



## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives  
**Topic:** Clarify Facilitating Gun Sales for Profit Is a Form of “Dealing in Firearms”  
**Date:** November 2020

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**Recommendation:** Issue a regulation clarifying that facilitating gun sales for profit online is a form of “dealing in firearms.”

### **I. Summary**

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

Under the Gun Control Act of 1968 (GCA), any person who is engaged “in the business” of selling guns is a firearms dealer and must obtain a federal firearms license (FFL).<sup>1</sup> This distinction triggers certain federal laws and regulations that federal firearm licensees (FFLs) must follow, including the statutory requirement that they conduct a background check on potential purchasers. Gun sellers who do not qualify as firearms dealers are considered private sellers and are not required to obtain an FFL, and thus, are not required by federal law to conduct background checks.

The GCA is vague as to the level of sales activity that distinguishes someone who sells guns occasionally—and is not subject to federal licensing requirements—from someone who is “engaged in the business” of firearm sales and qualifies as a firearms dealer. According to a report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the federal definition of “engaged in the business” often frustrates the prosecution of “unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.”<sup>2</sup>

Because of this vagueness, individuals prohibited from purchasing or possessing firearms under federal law can easily buy them from unlicensed sellers with no background check in most states. In fact, an estimated 22% of US gun owners acquired their most recent firearm without a background check—which translates to millions of Americans acquiring millions of guns, no questions asked, each year.<sup>3</sup>

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<sup>1</sup> 18 U.S.C. § 923(a).

<sup>2</sup> ATF, “Gun Shows: Brady Checks and Crime Gun Traces,” January 1999, 1, <http://www.atf.gov/files/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf>.

<sup>3</sup> Matthew Miller, Lisa Hepburn & Deborah Azrael, “Firearm Acquisition Without Background Checks,” *Annals of Internal Medicine* 166, no. 4 (2017): 233–239.

Websites such as Armslist.com, which serves as an online marketplace devoted entirely to the sale of firearms and firearm paraphernalia,<sup>4</sup> allow their users to exploit the private sale loophole with little to no safeguards, and facilitate a large number of illegal gun transactions online.<sup>5</sup> Because the GCA does not explicitly include “facilitation” in its definition of being “engaged in the business of dealing in firearms,” Armslist is currently able to avoid federal firearms regulation. According to a study of Armslist by Everytown for Gun Safety, there were nearly 1.2 million ads for firearm sales on the website that would not require a background check in 2018 alone.<sup>6</sup> While this memo will only specifically address Armslist and lawsuits against the company, there are many other websites that facilitate gun sales online, including GunBroker and GunsAmerica.<sup>7</sup>

To hold these websites accountable and increase the number of gun sales subject to a background check, the next administration, through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), should issue a new rule clarifying that one is “dealing in firearms” under the GCA when one facilitates private gun sales for profit. The practical effect of such a rule would be to require a website such as Armslist to either: (1) obtain an FFL and conduct background checks itself for all private sales on its platform, or (2) obtain an FFL and only allow federally licensed gun dealers to post sales on its platform.

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

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.<sup>8</sup> To finalize a new rule under the GCA, the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a 90-day period for receiving public comments,<sup>9</sup> respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.<sup>10</sup> In total, the multi-phase NCRM process generally extends for a year.

## **II. Current state**

### **Armslist and similar gun sale facilitation websites**

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<sup>4</sup> See, Armslist Firearms Marketplace, “About Armslist,” accessed August 24, 2020, <https://www.armslist.com/info/about>.

<sup>5</sup> Mayors Against Illegal Guns, “In the Business, Outside the Law,” December 2013, [http://www.ncdsv.org/images/EFGS\\_In-The-Business-outside-the-law\\_12-2013.pdf](http://www.ncdsv.org/images/EFGS_In-The-Business-outside-the-law_12-2013.pdf).

<sup>6</sup> Everytown for Gun Safety, “Unchecked: Over 1 Million Online Firearm Ads,” January 3, 2019, <https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/>.

<sup>7</sup> See Becky Dobyms, “How to Sell Guns Online,” Qualbe, accessed August 23, 2020, <https://qualbe.com/blog/sell-guns-online/>.

<sup>8</sup> 5 U.S.C. § 553.

<sup>9</sup> The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).

<sup>10</sup> Congressional Research Service, “An Overview of Federal Regulations and the Rulemaking Process,” January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

In the last six months, Armslist.com has been visited by over 8.2 million Americans<sup>11</sup> and is one of the largest free websites for gun classified ads in the country. It was launched in 2009 after Craigslist banned the sale of firearms on its website.<sup>12</sup> Armslist represents itself as a “firearms marketplace” and calls its users “Armslist customers” in advertisements that offer a discount on an associated FFL’s website.

Upon visiting Armslist.com, Armslist requires users to agree to a series of fourteen terms, including confirmation that users: (1) are 18 years or older, (2) understand that Armslist does “not become involved in transactions between parties and does not certify, investigate, or in any way guarantee the legal capacity of any party to transact,” (3) are responsible for obeying “all applicable enforcement mechanisms” under the law, including licensing requirements, (4) will contact the ATF if there is uncertainty with any firearm sale or transfer, (5) understand that Armslist is a Second amendment “champion,” but will comply with all laws pursuant to the Constitution of the United States and due process of law, and (6) take responsibility for their own actions and the actions and consequences “related to or resulting from” their use of Armslist.<sup>13</sup>

After agreeing to these terms, users are prompted to create an Armslist account and are asked to provide an email address and telephone number, although providing a telephone number is optional. Although Armslist claims that all “major functions” of the site can be used without an account,<sup>14</sup> an email address is required to create a firearms listing or to contact a seller through the website’s internal messaging platform.

Once an account is created, prospective sellers can post new firearms listings on the site by confirming their email, providing the city and state where the firearm is located, describing the model of the firearm they are selling, and once again agreeing to Armslist’s terms and conditions. After this information is processed, Armslist verifies the email address attached to each listing and publishes the classified within a matter of minutes. If a buyer is interested in purchasing a firearm from an Armslist classified, they can contact the seller using Armslist’s internal email system, which provides relative anonymity, because the exchanges are housed entirely within Armslist’s infrastructure,<sup>15</sup> allowing buyers and sellers to contact one another without any public record.<sup>16</sup> Prospective sellers can also view all listings from a particular seller at once, which allows site users to see a seller’s full catalog of available firearms for sale.

As stated on its website, Armslist is a service provider facilitating the postings of the classifieds of firearms for sale and “*can not* and *will not* be a party in transactions” enabled by its own site.

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<sup>11</sup> SimilarWeb, “Armslist.com,” accessed August 2020, <https://www.similarweb.com/website/armslist.com/>.

<sup>12</sup> Colin Lecher and Sean Campbell, “The Craigslist of Guns,” The Verge, January 16, 2020, <https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation>.

<sup>13</sup> Armslist, “Terms of Use”, accessed October 26, 2020, <https://www.armslist.com/info/terms>.

<sup>14</sup> *Id.*

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

<sup>16</sup> Mayors Against Illegal Guns, “In the Business, Outside the Law,” December 2013, [http://www.ncdsv.org/images/EFGS\\_In-The-Business-outside-the-law\\_12-2013.pdf](http://www.ncdsv.org/images/EFGS_In-The-Business-outside-the-law_12-2013.pdf).

As such, Armslist claims it is the responsibility of the buyer and seller “to conduct safe and legal transactions.”<sup>17</sup> Armslist does not play a role in the physical transfer of firearms sold or monies exchanged between buyers and sellers, but does play the role of a facilitator to connect buyers and sellers on its platform.

Although federal law currently requires licensed gun dealers to conduct in-person background checks on gun purchasers and to maintain records of their sales,<sup>18</sup> it does not extend these requirements to unlicensed sellers. This means that a person can acquire a gun online from an unlicensed seller who resides in the same state without any background check or sale record, unless the buyer and seller reside in a state that has closed this dangerous loophole by requiring background checks on all gun sales.<sup>19</sup>

This helps explain why online “private” gun sales on websites like Armslists are a major source of guns trafficked on the black market and sold to people who could not pass a background check otherwise.<sup>20</sup> In 2018, approximately 1.2 million firearm sales listings were posted on Armslist that would not require a background check, and one in nine prospective online buyers would not have passed a background check if administered.<sup>21</sup> The level of anonymity provided by websites like Armslist allows prospective buyers to purchase firearms unchecked at alarming levels.

### **Federal regulatory scheme**

The GCA makes it unlawful for any person except a licensed dealer to “engage in the business” of dealing in firearms.<sup>22</sup> By contrast, a so-called “private seller” (one who is not “engaged in the business”) is exempt from federal licensing requirements.<sup>23</sup> Thus, private sellers are not subject to the myriad of federal requirements imposed on dealers under the GCA, such as mandatory background checks on prospective buyers, keeping firearms transaction records so that crime guns can be traced to their first retail purchaser, and ensuring safety locks are provided with every handgun and available in any location where firearms are sold.<sup>24</sup>

Individuals who sell guns on online platforms and the online platforms themselves take advantage of the GCA’s vague definition of “engaged in the business” to sell and facilitate the sale of high volumes of firearms without a license, without conducting background checks, and

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<sup>17</sup> Armslist, “Frequently Asked Questions,” accessed October 16, 2020, <https://www.armslist.com/info/faqs>.

<sup>18</sup> 18 U.S.C. § 923.

<sup>19</sup> Giffords Law Center, “Interstate and Online Gun Sales,” accessed October 16, 2020, [https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/interstate-online-gun-sales/#footnote\\_10\\_5619](https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/interstate-online-gun-sales/#footnote_10_5619).

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

<sup>21</sup> Everytown for Gun Safety, “Unchecked: Over 1 Million Online Firearm Ads,” January 3, 2019, <https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/>.

<sup>22</sup> 18 U.S.C. § 922(a)(1)(A).

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

<sup>24</sup> 18 U.S.C. § 922(t)(1)(A)–(B).

without oversight from the ATF. These unregulated sales are a significant threat to public safety; unlicensed sellers regularly provide firearms to people who go on to commit violent crimes or engage in illegal firearms trafficking.<sup>25</sup>

As applied to a firearms dealer, the term “engaged in the business” is defined as:

[A] 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<sup>26</sup> 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.<sup>27</sup>

The GCA fails to define the term “dealing in firearms.” This lack of clarity means that websites that facilitate the sale of firearms for profit—and thus “devot[e] time, attention, and labor” to such facilitation with the “principal objective of livelihood and profit through the repetitive purchase and resale of firearms”—are not currently required under ATF guidance to apply for an FFL.<sup>28</sup>

### **Obama administration efforts**

In January 2016, in response to the shooting at Sandy Hook Elementary School, the Obama administration undertook a series of executive actions designed to reduce gun violence.<sup>29</sup> One such action sought to clarify that it “doesn’t matter where you conduct your business—from a store, at gun shows, or over the Internet: If you’re *in the business* of selling firearms, you must get a license and conduct background checks” (emphasis added).<sup>30</sup> In particular, the ATF clarified the following principles via guidance:

A person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted. For example, a person can be

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<sup>25</sup> See, e.g., Scott Glover, “Unlicensed dealers provide a flow of weapons to those who shouldn't have them, CNN investigation finds,” CNN, March 25, 2019, <https://www.cnn.com/2019/03/25/us/unlicensed-gundealers-law-invs/index.html>.

<sup>26</sup> 18 U.S.C. § 921(a)(22) states that “[t]he term ‘with the principal objective of livelihood and profit’ means 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.”

<sup>27</sup> 18 U.S.C. § 921(a)(21)(C).

<sup>28</sup> ATF, “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,” January 2016, <https://www.atf.gov/file/100871/download>.

<sup>29</sup> Executive Office of the President, “Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer,” White House Archives, January 4, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>.

<sup>30</sup> *Id.*

engaged in the business of dealing in firearms even if the person only conducts firearm transactions at gun shows or through the Internet....

[T]here is no specific threshold number of firearms purchased or sold that triggers the licensure requirement. Similarly, there is no “magic number” related to the frequency of transactions that indicates whether a person is “engaged in the business” of dealing in firearms. It is important to note, however, that even a few firearms transactions, when combined with other evidence, can be sufficient to establish that a person is “engaged in the business” of dealing in firearms. For example, courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place....

Perhaps the clearest indication of whether a person is “engaged in the business” of dealing in firearms can be found in what he or she represents to others. Some factors that may demonstrate that you intend to engage in the business of dealing in firearms include: representing yourself as a source of firearms for customers...<sup>31</sup>

A rule explicitly clarifying that *facilitating* transactions of gun sales for profit through the Internet—and not just transacting in gun sales for profit through the Internet—is a method of being “engaged in the business” of dealing in firearms would build on this guidance from the ATF.

### **Pending litigation**

While the federal government has failed to address the issue of illegal gun sales online successfully, legal organizations have been actively trying to hold websites like Armslist accountable for the illegal sales facilitated by their platforms. One case currently pending in the District of Wisconsin, *Bauer v. Armslist, LLC*, was filed by the Brady Campaign to Prevent Gun Violence on behalf of the family and estate of a Chicago police officer who was shot and killed by a four-time felon who purchased a gun from a seller found on Armslist.<sup>32</sup> The complaint “seeks to hold the Armslist Defendants responsible for the foreseeable consequences of intentionally, recklessly and/or negligently designing and administering Armslist.com as a platform that does not merely enable but actively encourages and assists in the completion of illegal transactions supplying the criminal firearms market.”<sup>33</sup> The case is currently pending.

Similar lawsuits have been filed by Brady and other legal organizations in past years, but no cases have successfully held Armslist or other websites accountable for illegal gun sales facilitated on their platforms. The reason for the lack of success will be explained in greater detail in Section IV below, but, in brief, Section 230 of the Communications Decency Act (CDA) prevents internet service providers (such as Armslist) from being held accountable for illegal posts on their platforms. The *Bauer* complaint attempts to frame the claim in a way that

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<sup>31</sup> ATF guidance *supra* note 28.

<sup>32</sup> Civ. No. 2:20-cv-00215 (D. Wisc. Feb. 12, 2020).

<sup>33</sup> Complaint, *Bauer v. Armslist, LLC*, Civ. No. 2:20-cv-00215 (D. Wisc. Feb. 12, 2020), ¶ 19.

circumvents the CDA, but it remains to be seen whether such framing will be successful.<sup>34</sup> Other cases have attempted to frame their arguments to work around the CDA without success.<sup>35</sup>

However, as explained below, it's important to note that the fact that civil litigation has been unsuccessful in piercing the CDA does not mean the federal government can not impose licensing requirements on online firearms marketplaces.

### **III. Proposed action**

In order to effectuate the purpose of the GCA and ensure websites like Armslist are required to comply with federal law, the next administration should promulgate a rule to clarify that facilitating gun sales for profit is a method of being “engaged in the business” of dealing in firearms, and require such facilitators to obtain an FFL to operate.

#### **A. Substance of proposed rule**

As noted above, under 18 U.S.C. § 921(a)(21)(C), an individual or entity “engaged in the business” of selling firearms is defined as “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.”<sup>36</sup> The NPRM should clarify that any individual or entity that serves as the facilitator of gun sales with the intent to profit is covered by this definition. In particular, the NPRM should clarify the following:

- Facilitation of gun sales is a form of “dealing in firearms.” Just because websites like Armslist are not directly transferring guns from buyers to sellers does not mean they are not devoting time, attention, and labor to that transfer. Indeed, such entities—by connecting gun buyers and sellers, providing the platform for these gun buyers and sellers to communicate, and indirectly profiting off of gun sales through advertisements and fees paid by premium users—are solely devoted to dealing in firearms by facilitating firearm sales. As such, the NPRM should clarify that “facilitating gun sales” is a form of “dealing in firearms.” The NPRM should also codify several factors to help identify whether the entity at issue is facilitating gun sales, including:
  - whether the entity holds itself out publicly as a facilitator of guns sales, including on its website or via advertisements
  - whether the entity’s name implies that it facilitates gun sales
  - whether a substantial portion of the entity’s revenue is directly related to its facilitation of gun sales

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<sup>34</sup> “This suit does not seek to treat the Armslist Defendants as publishers or speakers of third-party content, or to impose liability on the Armslist Defendants for simply publishing content solely produced by third-party users. The Armslist Defendants are liable because they acted negligently and intentionally, and took an active role in the production and proliferation of the content on Armslist.com.” *Id.* at ¶ 20.

<sup>35</sup> See, e.g., *Daniel v. Armslist, LLC*, 386 Wis.2d 449 (2019).

<sup>36</sup> 18 U.S.C. § 921(21)(C).

- Only those who facilitate gun sales “as a regular course of trade or business” will be deemed “engaged in the business.” The GCA is vague as to the level of activity that distinguishes someone who deals in guns occasionally—and is not subject to federal licensing requirements—from someone who is “engaged in the business” of dealing in firearms and qualifies as a firearms dealer. The next administration should clarify the level of activity sufficient to trigger FFL licensing requirements by setting a numerical threshold on the number of guns sold or offered for sale.<sup>37</sup> Such a clarification would apply to a facilitator of gun sales just as it would to a seller of guns.
- Only those who facilitate gun sales “with the principal objective of livelihood and profit” would be deemed “engaged in the business.” The GCA is more explicit as to the motivation that must inform an entity’s dealings in firearms. For an entity to be considered “in the business,” it must have “the principal objective of livelihood and profit through the repetitive purchase and resale of firearms,” which the GCA defines as “predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”<sup>38</sup> The NPRM should clarify that facilitation of gun sales for profit fits within this definition because the profit facilitators derived from advertising and user fees depend entirely on the “repetitive purchase and resale of firearms.”

## B. Process

To issue a new rule, the ATF must go through the NCRM process under the APA.<sup>39</sup> First, an agency must provide notice that it intends to promulgate a rule by publishing a NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Next, the agency must accept written public comments on the proposed rule for a period of at least 90 days, as specified by the GCA.<sup>40</sup> An oral hearing is not required.<sup>41</sup> Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting the proposals, or by modifying the proposed rule to reflect their input.

In order to prevail in a substantive legal challenge to the rule, the ATF should confirm that the definition of “facilitators” is consistent with the statutory language and reasonable, in light of the

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<sup>37</sup> See, “Promulgate a regulation providing that a person who sells five guns or more for profit per calendar year is considered “in the business” of selling firearms,” <https://giffords.org/wp-content/uploads/2020/11/Promulgate-a-regulation-providing-that-a-person-who-sells-five-guns-or-more-for-profit-per-calendar-year-is-considered-“in-the-business”-of-selling-firearms.pdf>.

<sup>38</sup> 18 U.S.C. § 921(a)(22)

<sup>39</sup> 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

<sup>40</sup> 18 U.S.C. § 926(b).

<sup>41</sup> See *Nat’l Rifle Ass’n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).



statute's purposes, agency experience enforcing the statute, and the comments submitted on the NPRM.

Because this regulation is novel, the ATF should anticipate a significant influx of comments from the public and industry stakeholders. Consequently, it may take several months after the comments period has closed for the ATF to draft a final rule that meaningfully responds to and/or incorporates all of the significant comments.

Once the revision process is complete, the final rule will be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

### 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>42</sup> In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF.<sup>43</sup> These provisions are "general conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.<sup>44</sup> The ATF's interpretation of who qualifies as a dealer is in the exercise of its general rulemaking authority.<sup>45</sup> Indeed, the definition of dealer is central to the regulatory regime established by the GCA, including the enforcement of the licensing requirement under § 923(a).

## **IV. Risk analysis**

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.<sup>46</sup> The procedural requirements of the APA and the GCA are discussed in Section III of this memorandum. So long as the ATF is careful to observe these requirements, the new rule is likely to withstand procedural challenges.

Relevant here, substantive challenges will likely be mounted on the basis of the APA and Section 230 of the CDA.

### A. APA

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<sup>42</sup> 18 U.S.C. § 926(a).

<sup>43</sup> 28 C.F.R. §§ 0.130, 0.131.

<sup>44</sup> *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.

<sup>45</sup> *Id.*

<sup>46</sup> 5 U.S.C. § 553.

APA challenges will argue either that the rule is “in excess of [the agency’s] statutory jurisdiction, authority or limitations,”<sup>47</sup> or that the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>48</sup>

When a court reviews an agency’s interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>49</sup> Pursuant to that rubric, at step one, courts examine “whether Congress has directly spoken to the precise question at issue.”<sup>50</sup> If so, “that is the end of the matter” and courts must enforce the “unambiguously expressed intent of Congress.”<sup>51</sup>

However, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.<sup>52</sup> This reflects the fact that “*Chevron* recognized that [t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>53</sup>

Here, at *Chevron* step two, the ATF has evidence to support the reasonableness of its interpretation of “dealing in firearms,” including the text of the GCA and the statute’s purpose.

First, a plain reading of the text of the GCA suggests facilitating sales is a form of “dealing in firearms.” The text itself does not explicitly say an entity must physically conduct a transaction to “deal in firearms.” If Congress had intended to limit the regulatory regime to just those who physically sell firearms, the statutory text would not contain the word “in”—it simply would have defined “in the business” to include those who “sell or transfer firearms.” Instead, the text says an entity must devote “time, attention, and labor to **dealing in** firearms” (emphasis added).

It is a widely accepted canon of statutory interpretation that statutes should be construed “so as to avoid rendering superfluous” any statutory language: “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....”<sup>54</sup> The ATF could reasonably argue that by using the phrase “dealing in firearms”

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<sup>47</sup> 5 U.S.C. § 706(2)(C).

<sup>48</sup> 5 U.S.C. § 706(2)(A).

<sup>49</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

<sup>50</sup> *Id.* at 842.

<sup>51</sup> *Id.* at 842-43.

<sup>52</sup> *Id.* at 843.

<sup>53</sup> *Id.* at 55–56 (internal quotation marks and citation omitted).

<sup>54</sup> *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in *Corley v. United States*, 556 U.S. 303, 314 (2009)); *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word “law” broadly could render word “regulation” superfluous in preemption clause applicable to a state “law or regulation”). See also *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”) (rejecting interpretation that would have made “uses” and “carries” redundant in statute penalizing using or carrying a firearm in commission of offense). In a case analyzing the significance of the adjective “applicable” in a provision of the Bankruptcy Code,

as opposed to the phrase “dealing firearms,” or “selling or transferring firearms,” Congress meant the definition of “in the business” to encompass activities directly related to the sale in addition to the actual transfer itself.

In addition to the text of the GCA, the purpose of the Brady Handgun Violence Prevention Act (Brady Bill) would also support the ATF’s new rule. In creating a national background check system for firearms at the point of sale, Congress sought to regulate commercial entities responsible for the sale of large numbers of firearms. When the current language allowing unlicensed people to make “occasional sales” and sell guns from their “personal collections” was passed in 1986 as part of the Firearm Owners’ Protection Act (FOPA), the standard was discussed in legislative hearings at that time. According to an analysis conducted by Everytown for Gun Safety, the testimony indicates that the goal of the legislation was to create a clear definition for what constitutes “engaged in the business” and to protect people who sell guns in very small numbers.<sup>55</sup>

For example, Senator James McClure (R-ID), the sponsor of FOPA, said that the legislation would address the problem wherein sellers were prosecuted for transferring “two, three, or four guns from their collection.”<sup>56</sup> Senator Orrin Hatch (R-UT) said that the new definition would protect people from selling “two or three weapons from their personal collections and thus unwittingly violating” the law.<sup>57</sup> The head of the National Rifle Association’s Institute for Legislative Action described the problem as “prosecutions on the basis of as few as two sales.”<sup>58</sup>

In the last six months, Armslist.com has been visited by over 8.2 million Americans,<sup>59</sup> and in 2018 alone, approximately 1.2 million firearm sales listings were posted on Armslist that would not have required a background check.<sup>60</sup> By facilitating large numbers of firearm sales outside the view of federal regulation, websites like Armslist have co-opted the narrow private sales exception to contravene the purpose of the Brady Bill. By requiring the large commercial entity

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the majority opinion relied on the presumption against superfluity to hold that “applicable” had a limiting effect, whereas Justice Scalia, in dissent, observed that “[t]he canon against superfluity is not a canon against verbosity. When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with.” Compare *Ransom v. FIA Card Services*, 562 U.S. \_\_\_, No. 09-907, slip op. at 7-8 (January 11, 2011) with *Ransom v. FIA Card Services*, 562 U.S. \_\_\_, No. 09-907, slip op. at 2 (January 11, 2011) (Scalia, J., dissenting).

<sup>55</sup> Everytown for Gun Safety, “Business as Usual,” November 12, 2015, <https://everytownresearch.org/report/business-as-usual/#intro>.

<sup>56</sup> The Firearm Owners’ Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47(1981) (statement of Sen. James McClure).

<sup>57</sup> The Firearm Owners’ Protection Act, Hearing Before the S. Comm. on the Judiciary, 98th Cong. 5 (1983) (Statement of Senator Orrin Hatch).

<sup>58</sup> The Firearm Owners’ Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47 (1981) (Statement of Neal Knox, Exec. Dir. NRA-ILA).

<sup>59</sup> SimilarWeb, “Armslist.com,” August 2020, <https://www.similarweb.com/website/armslist.com/>.

<sup>60</sup> Everytown for Gun Safety, “Unchecked: Over 1 Million Online Firearm Ads,” January 2, 2019, <https://everytownresearch.org/report/over-1-million-online-firearm-ads-no-background-checks-required/>.

responsible for these sales to take responsibility for the safety of the transactions they facilitate, the ATF would be effectuating the purpose of the Brady Bill.

## B. CDA Section 230

Even if the new rule did not violate the APA, a court could find that the rule contravenes Section 230 of the CDA. The section states that, “[n]o provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>61</sup> The practical effect of Section 230 is that an internet service provider like Armslist cannot be held liable for illegal content posted on its platform by a user. As applied to the context of gun sales, this means that Armslist cannot be found liable for illegal gun sale postings made on its website, or for illegal gun sales facilitated by the website. However, Section 230 of the CDA would not act as a barrier to the ATF implementing the proposed rule.

Courts have used Section 230 of the CDA as a basis to dismiss suits brought against Armslist for the company’s facilitation of illegal gun sales in the past.<sup>62</sup> One example is *Daniel vs. Armslist LLC*, in which a man illegally purchased a gun after responding to an Armslist posting and then shot and killed four people.<sup>63</sup> The daughter of one of the victims brought suit against Armslist for negligence and related torts for its involvement in the shooting,<sup>64</sup> and the case was brought to the Wisconsin Supreme Court, which held that the CDA barred all of Daniel’s claims against Armslist<sup>65</sup> because “all of Daniel’s claims against Armslist require the court to treat Armslist as the publisher or speaker of third-party content,” which was disallowed under the CDA.<sup>66</sup>

Although the CDA would act as a barrier against holding a website like Armslist liable for gun violence that occurs from illegal sales on its platform, as *Daniel vs. Armslist LLC* shows, it would not necessarily act as a barrier to ATF implementing the proposed rule. The rule does not seek to treat these websites as publishers of information on their websites after the fact; it seeks to require that the websites obtain FFLs before the illegal sales occur. It could be argued that this places an affirmative obligation on the websites to prevent illegal activity, in violation of the CDA.

However, it is also possible that the rule could avoid conflicting with the CDA by virtue of the difference between online posts that are clear “speech,” and gun transactions that could be seen as more than just “speech.” As one Cornell professor pointed out to *The Verge* in an article about the CDA and Armslist, requiring a license for each tweet on Twitter would make it

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<sup>61</sup> 47 U.S.C. § 230(c)(1).

<sup>62</sup> See, e.g., *Vesely v. Armslist LLC*, 762 F.3d 661 (7th Cir. 2014) (holding that the CDA barred plaintiff’s claim against Armslist for the website’s facilitation of illegal gun sale that resulted in a homicide); *Daniel v. Armslist, LLC*, 386 Wis.2d 449, 457 (2019) (same); *Stokinger v. Armslist, LLC*, 1884CV03236F, 2020 WL 2617168 (Sup. Ct. Mass. Apr. 28, 2020).

<sup>63</sup> *Daniel v. Armslist, LLC*, 386 Wis.2d 449, 457 (2019).

<sup>64</sup> *Id.* at 461.

<sup>65</sup> *Id.* at 484.

<sup>66</sup> *Id.* at 481.

impossible for the social media website to function; however, requiring a license for each sale on Armslist “doesn’t make firearm sales impossible.”<sup>67</sup> Moreover, if the proposed rule requires Armslist to obtain an FFL itself—as opposed to only allowing licensed sellers on the platform—then it arguably doesn’t conflict with the CDA, because it imposes a requirement on the platform itself to be able to operate, rather than requiring the platform to police content by users.<sup>68</sup>

Perhaps most importantly, the text of Section 230 explicitly provides:

No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, **or any other Federal criminal statute**.<sup>69</sup> (Emphasis added).

The proposed rule outlined above is exactly that: an attempt by the ATF to enforce a criminal statute, namely 18 U.S.C. § 923(a).<sup>70</sup>

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<sup>67</sup> Colin Lecher and Sean Campbell, “The Craigslist of Guns: Inside Armslist, the Online ‘Gun Show that Never Ends,’” The Verge, January 16, 2020, <https://www.theverge.com/2020/1/16/21067793/guns-online-armslistmarketplace-craigslist-sales-buy-crime-investigation>.

<sup>68</sup> The CDA does not prevent any and all regulation of websites; for example, many courts have found that websites are required to be accessible to all users under the Americans with Disabilities Act. Kris Rivenburgh, “The ADA Checklist: Website Compliance Guidance for 2019 in Plain English,” Medium, November 7, 2018, <https://medium.com/@krisrivenburgh/the-ada-checklist-website-compliance-guidelines-for-2019-in-plain-english-123c1d58fad9>; Jason P. Brown & Robert T. Quackenboss, “The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019,” Hunton Andrews Kurth LLP January 3, 2019, <https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/> (“Courts within the First, Second, and Seventh Circuit Courts of Appeals have found that a website can be a place of public accommodation independent of any connection to a physical space,” which subjects them to accessibility requirements under Title III of the Americans with Disabilities Act.).

<sup>69</sup> 47 U.S.C. § 230(e)(1).

<sup>70</sup> *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (“section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.”).