RECOMMENDED ACTION MEMO
Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Require FFLs to Sell Safety Devices
Date: November 2020

Recommendation: Finalize a rule proposed by the Obama administration to close regulatory loopholes that undermine the statutory requirement that federal firearms licensees sell compatible gun safety devices.

I. Summary

Description of recommended executive action

Under 18 U.S.C. § 923, applicants for a federal firearm license (FFL) must certify they will have gun storage and safety devices "available [for purchase] at any place in which firearms are sold."[1] Regulations implementing this statutory requirement currently leave three important loopholes:

(1) Regulations do not explicitly require that safety devices made available by federal firearm licensees (FFLs) be compatible with the actual firearms sold on the premises (herein the "compatibility requirement").

(2) Regulations only explicitly apply to gun *dealers* and do not mention gun manufacturers or importers, even those who sell directly to customers (herein the "application to manufacturers and importers loophole").

(3) Regulations do not explicitly grant the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) the ability to deny or revoke an FFL's license for noncompliance with the safety device requirement.

In May 2016, the ATF proposed a rule to close these three loopholes.[2] The 2016 Proposed Rule sought to amend ATF regulations to reflect the agency's interpretation that § 923 requires compatible safety devices, applies to manufacturers and importers if they have premises where firearms are sold, and grants the ATF the ability to use evidence of noncompliance in licensing proceedings.[3]

However, before the 2016 Proposed Rule could be finalized, President Trump took office and froze all pending regulatory actions by promulgating Executive Order 13771, which mandated that "the total incremental cost of all new regulations...to be finalized this year shall be no greater than zero" and required agencies proposing new regulations to identify at least two prior

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[1] 18 U.S.C. § 923(d)(1)(G).
[2] 81 Fed. Reg. 33448, "Commerce in Firearms and Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments," May 26, 2016, https://www.federalregister.gov/d/2016-12364.
[3] *Id*.

regulations that could be eliminated to offset the cost of the new ones.[4] This effectively made it impossible for new regulations to be finalized, and stalled the ATF's proposed rule to close the § 923 loopholes.

In order to effectuate the intent of Congress and help keep families safe, the next administration should issue a new rule to finish the work the Obama administration started, closing regulatory loopholes that undermine the statutory requirement that FFLs sell compatible gun safety devices.

Overview of process and time to enactment

Although the next administration's rule would likely be substantially similar to the 2016 Proposed Rule—for which the notice and comment rulemaking (NCRM) process was already well underway—it would be most prudent to begin the NCRM process from the beginning, rather than restart the process with the 2016 Proposed Rule. This would ensure the rule is in full compliance with procedural rulemaking requirements and mitigate potential legal challenges.

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the NCRM process.[5] To finalize a new rule, the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, 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 thirty days after it is published.[6]

This multi-phase process generally extends for a year; however, because the 2016 Proposed Rule already provides a significant foundation for the new rule, the process may be more expedient in this case.

II. Current state

The 1998 Omnibus Consolidated and Emergency Supplemental Appropriations Act (the "1998 Act") amended the Gun Control Act of 1968 (GCA) such that § 923(d)(1)(G) of the GCA requires that in order to apply for an FFL, applicants must certify they have secure gun storage or safety devices available for purchase.[7]

The safety lock requirement

The 1998 Act defines "secure gun storage or safety device" as:

> (a) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device

[4] Executive Order 13771, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," January 30, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/.
[5] 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.
[6] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.
[7] 18 U.S.C. § 923(d)(1)(G).

> (b) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device
>
> (c) a safe, gun safe, gun case, lockbox, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.[8]

The wording of the statute does not explicitly include a compatibility requirement. Therefore, gun sellers are currently able to comply with the statute only by offering safety devices that are compatible with *some* of the firearms they sell.

In addition, the section that requires certification of the storage and safety requirements only explicitly applies to gun *dealers*, and does not mention gun manufacturers or importers.[9] The statute requires that:

> ...in the case of an application to be licensed as a dealer, the applicant certifies that secure gun storage or safety devices will be available at any place in which firearms are sold under the license to persons who are not licensees…[10]

Other sections in the statute appear to distinguish between dealers, manufacturers, and importers. For example, the section on record-keeping begins by stating that "[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain such records…."[11]

However, the subsequently enacted Child Safety Lock Act of 2005 (the "2005 Act") created 18 U.S.C. § 922(z), which makes it a federal crime, with certain exceptions:

> for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

Finally, there is a need to clarify the enforcement mechanism of § 923. The 1998 Act explicitly authorized the attorney general to revoke the FFL of a firearms seller who fails to make secure gun storage or safety devices available.[12] However, a portion of the 1998 Act provides:

> ...notwithstanding any other provision of law, evidence regarding compliance or noncompliance [with the secure gun storage or safety device requirement] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity.[13]

ATF regulations currently do not reflect the interpretation that this provision of the 1998 Act applies to civil liability actions and not proceedings regarding FFL denials or revocations.[14]

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[8] 18 U.S.C. § 921(a)(34).
[9] *Id.*
[10] 18 U.S.C. § 923(d)(1)(G).
[11] 18 U.S.C. § 923(g)(1)(A).
[12] 18 U.S.C. § 923(e).
[13] Pub. L. 105–277, div. A, § 101(b) (October 21, 1998), 112 Stat. 2681–50, 2681–70, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section923&num=0&edition=prelim.
[14] Supra note 2.

However, any other interpretation would strip § 923(d) and (e) of appropriate enforcement mechanisms and render them meaningless.

Obama administration action

In May 2016, the ATF issued an NPRM to close these three loopholes and invited members of the public to comment on the 2016 Proposed Rule.[15] The public comment period ended on August 24, 2016.[16] The 2016 Proposed Rule received four comments total, including a detailed comment in opposition to the proposed rule, issued by Gun Owners of America (GOA) and the Gun Owners Foundation (GOF), calling the proposal "burdensome and expensive."[17]

Trump administration action

Upon taking office, Trump moved the 2016 Proposed Rule to the long-term regulatory agenda, and issued two executive orders that required agencies to maintain net-zero new costs and issue two significant deregulations for every new regulation promulgated.[18] These developments effectively led to the 2016 Proposed Rule stalling after the NPRM phase, and no further updates on the rule have been given.

III. Proposed action

In order to mitigate potential firearm accidents, the next administration should issue a new rule to close regulatory loopholes that undermine the statutory requirement that federal firearms licensees sell compatible gun safety devices.

A. Substance of the new rule

In all likelihood, the new rule's form and justifications will be very similar to the 2016 Proposed Rule, and the next administration may freely utilize the language and analysis present in the 2016 proposal. However, the next administration should consider whether any changes should be made to the language before issuing an NPRM.

Incorporating responses to 2016 public comments

The administration should review the four comments submitted during the 2016 comment period and include language that incorporates or responds to arguments raised by the public. In particular:

- The new NPRM should clearly outline why the ATF interprets § 923 to require FFLs to have available gun storage and safety devices that are **compatible** with the firearms they sell, even though the statute does not say so explicitly.

[15] *Id.*
[16] *Id.*
[17] Gun Owners of America and Gun Owners Foundation, "Comment Letter on Proposed Rule - Commerce in Firearms and Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments," August 24, 2016, https://beta.regulations.gov/document/ATF-2016-0002-0005.
[18] Brookings Institute, "Tracking Deregulation in the Trump Era," August 6, 2020, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/.

In their joint comment, the GOA and GOF noted that § 923 does not contain any language specifying that the required gun storage and safety devices be "compatible" with the firearms offered for sale, concluding that, "ATF may wish that the statute went further, but it does not, and ATF is not at liberty to enact through regulation what Congress did not require by statute."[19]

The statute explicitly requires FFLs to have secure gun storage or safety devices available for customers to purchase. The purpose of this requirement is to prevent gun-related accidents by ensuring gun buyers are readily able to purchase proper storage for their firearms.[20] In order to be effective, these devices have to be compatible with the guns sold by FFLs. A device that is incompatible, broken, or outdated will do little to prevent unauthorized users, including minors, from improperly accessing guns. Therefore, without the compatibility requirement interpretation, the statute's purpose is frustrated, and its plain language holds little meaning.

In addition, the 2005 Act, as codified at § 922(z), specifically mandated that each handgun be sold "with a secure gun storage or safety device ... *for that handgun*." (Italics added.) In order for these two provisions to be interpreted in a consistent manner, the secure gun storage and safety devices available on an FFL's premises must be compatible with the firearms sold by the FFL.

In addition to codifying this requirement in the NPRM, the ATF should also update Form 7 to make the compatibility requirement explicit.[21]

- The new NPRM should clearly outline why the ATF interprets the § 923 certification requirement to apply to gun manufacturers and importers, even though that provision does not say so explicitly.

The GOA and GOF comment argued the ATF's interpretation of § 923's certification requirement as applying to manufacturers and importers violates basic principles of statutory interpretation: if Congress meant § 923's certification requirement to apply to licensees other than dealers, it would have explicitly written the statute to include manufacturers and importers.[22]

The 2016 Proposed Rule explicitly supported its interpretation of this issue by noting that "[f]ederal regulations provide that a licensed importer or a licensed manufacturer may engage in the business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured."[23] The new proposed rule should similarly outline the support for such an interpretation.

Section 923(e)'s authorization for the ATF to revoke the licenses of noncompliant FFLs, in contrast with the certification requirement, also explicitly gives the ATF the authority to revoke the license of any FFL who fails to make secure gun storage and safety devices available at locations where they sell guns to members of the public. To be consistent with this provision, the certification requirement should also apply to all FFLs.

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[19] Supra note 17.
[20] Giffords Law Center to Prevent Gun Violence, "Safe Storage," accessed October 13, 2020, https://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/safe-storage/.
[21] *See*, ATF Form 7, "Application for Federal Firearms License," accessed October 13, 2020, https://www.atf.gov/file/61506/download.
[22] Supra note 17.
[23] Supra note 2.

Furthermore, the 2005 Act explicitly imposed on manufacturers, importers, and dealers the requirement that handguns be sold or transferred with secure gun storage and safety devices. In order for manufacturers and importers to comply with this requirement, they must have such devices available in locations where they sell firearms directly to consumers. Notably, section 923(e) only requires these devices to be available at such locations.[24]

- The new NPRM should clearly outline why the ATF interprets § 923's evidentiary limitation to permit the use of evidence of noncompliance in FFL denial or revocation proceedings.

The GOA and GOF comment argued this interpretation amounts to ATF "ignor[ing] those provisions of federal law of which it disapproves," and recommended instead that the ATF "present its proposal to Congress and ask for legislation to amend the statute."[25]

The 2016 Proposed Rule explained how the ATF arrived at its interpretation, noting that:

> A basic tenet of statutory construction is that each provision in a law is intended to have some effect. To interpret [the Act's evidentiary limitation] as applying to license denial and revocation proceedings would result in the amendments to sections 923(d)(1) and (e) having no effective enforcement mechanism. To give meaning to the secure gun storage or safety device requirement...ATF reads this evidentiary limitation as not applying to license denial and revocation proceedings.[26]

The new proposed rule should similarly provide detailed support for the agency's interpretation of the § 923's evidentiary limitation.

Including a reference to § 923(e) in the regulation regarding revocations would conform the regulation to the changes made by the 1998 Act. It would also dramatically strengthen the ATF's ability to enforce § 922(z)'s closely related requirement that FFLs sell and transfer handguns only with secure gun storage or safety devices. The ATF may conduct inspections of FFLs to ensure compliance with record-keeping requirements. During these inspections, it may become apparent that an FFL does not have compatible secure gun storage and safety devices available. It may be more difficult for the ATF to prove that the FFL is selling or transferring handguns without these devices, than it is for the ATF to prove that the FFL does not have them available. However, if an FFL does not have them available, the ATF would have a strong reason to believe the FFL is not complying with § 922(z)'s requirement that FFLs sell and transfer handguns only with secure gun storage or safety devices.

- The new NPRM should clarify that the certification requirement does not apply to firearms (including deconstructed firearms) before the point of sale.

The GOA and GOF comment interpreted the 2016 Proposed Rule to require manufacturers and importers to use safety devices by locking up firearms in safes every night. The comment

[24] 18 U.S.C. § 923(e) ("at any place in which firearms are sold under the license to persons who are not licensees.")
[25] *Id.* at 4.
[26] Supra note 2.

claimed this requirement would be time-consuming and cost-prohibitive, and force some manufacturers and importers to shut down their on-site storefronts altogether.[27]

This claim misinterprets the statute and the proposed regulation, which required the secure gun and safety devices to be available for *purchase* by individual consumers. To avoid future litigation, the new proposed rule should explicitly state that this requirement does not apply to firearms (including deconstructed firearms) before the point of sale.

Additional revisions to the 2016 Proposed Rule

In addition to the comments received in 2016, the new rule should avoid ambiguity as much as possible to avoid a potential legal challenge. Based on this principle, we suggest a small number of revisions to the 2016 Proposed Rule, including:

- <u>The new NPRM should add the word "functioning" to the definition of "secure gun storage or safety device."</u>

The 2016 Proposed Rule sought to amend 27 C.F.R. 478.11(c) to define "secure gun storage or safety device" as:

> A safe, gun safe, gun case, lockbox, or other device that is designed to be or can be used --to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.[28]

The new rule should include the word "functioning" so that the amendment would read: "[a] safe, gun safe, gun case, lockbox, or other **functioning** device…". The addition of "functioning" would prevent individuals from circumventing the rule and flouting the purpose of the statute. It avoids the circumstance in which a device that is designed to store a gun securely—but does not actually secure the gun, because it is broken, for example—is compliant with the regulation implementing the statute.

- <u>The new NPRM should add language to ensure the compatibility requirement is effective.</u>

The new rule should update the compatibility requirement language in the 2016 Proposed Rule to emphasize more forcefully that FFLs must have a compatible safety device available for *each* model of firearm they sell. Proposed edits to the 2016 Proposed Rule language are provided below in emphasized language:

> (a) "that ~~**compatible**~~ secure gun storage or safety devices **<u>compatible with each model/type of firearm available for purchase</u>** will be available for purchase at any place where firearms are sold under the license…"
> (c) "Each licensee described in this section must have compatible secure gun storage or safety devices **<u>for each model/type of firearm available for purchase</u>** available at any place in which firearms are sold…"

Without specifying that the storage devices must be compatible with *each* model of firearm sold—a low burden, given the broad definition of secure gun storage and safety device—and

[27] *Id.* at 3.
[28] Supra note 2.

that the device must be available for purchase (not just testing), it will still be possible for sellers to get around the rule.

- The new NPRM should clarify that failure to provide gun storage devices that are compatible with each handgun sold will not only result in revocation, but would also violate § 922(z)'s criminal provision.

For clarity purposes, the NPRM should explicitly note that failure to provide gun storage devices that are compatible with each handgun sold is a federal crime under 18 U.S.C. § 922(z).

B. Process

Although the next administration will rely on the 2016 Proposed Rule to inform its new rule, the administration should begin the rulemaking process again to ensure full compliance with procedural requirements. The new proposed rule must go through the NCRM process under the APA.[29]

First, an agency must provide notice that it intends to promulgate a rule by publishing an 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. The NPRM published in the *Federal Register* for the 2016 Proposed Rule already provides a detailed analysis of how the proposed rule complies with the APA, as well as the executive orders that relate to agency rulemaking.[30]

Then the agency must accept public comments on the proposed rule for a period of at least 90 days. Received comments must be reviewed, and the ATF must respond to significant comments either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can 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.[31] In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF. Additionally, 18 U.S.C. § 923(a) states that the application for an FFL "shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe." These provisions are "general conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.[32]

The ATF's interpretation of the compatibility requirement, the safety device requirement's application to manufacturers and importers, and the evidentiary limitation are in the exercise of

[29] 5 U.S.C. § 553.
[30] This analysis assumes Executive Order 13771 will be rescinded.
[31] 18 U.S.C. § 926(a).
[32] *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.

its general rulemaking authority.[33] The compatibility requirement represents the agency's clarification of the certification required by § 923(d)(1)(G). The requirement is directly relevant to the approval of license applications by the attorney general under § 923(a). The ATF's interpretation of whether the gun safety device requirement applies to manufacturers and importers is similarly relevant to the approval of license applications by the attorney general under § 923(a). Finally, the ATF's interpretation of the evidentiary limitation is directly related to its ability to defend its revocations or denial of license applications under § 923(a) and carry out the provisions of the statute under § 926(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.[34] Substantive challenges may argue either that the agency rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[35] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[36]

Procedural challenges

By restarting the NCRM process with a new rule based on the 2016 Proposed Rule, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[37]

Litigation brought against a December 2018 rule provides an example of the creative claims the next administration may face. The rule sought to clarify the classification of bump stock devices under a different provision of 18 U.S.C. § 923.[38] The rule was challenged, in part, on the grounds that Acting Attorney General Matthew G. Whitaker "was not validly serving as the Acting Attorney General, as either a statutory or constitutional matter," when he signed the rule on December 18, 2018.[39] The challenge was ultimately unsuccessful, but there was no final decision on the question the case raised on the authority of the acting attorney general.[40]

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[33] *Id.*

[34] 5 U.S.C. § 553.

[35] 5 U.S.C. § 706(2)(C).

[36] 5 U.S.C. § 706(2)(A).

[37] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

[38] 83 Fed. Reg. 66514 (December 18, 2018) (codified as 27 C.F.R. §§ 447.11, 478.11, 479.11).

[39] 84 Fed. Reg. 9239, 9240 (March 11, 2019); *Guedes v. Bureau of Alcohol Tobacco Firearms and Explosives*, 920 F.3d 1, 28-29, 31-32 (D.C. Cir.), judgment entered, 762 F. App'x 7 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 789 (2020).

[40] *See Guedes*, 920 F.3d at 11 ("Whether or not those arguments would otherwise have had merit (something we do not decide), [plaintiff] has no likelihood of success on this claim because the rule has

Careful attention to each step of the APA's rulemaking process is an important safeguard against such novel procedural challenges.

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[41] The agency must address the concerns raised in all non-frivolous and significant comments.[42] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[43] By reviewing the comments submitted to the 2016 Proposed Rule, the next administration can produce a new draft rule that anticipates the types of comments the new proposed rule may receive.

Substantive challenges

Substantive challenges will argue either that the rule is "in excess of [the agency's] statutory jurisdiction, authority or limitations,"[44] or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[45]

When a court reviews an agency's interpretation of a statute that the agency 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*.[46] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[47] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[48] In the case of statutory silence or ambiguity, 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.[49] 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."[50]

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been independently ratified by Attorney General William Barr, whose valid appointment and authority to ratify is unquestioned.").

[41] 5 U.S.C. § 553(c).

[42] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

[43] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

[44] 5 U.S.C. § 706(2)(C).

[45] 5 U.S.C. § 706(2)(A).

[46] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

[47] *Id.* at 842.

[48] *Id.* at 842-43.

[49] *Id.* at 843.

[50] *Id.* at 55–56 (internal quotation marks and citation omitted).

A. Compatibility requirement

A legal challenge is unlikely to show successfully that FFLs, already required by law to have secure gun storage or safety devices available, should not also be required to match those safety devices to the actual guns they sell.[51] Without the compatibility requirement, it is unclear what the existing requirement would accomplish. At *Chevron* step one, a court will likely find § 923 unambiguous and rule in favor of the ATF, even without deference, since a contrary reading leads to an absurd result[52] and undermines the statutory purpose of keeping firearms away from those who do not have permission to use them, including minors. This issue is especially prescient in the accidental gun-related deaths that occur far more frequently in the US than other comparable high-income nations.[53]

In addition to the absurdity of a contrary interpretation, the breadth of definitional possibilities for "secure gun storage and safety devices" also supports the reasonableness of the agency's interpretation.[54] The new rule would not demand that each seller make accessible a form-fitted lock for its individual owner. It demands, at a minimum, that sellers of guns also sell lockboxes in which people can safely and properly store their guns. A single model of secure gun storage or safety device that fits many different types of firearms could achieve compliance. As in the 2016 Proposed Rule, the new rule should clearly explain the minimal burden that this additional requirement places on dealers, manufacturers, and importers.[55]

B. Application of the statute to manufacturers and importers

A court is likely to find the plain text of the statute unambiguous on the question of whether the ATF can apply the certification requirement to manufacturers and importers.

Dissenters of the Proposed Rule could argue that the ATF misinterpreted the statute based on *expressio unius est exclusio alterius, a* canon of statutory interpretation that dictates that the express inclusion of one or more things of a class signals the exclusion of others of the same class. Indeed, the GOA and GOF's 2016 comment asserted that the ATF lacks the authority to require the safety devices' certification on anything other than "an application to be licensed as a dealer."[56]

However, the *expressio unius* argument is weak: manufacturers and importers who sell firearms fall squarely within the definition of "dealer." 18 U.S.C. § 921(11) defines "dealer" as:

> (a) any person engaged in the business of selling firearms at wholesale or retail

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[51] 18 U.S.C. 923(d).
[52] *See* Laura R. Dove, "Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine," 19 Nev. L. J. 741, 758-762 (2019). "The absurdity doctrine is a canon of statutory interpretation holding that a statute's apparent ordinary meaning may be disregarded if the results of its application are (in some sense) absurd." *Id.* at 742.
[53] Giffords Center to Prevent Gun Violence, "Gun Violence Statistics," accessed October 13, 2020, https://lawcenter.giffords.org/facts/gun-violence-statistics/#unintentional; Mamie Buoy, "Deputies say 2-year-old boy dies after accidentally shooting himself," Eyewitness News WCHCS, July 23, 2020, https://wchstv.com/news/local/deputies-say-two-year-old-child-dies-after-accidentally-shooting-himself.
[54] Supra note 2.
[55] Supra note 2.
[56] 18 U.S.C.§ 923(d)(1)(G).

(b) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms
(c) any person who is a pawnbroker[57]

The definitions of "manufacturer" and "importer" consider the sale of firearms and do not preclude manufacturers and importers from being considered "dealers" if they "engage in the business of selling firearms."[58]

Additionally, in the event of a substantive legal challenge, the ATF can argue that the attorney general's application of the certification requirement to manufacturers and importers is reasonable, given § 923's authorization for the ATF to revoke the licenses of all noncompliant FFLs (not just dealers) and § 922(z)'s requirement that they only sell or transfer handguns with secure gun storage or safety devices. The ATF's application of the requirement to manufacturers and importers is also supported by the ATF's broad authority to determine licensing requirements.[59] The ATF has discretion in this area, and the statute notably lacks explicit language that prevents the ATF from applying the same requirements to all those who engage in the business of selling firearms, regardless of whether they also produce or import them.

The Tenth Circuit addressed a similar issue in a challenge to the ATF's July 2011 demand letter, which required dealers to report "whenever, at one time or during any five consecutive business days, [they] sell or otherwise dispose of two or more semi-automatic rifles capable of accepting a detachable magazine and with a caliber greater than .22… to an unlicensed person."[60] The plaintiffs claimed that Congress intended to "limit mandatory reporting of multiple gun sales to handguns (i.e. pistols and revolvers) only" under 18 U.S.C.§ 923(g)(3)(A).[61]

The statute at issue explicitly required multiple sale reporting for "pistols and revolvers," as opposed to "firearms" in general.[62] The plaintiffs used this to argue that the ATF could not require the same reporting for semi-automatic rifles as it did for pistols and revolvers.[63] The Court rejected this argument, emphasizing the contextual nature of statutory interpretation and the lack of language expressly limiting the ATF's authority to seek similar information for different firearms.[64]

i. <u>As applied challenge</u>

The general permissibility of the ATF's extension of the certification requirement to manufacturers and importers does not prevent successful as-applied challenges. Manufacturers and importers are likely to challenge enforcement actions arising from violations of the certification requirement. They will argue that they are not "engaged in the business of being a

[57] 18 U.S.C. § 921(11).
[58] *See* 18 U.S.C.§§ 921 (9), (10); *Broughman v. Carver*, No. 7:08-cv-00548, 2009 WL 2511949, at *2 (W.D. Va. Aug. 14, 2009), aff'd, 624 F.3d 670 (4th Cir. 2010).
[59] 18 U.S.C. § 923(a). *See Guedes*, at 20-21.
[60] *Ron Peterson Firearms LLC v. Jones*, 760 F.3d 1147, 1153-54 (10th Cir. 2014).
[61] *Id.* at 1157–58.
[62] *Id.*
[63] *Id.*
[64] *Id.* ("simply because Congress imposes a duty in one circumstance does not mean that it has necessarily foreclosed the agency from imposing another duty in a different circumstance.") (internal quotation marks and citations omitted).

dealer."[65] These as-applied challenges will depend on the facts and circumstances of each case and will have to be dealt with on a case-by-case basis.[66] To prevent its determinations from being overturned, the ATF should carefully and thoroughly document and record its process. The court will not—or should not—base its reasoning on whether it agrees with the agency's policy, but rather on the rationality and strength of the agency's reasoning.[67]

ii. Arbitrary and capricious challenge

The inclusion of manufacturers and importers is final agency action subject to arbitrary and capricious review under 5 U.S.C. § 706(2)(A).

An agency decision is arbitrary and capricious if it: (1) failed to consider all relevant factors, (2) failed to consider an important aspect of the problem, (3) relied on factors Congress did not intend, or (4) made a clear error of judgment.[68] A court may not "substitute [its] judgment for that of the agency,"[69] and will be deferential towards policy decisions that are based on the agency's "authoritative and considered judgments."[70] Therefore, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[71]

The arguments addressed above, relating to the ability of the attorney general and the ATF to carry out its statutory mandate, are relevant to the arbitrary and capricious analysis. Thus, for those same reasons, a successful challenge is unlikely. However, in order to meet the requirement that the agency "consider all relevant factors," the agency should address all comments to the 2016 Proposed Rule and all comments to the new rule when it is proposed by the next administration.[72]

The ATF should also consider the implication of the rule being proposed for a second time. It may investigate if and how manufacturers and importers changed their practices in response to the 2016 Proposed Rule. The fact that there was a prior rulemaking, and that it was not entirely

[65] The 2016 Proposed Rule requires that the manufacturers and importers "be engaged in business… as a dealer." 81 Fed. Reg. 33448, 33453 (May 26, 2016). "Engaged in the business" is a technical term in the law. As applied to a dealer (which, as stated, plainly encompasses manufacturers and importers), "engaged in the business" means to "devote[] 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, 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." 18 U.S.C.§ 921(21)(C). The 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. 18 U.S.C. § 921(22).

[66] *See, e.g.*, *U.S. v. Gross*, 451 F. 2d. 1355, 1357-58 (7th Cir. 1971) (concluding that "the statute [] is not impermissibly vague and that the defendant's sale of eleven separate weapons within a reasonably short space of time clearly made him a dealer under the statutory definition.").

[67] *Long Island Care at Home, Ltd. v. Coke*, 551 US 158, 170 (2007).

[68] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[69] *Id.*

[70] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (internal citations omitted).

[71] *State Farm*, 463 U.S. at 43 (quotation marks omitted).

[72] *Nova Scotia Food Prods. Corp*., at 240.

revoked by the preceding administration, may reduce the ability of challengers to claim "unfair surprise" or detrimental reliance.[73]

Similar to challenges based on statutory interpretation, manufacturers and importers will argue that the application of the certification requirement is arbitrary and capricious in their case, should their licenses be revoked or applications denied. To prevent its determinations from being overturned, the agency should carefully and thoroughly document and record its process.

C. Evidentiary limitation

Interpreting the 1998 Act's evidentiary limitation to apply to the ATF's license denials or revocations (and subsequent appeals) would prevent the ATF from properly supporting its decision to revoke a license with the very information that influenced that decision in the first place.[74] This is contrary to administrative law principles set forth by the Supreme Court.[75]

The absurdity of this result is easily understood when put in concrete terms. For example, if the attorney general revokes or denies a license to an individual who has stolen firearms and transported them across state lines in violation of § 922(a)(1), the individual is entitled to a hearing.[76] If the attorney general cannot present evidence at the hearing, the government cannot make its case and cannot revoke or deny the license. If the individual's license is somehow ultimately revoked or denied and they appeal, the district court will not be able to "consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph [f](2)."[77]

The 2016 proposed rule uses essential principles of statutory interpretation to conclude that this limitation would "result in the amendments to sections § 923(d)(1) and (e) having no effective enforcement mechanism."[78] This is an effective and reasonable argument that supports the ATF's interpretation, since "each provision in a law is intended to have some effect."[79]

[73] *Long Island Care at Home, Ltd. v. Coke*, 551 US 158, 170 (2007).
[74] *See* 18 U.S.C.§ 923(e).
[75] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).
[76] 18 U.S.C.§923(f)(2).
[77] 18 U.S.C.§ 923(g)(1).
[78] Supra note 2.
[79] *Id.*