter had previously attempted to buy from a licensed dealer, but was rejected by the licensed firearms dealer because the NICS flagged that he was a prohibited person. After a detailed investigation, federal prosecutors convicted the unlicensed firearms dealer of federal crimes, and a federal judge sentenced him to two years in prison.⁵ Our goal in passing section 12002 was to prevent someone from shopping around for an unlicensed firearms dealer, not to give the ATF the authority to impose a gun control regime on law-abiding Americans.

Section 12002 made only a very tailored change to the language of the Gun Control Act with regard to “engaged in the business.” It modified the definition of “engaged in the business . . . as applied to a dealer in firearms” by striking the phrase “with the principal objective of livelihood and profit,” and replacing it with “to predominantly earn a profit.”⁶ We left the majority of the statute intact. As amended, the statute now defines a person engaged in the business as a dealer in firearms as:

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 collection of firearms.⁷

² Press Release, The White House, President Biden Announces New Actions to Reduce Gun Violence and Make Our Communities Safer (Mar. 14, 2023), *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/14/fact-sheet-president-biden-announces-new-actions-to-reduce-gun-violence-and-make-our-communities-safer/>.

³ *See, e.g.*, 159 CONG. REC. S2740 (Apr. 17, 2013) (rollcall vote no. 97 on S.Amdt. 715 to Safe Communities, Safe Schools Act of 2013, S. 649, 113th Cong. (2013)); Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (2021) (as placed on calendar in the Senate, May 25, 2022); Background Check Expansion Act, S. 529, 117th Cong. (2021).

⁴ *See* Background Check Expansion Act, S. 494, 118th Cong. (2023).

⁵ *Prison For Man Who Sold Texas Shooter Seth Ator AR-15 Used in Midland-Odessa Massacre*, CBS Texas (Jan. 7, 2021, 12:23 p.m.), <https://www.cbsnews.com/texas/news/prison-for-man-sold-texas-shooter-seth-ator-ar-15-midland-odessa-massacre/>

⁶ Bipartisan Safer Communities Act, S. 2938, 117th Cong. § 12002 (2022) (“BSCA”).

⁷ 18 U.S.C. § 921(a)(21)(C) (emphasis added).

This was an incremental update. We merely struck the “livelihood” language from the statute. This was done to prevent someone who should register as a firearms dealer from evading licensing requirements because he or she had another job that supported his livelihood. In other words, we wanted to clarify that if a person has a job and also operates a firearms business, he or she must still register as a firearms dealer. This was the law in many different jurisdictions across the country and consistent with the ATF’s guidance.⁸ In its 2016 bulletin, the ATF stated:

As a general rule, **you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit.** In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed.⁹

We drafted this provision to codify the ATF’s existing guidance to firearms dealers. This underscores how far afield the ATF is with the proposed rule. Our goal was to provide the American people with predictability and clarity in the law, not to give the ATF an opportunity to impose a gun control regime on law-abiding Americans.

In making this incremental clarification, we left in place all of the other language in the statute that needs to be considered by the ATF before deeming someone a firearms dealer. In other words, someone would need to register as a firearms dealer only if he or she:

- (1) devotes time, attention, **and** labor to dealing firearms;
- (2) does so as a regular course of trade or business;
- (3) to predominantly earn a profit; **and**
- (4) repeatedly buys and resells firearms.¹⁰

The proposed rule ignores these statutory requirements. Instead, the proposed rule creates a series of novel, unworkable and unlawful presumptions that purport to apply in civil and administrative proceedings. The proposed rule states, for example, that someone is presumed to be a firearms dealer, absent reliable evidence to the contrary, if someone “[s]ells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms.”¹¹ Thus, under the proposed rule, the ATF would require someone to prove he or she is not a firearms dealer in instances where no firearms are actually exchanged or sold. The presumptions subject someone to potential civil fines and fees as well as criminal penalties for solely making representations. As noted above, a key element for when someone would need to register is when he repeatedly buys and resells firearms. The proposed rule ignores this statutory requirement.

⁸ See, e.g., Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, No. 14.3 (2022 ed., rev. Dec. 2021) (previously No. 8.53 (2010 ed.)); *United States v. King*, 735 F.3d 1098, 1106 (9th Cir. 2013) (citing instruction 8.53 (2010 ed.)); Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2010), No. 34.1 (noting that a person can be a dealer even if “it’s not the person’s primary business or job”).

⁹ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Do I need a License to Buy and Sell Firearms? Guidance to help you understand when a Federal Firearms License is required under federal law.*, ATF Publication 5310.2, at 4 (Jan. 2016), available at:

<https://web.archive.org/web/20220531053058/https://www.atf.gov/file/100871/download> (emphasis added).

¹⁰ 18 U.S.C. § 921(a)(21)(C).

¹¹ 88 Fed. Reg. at 62,021 (to be codified at 27 C.F.R. § 478.11(c)(3)(i)).

Similarly, the proposed rule presumes that someone is a firearms dealer if they repetitively offer for sale firearms “[w]ithin 30 days after the person purchased the firearms . . .” or the firearm or firearms are “new, or like new in their original packaging.”¹² Firearm collectors sometimes choose to keep their collections in the original packaging. Hobbyists sometimes purchase similar firearms—of the same make and model—to increase their own personal collection. These actions do not make someone a firearms dealer. If anything, these are common recreational activities of gun owners, collectors, and hobbyists.

If the proposed rule goes into effect, innocent people will have to prove to the ATF that they are not firearms dealers when they, for example, try to resell firearms that are in the original packaging or represent that they can sell additional firearms to their friends. These types of activities do not make someone a licensed firearms dealer. Nothing in current law, including as amended by the BSCA, empowers the ATF to shift the burden to an innocent person to prove that keeping a firearm in its original packaging or discussing the sale of firearms to friends or family makes him a licensed firearms dealer. The proposed rule’s overreach will chill lawful Americans from exercising their rights under the Second Amendment.

Comparing the civil presumptions to the actual text in the law underscores that the proposed rule is both unlawful and absurd. Nothing in the presumptions take into account whether the individual devotes time, attention, and labor to dealing firearms.¹³ Similarly, the presumptions do not factor in whether the person repeatedly buys and sells firearms as a regular course of trade or business.¹⁴

Furthermore, the civil and administrative presumptions ignore the occasional seller and hobbyist protections under the law. The statute—before and after BSCA’s enactment—explicitly states that someone who engages in “occasional sales, exchanges, or purchases of firearms” is not engaged in the business as a firearms dealer.¹⁵ Occasional sellers may keep firearms in their original packaging or discuss the purchase and resale of firearms with friends. Occasional sellers—because they are occasional sellers—may represent that they are able to get firearms. And occasional sellers may collect or even sell firearms of the same make and model. The proposed rule paints a broad brush to attempt to regulate conduct that is protected under the law for occasional sellers of firearms.

Section 12002 of the BSCA should not be read in isolation. It should be read within the context of the BSCA’s entire text, structure, and history. None of the firearms provisions in the bill—including increased penalties for firearms crimes and the enhanced juvenile record checks—violate the Second Amendment rights of law-abiding Americans. In fact, the BSCA imposed on the Administration strict due process and other constitutional requirements before it issues any grant for an extreme risk protection order under the new crisis intervention program funding. Under the BSCA, extreme risk protection order programs funded under the Edward Byrne Memorial Justice Assistance Grant Program must include, at a minimum:

¹² 88 Fed. Reg. at 62,021 (to be codified at 27 C.F.R. § 478.11(c)(3)(iv)(A)&(B)).

¹³ 18 U.S.C. § 921(a)(21)(C).

¹⁴ *Id.*

¹⁵ *Id.*

(I) pre-deprivation and post-deprivation due process rights that prevent any violation or infringement of the Constitution of the United States, including but not limited to the Bill of Rights, and the substantive or procedural due process rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the States, and as interpreted by State courts and United States courts (including the Supreme Court of the United States). Such programs must include, at the appropriate phase to prevent any violation of constitutional rights, at minimum, notice, the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses;

(II) the right to be represented by counsel at no expense to the government;

(III) pre-deprivation and post-deprivation heightened evidentiary standards and proof which mean not less than the protections afforded to a similarly situated litigant in Federal court or promulgated by the State's evidentiary body, and sufficient to ensure the full protections of the Constitution of the United States, including but not limited to the Bill of Rights, and the substantive and procedural due process rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the States, and as interpreted by State courts and United States courts (including the Supreme Court of the United States). The heightened evidentiary standards and proof under such programs must, at all appropriate phases to prevent any violation of any constitutional right, at minimum, prevent reliance upon evidence that is unsworn or unaffirmed, irrelevant, based on inadmissible hearsay, unreliable, vague, speculative, and lacking a foundation; and

(IV) penalties for abuse of the program.¹⁶

The BSCA further requires the Attorney General to “coordinat[e] with grant recipients, to protect the constitutional rights of individuals subject to the crisis intervention programs or initiatives.”¹⁷ In another part of the bill, we included a provision that would restore the Second Amendment rights of individuals—after a period of 5 years—for a conviction of a misdemeanor crime of domestic violence.¹⁸ As evident in multiple parts of the BSCA, we were very mindful that we were passing legislation that would enhance public safety while simultaneously preserving and protecting the Second Amendment rights of law-abiding Americans. Therefore, the proposed rule is inconsistent with the text and structure of the bill.

The legislative record further underscores our concern with protecting the Second Amendment rights of law-abiding Americans. During the negotiation and passage of the BSCA, we made clear that we were not expanding background checks.¹⁹ Every single Republican that

¹⁶ BSCA § 12003(a)(2) (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)).

¹⁷ BSCA § 12003(a)(b) (codified at 34 U.S.C. § 10152(h)(4)).

¹⁸ BSCA § 12005(c)(2) (codified at 18 U.S.C. § 921(a)(33)(C)).

¹⁹ 168 CONG. REC. S3117 (daily ed. June 23, 2022) (statement of Sen. Cornyn) (“So just to conclude, just to repeat myself for emphasis, this bill does not infringe on law-abiding citizens rights under the Second Amendment. It doesn’t actually expand the background checks system. It doesn’t impose mandatory waiting periods or any other restrictions.”).

cosponsored the bill had this understanding.²⁰ As authors of the legislation, we said this both before and during the passage of the BSCA:

Senator Cornyn on 6/13/22: There was a lot of desire on both sides to include additional things, but they were excluded in large part because of our necessity of getting to 60 votes in order to get a bill—for example, **proposals on universal background checks**, assault weapon bans for 18- to 21-year-olds, mandatory waiting periods, a 21-day waiting period for purchases of all firearms for 18- to 21-year olds, high-capacity magazine bans, unconstitutional mandatory safe storage All of these had been proposed by either President Biden or many of our Democratic colleagues and were not included in the statement of principles that was agreed to by 10 Republicans and 10 Democrats. We knew including any of these components would jeopardize our ability to get a deal. So anytime our Democratic colleagues tried to push the envelope as far as they could, we had to remind them of that requirement and push back.²¹

Senator Cornyn on 6/23/22: I think we have come up with a way to make good public policy and also to maintain that commitment to the Constitution. Some people want to create a false choice. I don't think we need to go there because there is not a false choice, as I said, between the Constitution and the Second Amendment and making good public policy. They don't have to overlap or interfere with each other. Both can stand on their own merits. **Well, as I said, law-abiding gun owners are not the problem. And that was a redline for me. During the course of our negotiations, our Democratic colleagues did push for a range of provisions that I believe stood no chance of becoming law, particularly in a 50–50 Senate.** We know that if Democrats want to do everything their way or Republicans want to do everything our way, almost by definition in a 50–50 Senate, nothing will happen.²²

Senator Tillis on 6/21/22: Today, we finalized bipartisan, commonsense legislation to protect America's children, keep our schools safe, and reduce the threat of violence across our country. Our legislation will save lives and will not infringe on any law-abiding American's Second Amendment rights. We look forward to earning broad, bipartisan support and passing our commonsense legislation into law.²³

Likewise, Democratic Senators who would have liked to expand background checks admitted that the legislation did not do this.²⁴

²⁰ See Press Release, Sen. Lisa Murkowski, Myth vs Fact: Bipartisan Safer Communities Act (June 23, 2022), available at <https://www.murkowski.senate.gov/press/release/myth-vs-fact-bipartisan-safer-communities-act>; 168 CONG. REC. S3102 (daily ed. June 23, 2022) (statement of Sen. McConnell) (“This strengthens the existing background check system without expanding it.”).

²¹ 168 CONG. REC. S2905 (daily ed. June 13, 2022) (statement of Sen. Cornyn).

²² 168 CONG. REC. S3115 (daily ed. June 23, 2022) (Statement of Sen. Cornyn)

²³ See Press Release, Sen. Thom Tillis, Tillis, Bipartisan Group of Senators Announce Bipartisan Safer Communities Act (June 21, 2022), available at <https://www.tillis.senate.gov/2022/6/tillis-bipartisan-group-of-senators-announce-bipartisan-safer-communities-act>

²⁴ See, e.g., 168 CONG. REC. S3112 (daily ed. June 23, 2022) (statement of Sen. Bennet) (“this can't be the end of our work. There is more for us to do. . . . We should pass universal background checks. . . . The country would be safer and Colorado would be safer if we pass background checks at the national level.”); 168 CONG. REC. S3114 (daily ed. June 23, 2022) (statement of Sen. Manchin) (“I would dearly love to have a common sense background

The proposed rule's list of presumptions is an attempt to unlawfully expand background checks. Previous attempts to do this have failed.²⁵ The BSCA did not give the ATF the authority to issue the proposed rule to settle the debate over expanding background checks. That legislative power resides with Congress. The proposed rule's civil presumptions for both who is a dealer of firearms and "predominantly to earn a profit" are an end-run around the legislative process.²⁶

There are severe consequences associated with the proposed rule's list of presumptions. Law-abiding firearms owners could face civil fines and penalties or even criminal prosecution. A criminal prosecution and conviction would mean a loss of one's right to possess a firearm and potential prison time. Even the proposed rule admits that the presumptions can be used in criminal cases.²⁷

Given the severe consequences associated with the proposed rule, we recommend that the ATF err on the side of caution when implementing the law instead of coloring outside of the lines. The proposed rule raises serious vagueness concerns in light of the severe penalties. Will someone face a civil investigation for handing out business cards to sell his personal collection? What about if someone decides to sell a firearm in its original packaging? Due process necessitates that the ATF scrap the proposed rule. If it stands, the proposed rule will lead and "encourage arbitrary and discriminatory enforcement."²⁸

The presumption of innocence is a bedrock principle reflected in our Constitution, laws, and traditions. The Framers of our Constitution were very skeptical of government overreach and executive power. That is why they created separate but coequal branches of government with defined and enumerated powers. Usurping the authorities of one branch or another harms our institutions and amounts to a violation of our separation of powers. Unfortunately, the proposed rule harms both by attempting to rewrite the law. As we've communicated to the ATF on many occasions, an agency's decision to rewrite the law and go against congressional intent make future political compromises more difficult. If Congress wants to create a series of presumptions in civil and administrative actions, it may do so. But it has to pass a law to give the ATF that authority.

We are proud of this piece of legislation because we know that it has and will continue to save lives. But the proposed rule is a bridge too far. It is inconsistent with the text, history, and our legislative intent. Not one of us Republicans would have cosponsored the legislation if we knew

check bill that did not infringe on law-abiding gun owners' rights and protected the Second Amendment. We weren't able to get that in. But, you know what, I understand. I would have loved to. But we got some other things in."); 168 Cong. Rec. S3124 (daily ed. June 23, 2022) (statement of Sen. Cardin) ("The legislation we pass in the Senate soon will save lives and help keep our communities safer, but there are many more reasonable steps we can and should take, consistent with the Second Amendment rights of law-abiding citizens. I will continue to strongly support the establishment of universal background checks for all gun purchases . . .").

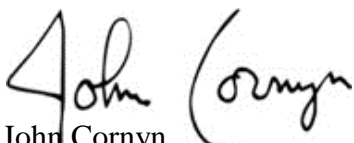
²⁵ See, e.g., 159 CONG. REC. S2740 (Apr. 17, 2013) (rollcall vote no. 97 on S.Amdt. 715 to Safe Communities, Safe Schools Act of 2013, S. 649, 113th Cong. (2013)).

²⁶ *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 677 (2023) ("We have often remarked that Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'").

²⁷ 88 Fed. Reg. at 62,000.

²⁸ *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 402-402 (2010)).

that the ATF would usurp our legislative authority to attempt to pass the proposed rule. We ask that the ATF withdraw the proposed rule and leave the legislative authority to settle controversial questions on background checks, civil penalties, criminal penalties, and presumptions to the Congress, where it rightfully belongs.

Handwritten signature of John Cornyn in black ink.

John Cornyn
United States Senator

Handwritten signature of Thom Tillis in blue ink.

Thom Tillis
United States Senator