



## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives  
**Topic:** Federal Firearm License Revocation  
**Date:** November 2020

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**Recommendation:** Issue guidance clarifying that the ATF will revoke a federal firearms license when a gun dealer has one serious and willful violation of federal, state, or local law.

### **I. Summary**

#### **Description of recommended executive action**

The Gun Control Act of 1968 (“GCA”) gives the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) the responsibility of ensuring federal firearms licensees (FFLs) comply with applicable laws and regulations.<sup>1</sup> Under the GCA, if an FFL willfully fails to comply with federal law, the ATF has the ability to revoke the FFL’s license.

Despite this authority, the ATF rarely revokes the licenses of noncompliant FFLs. For example, while more than one-third of inspected FFLs were found to violate federal firearms laws in FY 2011, the ATF only revoked the license of approximately 0.3% of gun dealers inspected that year.<sup>2</sup> Instead, the ATF routinely gives noncompliant gun dealers multiple chances over a period of years to correct violations, including serious violations such as selling guns to minors, failing to report missing or stolen guns, and failing to conduct a background check.

The result of this lax enforcement policy is that noncompliant FFLs continue to violate the law, and guns routinely end up in the wrong hands—with serious consequences. One report by the ATF analyzed 1,530 trafficking investigations conducted between July 1996 and December 1998 and found that dealers and pawnbrokers were associated with over 40,000 trafficked guns.<sup>3</sup> The report concluded that these FFLs’ “access to large numbers of firearms makes them a particular threat to public safety when they fail to comply with the law.”<sup>4</sup>

To reduce gun trafficking and hold FFLs accountable for violating the law, the ATF should issue guidance clarifying the following.

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<sup>1</sup> 18 U.S.C. Chapter 44, § 921 et seq.

<sup>2</sup> U.S. Dep’t of Justice Office of the Inspector General, “Review of ATF’s Federal Firearms Licensee Inspection Program,” April 2013, <https://oig.justice.gov/reports/2013/e1305.pdf>.

<sup>3</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, “Following the Gun: Enforcing Federal Laws Against Firearms Traffickers,” June 2000, [https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun\\_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf](https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf).

<sup>4</sup> *Id.*

- (1) **In addition to a violation of federal law, a violation of state or local law is an applicable violation of the GCA for license revocation purposes.** Currently, the ATF focuses its enforcement efforts on violations of federal law, but the GCA prohibits an FFL from failing to comply with state or local gun laws as well.
- (2) **A single willful and serious violation is sufficient to trigger FFL license revocation.** Currently, the ATF will not revoke an FFL's license until it establishes a series of violations and the FFL fails to respond to multiple warnings. However, the GCA does not require a series of violations. Rather, the law only requires that the FFL be aware it is failing to comply with applicable laws and/or regulation and continue to be noncompliant despite this knowledge. In its new guidance, the ATF should clarify that it will generally consider an FFL to be willfully violating the GCA if the FFL is found to commit the same violation a second time after being previously warned.

This guidance should replace or significantly amend the May 2018 guidance the ATF issued on this subject.

### **Overview of process and time to enactment**

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately upon assuming office. Because the guidance will be released in the form of a non-binding policy statement, rather than through a new rule, the policy statement does not need to go through notice-and-comment rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority, and provide details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the ATF's website.

## **II. Current state**

### **ATF license revocation authority**

To sell firearms in the US, a gun dealer must obtain a license from the ATF. After issuing such a license, the ATF is responsible for ensuring the gun dealer complies with the GCA and its implementing regulations.<sup>5</sup> To ensure FFLs comply with relevant laws and regulations, the ATF sends industry operations investigators (IOIs) to inspect FFL operations.

Under federal law, the ATF is permitted to conduct one regulatory compliance inspection of each FFL per year, and given their limited resources, the ATF has set an internal goal of

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<sup>5</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process," May 2018, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process>.

inspecting all gun dealers once every three years.<sup>6</sup> The inspection program's goals are to ensure that only qualified individuals receive licenses to sell guns; to educate FFLs about federal firearms laws; and to increase "compliance with firearms laws in order to prevent the transfer of firearms to those prohibited from having them."<sup>7</sup>

As part of an FFL compliance inspection, IOIs will review all sales transactions an FFL has made in the last 12 months and analyze the data for aberrant patterns, allowing inspectors to issue a report of violations or recommend administrative action against an FFL. Violations such as inventory discrepancies, failing to record firearms, missing or improperly filled out Form 4473s, or failures to complete background checks require IOIs to make a recommendation for an administrative action.

Based on the severity and frequency of these violations, the ATF can institute a series of such actions, including warning letters and warning conferences.<sup>8</sup> If an FFL "willfully violate[s]" the GCA, the "Attorney General may, after notice and opportunity for hearing, revoke any license issued."<sup>9</sup> The willfulness requirement was added in 1986 through the passage of the Firearms Owners' Protection Act of 1986 (FOPA). FOPA's stated purpose was to ensure that the GCA did not "place any undue or unnecessary federal restrictions or burdens on law abiding citizens"; however, it also made enforcing the GCA more difficult.<sup>10</sup>

Despite the importance of this part of its mission, the ATF has struggled for decades with serious budget limitations that disproportionately affect the agency's regulatory work. Since 2007, the number of FFLs has increased by nearly 20%.<sup>11</sup> During roughly the same period, the number of IOIs has increased by 0.02%.<sup>12</sup> In fact, the number of IOIs has essentially remained stagnant since the ATF's inception in 1972.<sup>13</sup>

The result: in FY 2019, the ATF employed only 770 regulatory investigators to conduct compliance inspections of FFLs.<sup>14</sup> These inspectors were responsible for overseeing 130,048

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<sup>6</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Congressional Budget Submission Fiscal Year 2020," U.S. Dep't of Justice, February 2019, <https://www.justice.gov/jmd/page/file/1144651/download>.

<sup>7</sup> *Supra* note 2.

<sup>8</sup> Office of Inspector Gen., "Review of ATF's Federal Firearms License Inspection Program," U.S. Dep't of Justice, April 2013, <https://oig.justice.gov/reports/2013/e1305.pdf>.

<sup>9</sup> 18 U.S.C. § 923(e).

<sup>10</sup> DOJ, "History of Federal Firearms Laws in the United States," accessed October 13, 2020, <https://www.justice.gov/archive/opd/AppendixC.htm>.

<sup>11</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Federal Firearms and Explosives Licenses by Types," May 2019, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types>.

<sup>12</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet: ATF Staffing and Budget," May 2014, <https://www.atf.gov/file/11081/download>.

<sup>13</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Staffing and Budget," May 2019, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget>.

<sup>14</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, "Fact Sheet - Facts and Figures for Fiscal Year 2019," June 2020, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2019>.

active FFLs, including 53,746 gun dealers.<sup>15</sup> The ATF was only able to conduct 13,079 firearm compliance inspections that year, accounting for roughly 10% of total active FFLs.

### License revocation is extremely rare

Each fiscal year, the ATF routinely discovers that a large number of FFLs have violated federal law. For example, in FY 2019, 34.3% of inspected FFLs were discovered to have at least one violation.<sup>16</sup> Many of these violations are not insignificant, or are merely technical in nature. The most frequently cited violations in FY 2019 and FY 2018 included: the failure “to obtain and/or document purchaser’s Identification document,” the failure “to report multiple handgun sales,” and the failure “to contact NICS [National Instant Criminal Background Check System] and wait stipulated time prior to transfer of firearm.”<sup>17</sup>

Despite committing even serious violations, few FFLs have their licenses revoked in any given year:

Recommendation	2019 <sup>18</sup>	
	Number	Share
<i>License surrendered; out of business</i>	1,634	12.49%
<i>No violation</i>	6,911	52.84%
<i>Violation found</i>	4,491	34.3%
• <i>Report, no further action</i>	2,594	19.83%
• <i>Warning letter issued</i>	1,482	11.33%
• <i>Warning conference</i>	415	3.17%
• <b>Revocation</b>	<b>43</b>	<b>0.33%</b>

In part, the GCA’s “willfulness” requirement for license revocation is to blame for the lack of FFL accountability. Because an FFL must be found to have willfully violated a provision of federal law for its license to be revoked, the ATF “does not revoke for every violation it finds,” noting that “revocation actions are seldom initiated until after an FFL has been educated on the requirements of the laws and regulations and given an opportunity to voluntarily comply with them but has failed to do so.”<sup>19</sup>

The concept of “willfulness” is discussed more fully in Section IV below, but courts and the ATF interpret it as “the intentional disregard of a known legal duty or plain indifference to a licensee’s legal obligations.”<sup>20</sup> This standard, however, even when plainly met, does not always result in license revocations.

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Supra* note 5.

<sup>20</sup> *Id.*

In practice, the ATF will rarely revoke a license even after an FFL repeats a serious violation for a second time after being warned (or arguably commits the violation “willfully” for the first time). Instead, the ATF will repeatedly issue reports of violations, send warning letters, and/or hold warning conferences before considering revocation.

For example, in 2016, a gun dealer in Ohio was found “to have repeatedly sold firearms to people who appeared to be prohibited from owning them, including a customer who self-identified as a felon.”<sup>21</sup> The IOI recommended the gun dealer’s license be revoked, citing this incident as well as “extensive noncompliance history.”<sup>22</sup> Despite this, the IOI’s supervisor ultimately “downgraded the recommendation to a warning, saying it would give the dealer ‘one more opportunity’ to get into compliance.”<sup>23</sup> Similarly, in 2017, an IOI and a supervisor recommended revoking the license of a gun dealer who repeatedly failed “to conduct federal background checks before selling firearms.”<sup>24</sup> However a senior supervisor downgraded the recommendation to a warning.<sup>25</sup>

The ATF’s failure to take decisive action after a wilful violation is found, is compounded by its inability to regularly reinspect FFLs. In a 2013 report, the Department of Justice, Office of Inspector General found that 58% of FFLs were not inspected over a five-year period.<sup>26</sup>

A May 2018 ATF guidance on FFLs revocations, labeled “Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process,” confirms that the ATF takes an extremely lax approach to revocations. It notes that “ATF does not revoke for every violation it finds” and that “revocation actions are seldom initiated.” It says the ATF only revokes an FFL’s license “on rare occasions” when revocation “becomes the only viable option.”<sup>27</sup>

This language has encouraged some noncompliant FFLs to become serial offenders. For example, one gun dealer had a 15-year history of serious GCA violations, including selling guns to minors, failing to report missing guns, selling large capacity magazines that were prohibited by law, and failing to conduct background checks before selling to non-licensed individuals.<sup>28</sup> While the ATF first discovered the gun dealer was noncompliant in 1993, the ATF did not recommend the gun dealer lose its license until 2009, choosing instead to issue warnings and pursue alternatives to revocation.<sup>29</sup>

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<sup>21</sup> Ali Watkins, “When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment,” *New York Times*, June 3, 2018, <https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 8.

<sup>27</sup> ATF, “Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process,” May 2018, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process>.

<sup>28</sup> Office of Inspector Gen., “Review of ATF’s Actions in Revoking the Federal Firearms License of Guns & Ammo,” U.S. Dep’t of Justice, September 2013, <https://oig.justice.gov/reports/2013/e1308.pdf>.

<sup>29</sup> *Id.*

## Dangers of noncompliant gun dealers

Failure to hold noncompliant FFLs accountable has real consequences. Nationally, between 2004 and 2011, the ATF discovered nearly 175,000 guns were unaccounted for during dealer compliance inspections.<sup>30</sup> In one study of illegal firearms trafficking cases, the ATF found that gun dealers were responsible for nearly half of the total number of trafficked guns documented during a two-year period.<sup>31</sup>

These weapons pose serious risks: guns sold or lost by noncompliant dealers can directly be traced to gun violence. “For example, Bull’s Eye Shooter Supply in Tacoma, Washington, lost 238 guns over a three-year period, one of which was used in 2002 by John Allen Muhammad—the ‘Beltway sniper’—during his multiweek shooting spree in the Washington DC area. Bull’s Eye had been on the ATF’s radar since at least 1994 for regulatory violations; however, its federal firearms license was not revoked until after the sniper shootings in 2003.”<sup>32</sup>

This is not just a stray anecdote. Between 1998 and 2010, “60 percent of the 6,800 guns sold in Virginia in that time and later seized by police [were] traced to just 40 dealers,” who had regulatory violations dating to the early 1990s and collectively were warned 73 times that they were violating federal law.<sup>33</sup> The guns from these noncompliant FFLs were associated with “40 homicide cases, 63 robberies, 96 suicides or attempts, 173 brandishings, 301 shootings with or without injuries, 655 drug probes and 1,043 weapons-related violations.”<sup>34</sup>

### III. Proposed action

To send a signal to FFLs that they must comply with gun laws and regulations, and to hold those who don’t accountable, the next administration should issue guidance clarifying the ATF will revoke a federal firearms license when a gun dealer has one serious and willful violation of federal, state, or local law. This amendment may take the form of an amendment or replacement for ATF’s May 2018 guidance on this subject.<sup>35</sup>

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<sup>30</sup> Supra note 7.

<sup>31</sup> ATF, “Following the Gun: Enforcing Federal Laws Against Firearms Traffickers,” U.S. Dep’t of the Treasury, June 2000, [https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun\\_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf](https://web.archive.org/web/20180409033440/http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf).

<sup>32</sup> Chelsea Parsons, Arkadi Gerney, et.al., “The Bureau and the Bureau,” Center for American Progress, Spring 2015, <https://cdn.americanprogress.org/wp-content/uploads/2015/05/ATF-report-webfinal.pdf>.

<sup>33</sup> David S. Fallis, “Virginia Gun Dealers: Small Number Supply Most Guns Tied to Crimes,” *Washington Post*, October 25, 2010, <https://www.washingtonpost.com/wp-srv/special/nation/guns/overlay/va-dealers.html?cn=nation>.

<sup>34</sup> *Id.*

<sup>35</sup> ATF, “Fact Sheet: Federal Firearms Compliance Inspections and Revocation Process,” May 2018, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process>.

## A. Substance of the guidance

The ATF regularly provides guidance to regulated entities in the form of fact sheets,<sup>36</sup> guides,<sup>37</sup> and open letters.<sup>38</sup> This guidance could take any of those forms and make two important clarifications regarding the ATF's enforcement priorities: (1) a violation of state or local law is an applicable violation of the GCA for license revocation purposes, and (2) a single willful and serious violation is sufficient to trigger license revocation.

### i. Violation of state or local gun laws

Under federal law, the ATF director, with authority delegated from the attorney general, may “revoke any [federal firearm] license...if the holder of such license has willfully violated any provision of [18 U.S.C. §§ 921-931] or any rule or regulation prescribed by the Attorney General under [18 U.S.C. §§ 921-931].”<sup>39</sup>

Currently, the ATF focuses its enforcement efforts on violations of several major requirements of the GCA, including:

- failure to verify or record purchaser's identification document<sup>40</sup>
- failure to report multiple sales or other dispositions of pistols and revolvers<sup>41</sup>
- failure to complete a NICS/POC background check<sup>42</sup>

However, two sections of the GCA prohibit FFLs from violating state or local law, which means violations of such laws constitute a violation of the GCA itself. This includes:

- **18 U.S.C. § 922(b)(2)**. This provision makes it unlawful for an FFL to “sell or deliver—any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition...”.
- **18 U.S.C. § 923(d)(F)(ii)(I)**. This provision requires an FFL to certify that “business will not be conducted under the license until the requirements of State and local law applicable to the business have been met.”

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<sup>36</sup> ATF, “Fact Sheets,” accessed October 13, 2020, <https://www.atf.gov/resource-center/fact-sheets>.

<sup>37</sup> ATF, “Publication Library,” accessed October 13, 2020, <https://www.atf.gov/resource-center/publications-library>.

<sup>38</sup> ATF, “Firearms Open Letters,” accessed October 13, 2020, <https://www.atf.gov/rules-and-regulations/firearms-open-letters>.

<sup>39</sup> *Supra* note 9.

<sup>40</sup> 27 C.F.R 478.124(c)(3)(i).

<sup>41</sup> 27 C.F.R 478.126a.

<sup>42</sup> 27 C.F.R 478.102(a).

Under the new guidance, the ATF should clarify that violations of state or local laws applicable to the FFL's business would constitute violations of the GCA, which, if willful, could constitute grounds to revoke an FFL's license. Importantly, the guidance should clarify that applicable state and local laws for purposes of license revocation decisions include, as the text of the GCA suggests, violations of generally applicable laws regulating businesses. Such laws—including negligence laws and unfair trade practices laws—are rarely enforced against gun dealers in the civil context due to the Protection of Lawful Commerce in Arms Act (PLCAA).<sup>43</sup> However, PLCAA's immunity protections do not apply to ATF regulatory actions, and the law itself explicitly excepts "an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26."<sup>44</sup>

ii. Establishing willfulness

The ATF's present process for revoking licenses gives noncompliant gun dealers multiple chances to correct the error: if an IOI discovers a violation, the ATF may issue a report of violations, send a warning letter, or hold a warning conference before ultimately issuing a recommendation to revoke the FFL's license. Often, FFLs receive multiple warnings before the license revocation process begins.

Under the new guidance, the ATF should clarify that a finding of a single willful and serious violation of applicable federal, state, or local laws is sufficient for a recommendation of revocation. The guidance should specify that the ATF will treat the failure to comply with regulations that are the most critical to minimizing gun-related violence and crime (e.g., conducting background checks, not selling firearms to persons prohibited from possessing firearms, filing reports of individuals who purchase multiple handguns, failing to report lost firearms) as a "serious" violation. Any such serious violation, if it is found to be willful, is sufficient for a recommendation of revocation, and the guidance should clarify that a single prior finding and warning of such a violation is generally sufficient to establish willfulness on behalf of the FFL. There may be situations where a single prior finding and warning is not sufficient to establish willfulness. For example:

- a new, corrupt employee selling a gun off books and who was promptly fired upon detection
- a sudden, serious illness of an owner who otherwise has had an unblemished record
- a natural disaster which overwhelmed an FFL who made corrective enhancements post-disaster
- a new FFL who truly misunderstood the first warning

However, absent these extenuating circumstances, a single prior finding of a violation and a warning is sufficient to establish willfulness.

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<sup>43</sup> 15 U.S.C. §§ 7901-7903.

<sup>44</sup> 15 U.S.C. § 7903 (5)(A)(vi).

## B. Process

This type of guidance may appropriately be considered an interpretive rule, because it is “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>45</sup> The Administrative Procedure Act’s (APA’s) NCRM requirement “does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” unless another statute provides otherwise.<sup>46</sup> As the Supreme Court observed in *Perez*, issuing interpretive rules is “comparatively easier” than issuing legislative rules.<sup>47</sup> However, “that convenience comes at a price: Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”<sup>48</sup>

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating “a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.”<sup>49</sup> Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.<sup>50</sup> The most relevant recommendations concern transparency and public participation. These include: (1) providing “members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule,” (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint,<sup>51</sup> and (3) avoiding

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<sup>45</sup> *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

<sup>46</sup> 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase “interpretative rule,” the phrase “interpretive rule” is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>47</sup> *Perez*, 575 U.S. at 97.

<sup>48</sup> *Id.* (citing *Guernsey*, 514 U.S. at 99).

<sup>49</sup> Executive Office of the President, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” Executive Order 13891, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

<sup>50</sup> Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>51</sup> *Id.* at 7.

the use of mandatory language (such as “shall” or “must”) to accurately reflect the non-legislative nature of the guidance.<sup>52</sup>

As discussed further below, in issuing this new guidance and amending the May 2018 guidance, the ATF must provide a reasoned explanation for the change, and demonstrate an awareness of the new policy. The ATF must also acknowledge the possibility that FFLs have relied on the earlier guidance and the ATF’s former practices, and address why those reliance interests are outweighed by public safety factors.

### C. Legal justification

The attorney general has the power to prescribe “such rules and regulations as are necessary to carry out the provisions of” the GCA.<sup>53</sup> This includes policy statements, interpretive rules, and rules of agency procedure. Additionally, 18 U.S.C. § 923(e) states that the “Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General.” The attorney general has delegated its responsibility to enforce the GCA to the director of the ATF, subject to the direction of the attorney general and the deputy attorney general.<sup>54</sup> ATF guidance interpreting § 923(e) is directly relevant to its ability to defend its revocation or denial of license application decisions.

## **IV. Risk analysis**

There are likely two types of challenges that could be brought against the new guidance: (1) challenges to the guidance document itself, and (2) as-applied challenges by FFLs in the context of the license revocation process.

### **Challenges to the guidance document**

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the “consummation” of the agency’s decision making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”<sup>55</sup> Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action.

If a court determines the guidance document is a final agency action, however, it can be judicially challenged for being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.<sup>56</sup> The ATF’s

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<sup>52</sup> *Id.*

<sup>53</sup> 18 U.S.C. § 926(a).

<sup>54</sup> 28 CFR 0.130(a).

<sup>55</sup> *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>56</sup> 5 U.S.C. § 706.

authority to interpret and provide guidance on FFL revocations is clear, as demonstrated by its long history of doing so.<sup>57</sup> The Supreme Court has also made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful.<sup>58</sup> Therefore, constitutional challenges are unlikely to succeed. As a result, the two most likely challenges against the ATF's new policy are those claiming that the ATF has not properly complied with procedural requirements and that the ATF's new guidance is arbitrary or capricious agency action.

## Procedural challenges

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.<sup>59</sup> However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules, such as guidance documents, are legislative rules in disguise, and the gun industry will likely challenge the ATF's guidance under this theory.

An interpretive rule "describes the agency's view of the meaning of an existing statute or regulation."<sup>60</sup> The court's inquiry is "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime."<sup>61</sup> Interpretive rules "are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required."<sup>62</sup> In other words, to be interpretive, a rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition."<sup>63</sup> By contrast, a rule is legislative "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."<sup>64</sup>

While the gun industry will likely challenge the proposed guidance as being a legislative rule that needed to go through NCRM, the ATF has a strong argument in response: that the guidance is just interpretive in nature. As the DC Circuit made clear in *American Mining Congress v. Mine Safety & Health Administration*,<sup>65</sup> a rule cannot be interpretive if there would not be an adequate

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<sup>57</sup> ATF's guidance documents have taken various forms, including FFL newsletters, a manual regarding the National Firearms Act, and others. See [atf.gov](http://atf.gov) for numerous examples.

<sup>58</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>59</sup> 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>60</sup> *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

<sup>65</sup> 995 F.2d 1106 (1993).

legislative basis for enforcement action. Here, both aspects of the guidance—clarification of the willfulness requirement and the state and local offenses that can trigger revocation proceedings—are already required by the GCA.<sup>66</sup> Therefore, this guidance “only reminds affected parties of existing duties” required by law, and is therefore an interpretive rule.<sup>67</sup>

That said, the ATF should be careful in crafting the proposed guidance. It should not be “cast in ‘mandatory language’ so ‘the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.’”<sup>68</sup> While articulating enforcement priorities consistent with existing legal duties has consistently been viewed by courts as interpretive, courts have found an articulation of guidance that is binding on the parties to be a legislative rule and thus require NCRM. For example, in *Community Nutrition Institute v. Young*,<sup>69</sup> the DC Circuit found that the FDA’s issuance of standards that declared the maximum allowable contaminants in food was legislative, rather than interpretive, because it had a present effect and was binding. Therefore, to guard against a successful NCRM challenge by the gun industry, the ATF should be mindful not to be too prescriptive in issuance of this new guidance, and instead leave some measure of discretion up to the individual IOIs responsible for enforcing the GCA’s requirements of FFLs.<sup>70</sup>

### **Arbitrary and capricious challenge under the APA**

A court will invalidate the regulation if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>71</sup> The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, thereby establishing a nexus between the facts and the agency’s choice.<sup>72</sup>

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.<sup>73</sup> However, the agency must provide good reasons for such change and an explanation as to why such change may ignore or disregard any “facts and circumstances that underlay or were engendered by the

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<sup>66</sup> See Section III.

<sup>67</sup> *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc). See also *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015) (holding that NCRM is not necessarily required when an agency modifies its guidance).

<sup>68</sup> *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 237 n.18 (D.D.C. 2018), aff’d and remanded sub nom. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (citation omitted).

<sup>69</sup> 818 F.2d 943 (D.C. Cir. 1987).

<sup>70</sup> See also *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978) (“The mere existence of some discretion is not sufficient, although it is necessary, for a rule to be classified as a general statement of policy.”).

<sup>71</sup> 5 U.S.C. § 706(2)(A).

<sup>72</sup> See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>73</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009).

prior policy."<sup>74</sup> The agency's document must contain an acknowledgment of reliance interests and address why those interests are outweighed by public safety factors. Even if such reliance interests are serious, public safety factors can outweigh them.<sup>75</sup>

Here, the ATF should acknowledge its prior lax approach to FFL violations and the detrimental effect this approach has had on public safety, as described above. The ATF should also acknowledge that FFLs may have relied on the ATF's approach in establishing their own business practices and protocols. However, to the extent these practices and protocols have allowed criminal and regulatory violations of the laws regarding firearms sales to occur, they are illegitimate. As a result, the ATF can and should appropriately put FFLs on notice that it will no longer continue its lax approach, and in the future, FFLs who willfully fail to comply with the law will be held accountable.

### **As-applied challenge**

The general permissibility of ATF's regulatory enforcement guidance under the APA does not prevent successful as-applied challenges by FFLs. In general, in the context of a license denial or revocation action, FFLs will likely argue that: (1) their violation of state or local law does not constitute a violation of the GCA, and (2) their single repeat offense does not constitute "willfulness" under the GCA.

First, there is a reasonable basis to assert that violations of state and local law provide a justification for revocation. As noted above, the GCA expressly prohibits an FFL from failing to comply with state and local law: the GCA makes it unlawful for a "licensed dealer . . . to sell or deliver . . . any firearm to any person in any State where the purchase or possession by such person of such firearm would be in *violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition*" (emphasis added);<sup>76</sup> and the GCA requires FFLs to certify that "business will not be conducted under the license until the requirements of State and local law applicable to the business have been met."<sup>77</sup>

Furthermore, federal courts of appeals have agreed that it is reasonable for the ATF to expect FFLs to comply with the state and local laws it is subject to: "It is reasonable . . . for the federal government to expect that an FFL located in a state, and subject to state and local laws, can master and remain current on the firearm laws of that state."<sup>78</sup>

Second, the proposed policy statement's criteria for a finding of willfulness is consistent with existing precedent interpreting the GCA. A number of circuit court cases have directly

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<sup>74</sup> *Id.*

<sup>75</sup> *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).

<sup>76</sup> 18 U.S.C. § 922(b)(2).

<sup>77</sup> 18 U.S.C. § 923(d)(F)(ii)(I).

<sup>78</sup> *Mance v. Sessions*, 896 F.3d 699, 708 (5th Cir. 2018), *cert. denied sub nom. Mance v. Barr*, No. 18-663, 2020 WL 3146838 (U.S. June 15, 2020); see also *Gen. Store, Inc. v. Van Loan*, 560 F.3d 920, 924 (9th Cir. 2009).

addressed this question and confirmed that “a single violation of the GCA is a sufficient basis for denying an application or revoking a firearms dealer's license.”<sup>79</sup> As a general matter, courts hold that “a dealer violates the statute when, with knowledge of what the law requires, it intentionally or knowingly violates the GCA’s requirements or acts with plain indifference to them (i.e. recklessly violates them).”<sup>80</sup> While willfulness is often currently demonstrated by a series of warnings over a period of years, the GCA does not require an extensive pattern of noncompliance to conclude that an FFL was breaking the law willfully. Instead, the law only requires that FFLs were aware of their obligations under the GCA, and nevertheless failed to comply with the law. In other words, evidence that an FFL committed the same violation a second time after being previously warned has always been sufficient to establish willfulness.

Finally, the ATF can argue that the proposed guidance simply articulates what is required by law. Courts have routinely acknowledged that an agency’s decision about whether to initiate an enforcement action is something that completely up to the agency in question.<sup>81</sup> Therefore, should a court find that the guidance is consistent with the GCA in the abstract, and the FFL in question has, in fact, willfully violated the law in a serious way, the ATF has a strong argument that an as-applied challenge should fail.

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<sup>79</sup> *Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 464 (6th Cir. 2004) (“[I]t has been recognized that a single violation of the GCA is a sufficient basis for denying an application or revoking a firearms dealer's license.”) (collecting cases); see also *Simpson v. Attorney Gen. United States of Am.*, 913 F.3d 110, 114 (3d Cir. 2019) (“A single willful violation [of the GCA] authorizes ATF to revoke the violator’s FFL”) (citation omitted); *Fairmont Cash Mgmt., L.L.C. v. James*, 858 F.3d 356, 363 (5th Cir. 2017) (“We need go no further; a single willful violation suffices to sustain ATF’s revocation decision.”); *Gen. Store, Inc. v. Van Loan*, 560 F.3d 920, 924 (9th Cir. 2009) (“Although we affirm the district court’s decision that both violations were willful, one willful violation would be sufficient, as a single willful violation is grounds for upholding the revocation.”).

<sup>80</sup> *Armalite, Inc. v. Lambert*, 544 F.3d 644, 647 (6th Cir. 2008).

<sup>81</sup> See e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985) (finding that the FDA’s decision not to undertake certain enforcement actions is presumptively unreviewable because it is “committed to agency discretion by law” under § 701(a)(2) of the Administrative Procedure Act).