



RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Issue Numerical Threshold to Define Firearm Sellers as “Dealers”
Date: November 2020

Recommendation: Clarify who qualifies as a firearms dealer by issuing a regulation stating that any person who sells five guns or more in any 12-month period is “in the business” of selling 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).¹ 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 a firearms “dealers” are not required to obtain an FFL, and thus, are not required under 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.”²

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.³

To limit the number of unlicensed dealers and increase the number of gun sales subject to a background check, the next administration should issue a new rule clarifying that any person

¹ 18 U.S.C. § 923(a).

² ATF, “Gun Shows: Brady Checks and Crime Gun Traces,” January 1999: 13-14, <http://www.atf.gov/files/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf>.

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

who sells five guns or more for profit in any 12-month period is “engaged in the business” of selling firearms, and thus qualifies as a gun dealer under federal law.

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.⁴ 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,⁵ respond to significant received comments (either by modifying the proposed rule or by 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.⁶ In total, the multi-phase NCRM process generally extends for a year.

II. Current state

Federal regulatory scheme

The GCA makes it unlawful for any person except a licensed dealer to “engage in the business” of dealing in firearms.⁷ By contrast, a so-called “private seller” (one who is not “engaged in the business”) is exempt from federal licensing requirements.⁸ Thus, private sellers are not subject to the myriad of federal requirements imposed on dealers under the GCA, including: 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 are available in any location where firearms are sold.⁹

Many private sellers take advantage of the GCA’s vague definition of “engaged in the business” to purchase and sell high volumes of firearms without a license, without conducting background checks, and without oversight from the ATF.¹⁰ 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.¹¹

⁴ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

⁵ The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).

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. § 922(a)(1)(A).

⁸ *Id.*

⁹ 18 U.S.C. § 922(t)(1)(A)–(B).

¹⁰ See, e.g., Chelsea Parsons, Eugenio Weigend Vargas, and Rukmani Bhatia, “The Gun Industry in America—the Overlooked Player in a National Crisis,” Center for American Progress, August 6, 2020; Chelsea Parsons and Arkadi Gerney, “Executive Action to Strengthen Background Checks by Addressing High-Volume Gun Sellers,” Center for American Progress, October 15, 2015, <https://www.americanprogress.org/issues/guns-crime/reports/2015/10/15/123346/executive-action-to-strengthen-background-checks-by-addressing-high-volume-gun-sellers/>.

¹¹ 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-gun-dealers-law-invs/index.html>.

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 profit¹² 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.¹³

The GCA fails to define the amount of “time, attention, and labor” devoted to “dealing in firearms” that a person must commit prior to needing to obtain an FFL. The statute also does not specify the frequency of firearm sales that would give rise to a “regular course of trade or business,” nor does it clearly define at what point periodic “sales, exchanges or purchases” are deemed more than “occasional.” The lack of clarity on these points means that some private firearm sellers who arguably should qualify as dealers may think that they are not required to apply for an FFL. Others may take advantage of these vague standards to justify a decision not to become licensed or to intentionally avoid ATF oversight.

When the current language that allows 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. 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.¹⁴

For example, Senator James McClure (R-ID), sponsor of the FOPA, said that the legislation would address the problem wherein sellers were prosecuted for transferring “two, three, or four guns from their collection.”¹⁵ 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.¹⁶ The head of the National Rifle Association’s Institute for

¹² 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.”

¹³ 18 U.S.C. § 921(a)(21)(C).

¹⁴ Everytown for Gun Safety, “Business as Usual,” November 12, 2015, <https://everytownresearch.org/report/business-as-usual/#intro>.

¹⁵ The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47(1981) (statement of Sen. James McClure).

¹⁶ The Federal Firearms Owner Protection Act, Hearing Before the S. Comm. on the Judiciary, 98th Cong. 5 (1983) (Statement of Senator Orrin Hatch).

Legislative Action described the problem as “prosecutions on the basis of as few as two sales.”¹⁷

In the face of this ambiguity, federal courts have not effectively resolved the vague statutory definition of “dealer.” Courts have declined to impose by themselves any specific threshold of gun transactions, such as a “magic number” of sales that need be specifically proven” before a person is deemed a firearms dealer.¹⁸ Although courts have published dozens of opinions addressing the GCA’s definition of “dealer,” they have tended to consider the totality of the circumstances to evaluate whether the particular individual in the case is “engaged in the business” of selling firearms.¹⁹ However, as the ATF has noted, “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.”²⁰

Obama administration efforts

In January of 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.²¹ 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).²² 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 engaged in the business of dealing in firearms even if the person only conducts firearm transactions at gun shows or through the Internet. Those engaged in the business of dealing in firearms who utilize the Internet or other technologies must obtain a license, just as a dealer whose business is run out of a traditional brick-and-mortar store.

¹⁷ The Firearms Owner Protection Act, Hearing Before the S. Comm. On the Judiciary, 97th Cong. 47 (1981) (Statement of Neal Knox, Exec. Dir. NRA-ILA).

¹⁸ *U.S. v. Nadirashvili*, 655 F.3d 114, 119 (2d Cir. 2011) (quoting *U.S. v. Carter*, 801 F.2d at 82); *U.S. v. Palmieri*, 21 F.3d 1265, 1268–69 (3d Cir.), vacated on other grounds; *U.S. v. Brenner*, 481 Fed. App’x 124, 127 (5th Cir. Apr. 30, 2012).

¹⁹ See, e.g., *U.S. v. Tyson*, 653 F.3d 192, 201 (3d Cir. 2011) (factors to consider include “the quantity and frequency of sales,” “the location of the sales,” “the conditions under which the sales occurred,” “the defendant’s behavior before, during, and after the sales,” “the price charged for the weapons,” “the characteristics of the firearms sold,” and “the intent of the seller at the time of the sales”); *U.S. v. Shipley*, No. 10-50856, 2013 WL 5646965, *3 (5th Cir. Oct. 17, 2013) (unpublished) (quoting *id.*); *Brenner*, 481 Fed. App’x at 127 (quoting *id.*); *Palmieri*, 21 F.3d at 1268; *U.S. v. Valdes*, No. 12–80234– CR, 2013 WL 5561131, at *5 (S.D. Fla. Oct. 4, 2013).

²⁰ ATF, “Do I Need a License to Buy and Sell Firearms?,” January 2016, <https://www.atf.gov/file/100871/download>.

²¹ 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>.

²² *Id.*

Quantity and frequency of sales are relevant indicators. There is no specific threshold number of firearms purchased or sold that triggers the licensure requirement. But it is important to note that even a few transactions, when combined with other evidence, can be sufficient to establish that a person is “engaged in the business.” 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, when other factors also were present.²³

A rule setting a bright line threshold would build on this guidance and further shrink the private sales loophole.

State regulatory regimes

At the state level, several state legislatures have opted to quantify the number of sales that triggers a licensing requirement. For example, in California, no state firearm dealer license is required for “infrequent” sales of handguns, which the state defines to mean fewer than six transactions, each involving any number of handguns, per calendar year.²⁴ In Massachusetts, residents who transfer “not more than four firearms...in any one calendar year” are exempt from the state licensure regime, so long as the buyer and seller comply with certain other requirements.²⁵

III. Proposed action

In order to effectuate the purpose of the GCA and ensure those who genuinely deal in firearms are required to comply with federal law, the next administration should promulgate a rule providing that anyone who sells five or more firearms for profit within any 12-month period is “engaged in the business” as a dealer and is therefore obligated to obtain an FFL.

A. Substance of proposed rule

The new proposed rule (or NPRM) should have several elements.

- It should create a numerical threshold stipulating that a person who sells or offers for sale five guns or more in any 12-month period is presumed to be “engaged in the business” of selling firearms. The next administration could set this threshold somewhere between 5–10 guns (we recommend the lower end), and this threshold would serve as a rebuttable presumption that an individual is selling firearms in the “regular course of trade or business,” clarifying the language in § 921(a)(21)(C). In addition to this numerical threshold, the new proposed rule should codify a set of factors

²³ *Id.* See also, ATF *supra* note 20.

²⁴ Cal. Penal Code §§ 16730, 27545, 27966.

²⁵ Mass. Gen. Laws Ch. 140, § 128A.

that courts have used to determine if a person is dealing firearms in the “regular course of trade or business,” including: (1) selling guns unused or still in their original packaging, (2) the repetitive sale of guns, (3) selling guns for profit, (4) re-selling guns shortly after obtaining them, (5) selling multiple guns of the same make and model, and (6) expressing a willingness or ability to obtain guns upon request.

If an individual sells or offers for sale five guns or more in any 12-month period, these other factors would be required to strongly outweigh the presumption that the person is “in the business” of selling firearms. However, if an individual sells or offers for sale four guns or fewer in any 12-month period, the new proposed rule would *not* create a presumption that the individual is selling firearms *outside* the “regular course of trade or business.” Instead, the analysis would be similar to that of the current regime: it would weigh the factors codified by the proposed rule.

- It should clarify that any person who falls before the five-gun threshold is not affirmatively released from the licensing and regulation regime. The new proposed rule should explicitly state that it is still possible for someone who sells or offers for sale fewer than five firearms per year to qualify as a dealer under the GCA. The analysis in cases with fewer than five gun sales will rely on the set of factors codified by the NPRM, as outlined above. This clarification to the new rule ensures that bona fide dealers are not able to avoid licensing and regulation simply because they sell or offer to sell fewer than five firearms per year,²⁶ and that prosecutors are not required to prove that an individual who sold or offered to sell a specific number of firearms before that person can be convicted of dealing firearms without a license.
- Clarify the definition of “personal collection” to include only firearms obtained or possessed for personal use. The GCA’s statutory exemption for those who sell “all or part of [their] personal collection of firearms” would still apply, regardless of the number of guns an individual sells or offers to sell.²⁷ The new proposed rule should clarify the term “personal collection” to include only those firearms obtained for a person’s own personal use, and not those obtained for the purpose of selling or trading. The definition should also clarify that, as with dealer-owned firearms, guns are not considered a part of a person’s personal collection until the owner has possessed them for at least one year, unless they were obtained through inheritance.²⁸

²⁶ Also, some individuals who sell fewer than five guns for profit per year presumably would still like to apply for FFLs, and should be allowed to do so. And a regulation that strictly excludes all individuals who engage in fewer than a specified number of transactions would likely result in ATF denying licenses to applicants “due to lack of business activity” and would conflict with the Tiahrt Rider. See Pub. L. 113-6, 127 Stat. 198, 248 (Mar. 26, 2013) (codified at 18 U.S.C. § 923).

²⁷ *Id.*

²⁸ Defining the term “personal collection” in this way is supported by the use of that term at 18 U.S.C. § 923(c). That provision authorizes dealers to maintain “personal collection[s]” of firearms, but limits this authority by: (1) prohibiting all sales from a dealer’s personal collection if the firearms were transferred from the dealer’s business inventory during the past year, and (2) requiring dealers to keep records of sales from their personal collections. Nevertheless, ATF has allowed dealers whose licenses are revoked

B. Process

To issue a new rule, the ATF 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.

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.³⁰ An oral hearing is not required.³¹ Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting those 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 setting the threshold at five firearms in any 12-month period is consistent with the statutory language, and reasonable in light of the 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.³² In turn, the attorney general has delegated authority to issue to the ATF rules and regulations related to the GCA.³³ These provisions are "general

to convert their business inventories into their personal collections and then sell them as private sellers (i.e., without background checks). See Mem. in Support of Mot. Dismiss or in the Alt. to Transfer, *Abrams v. Truscott*, No. 06-cv-643 (CKK), at 7 (D.D.C. filed June 15, 2006). The regulation proposed here would close this so-called "fire sale loophole" by preventing guns acquired for the purpose of selling or trading from being considered part of a "personal collection." ATF should acknowledge and explain this change in interpretation in the NPRM, and may wish to add clarifying language to 27 C.F.R. Subpart E regarding the activities of a dealer after the dealer's license is suspended or revoked.

²⁹ 5 U.S.C. § 553.

³⁰ 18 U.S.C. § 926(b).

³¹ See *Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).

³² 18 U.S.C. § 926(a).

³³ 28 C.F.R. §§ 0.130, 0.131.

conferral[s] of rulemaking authority” that would lead a court to defer to the agency’s interpretation.³⁴ The ATF’s interpretation of who qualifies as a dealer is in the exercise of its general rulemaking authority.³⁵ 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 and substantive. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.³⁶ 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.

The proposed regulation is also likely to withstand constitutional challenges. Laws imposing conditions and qualification on the “commercial sale of arms” are presumed constitutional.³⁷

Relevant here, substantive challenges will likely be mounted against the five-gun threshold (i.e. the clarification of “regular course of trade or business”). APA challenges will argue either that the rule is “in excess of [the agency’s] statutory jurisdiction, authority or limitations,”³⁸ or that the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”³⁹

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*.⁴⁰ Pursuant to that rubric, at step one, courts examine “whether Congress has directly spoken to the precise question at issue.”⁴¹ If so, “that is the end of the matter,” and courts must enforce the “unambiguously expressed intent of Congress.”⁴² 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.⁴³ 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.”⁴⁴

³⁴ *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013); *Guedes*, at 20-21.

³⁵ *Id.*

³⁶ 5 U.S.C. § 553.

³⁷ *See District of Columbia v. Heller*, 554 U.S. 570, 626-27, 627 (2008).

³⁸ 5 U.S.C. § 706(2)(C).

³⁹ 5 U.S.C. § 706(2)(A).

⁴⁰ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

⁴¹ *Id.* at 842.

⁴² *Id.* at 842-43.

⁴³ *Id.* at 843.

⁴⁴ *Id.* at 55–56 (internal quotation marks and citation omitted).

Here, at *Chevron* step two, the ATF has ample evidence to support the reasonableness of its interpretation of “regular course of trade or business,” including past case law on the issue, legislative history of the GCA, past ATF rulemakings, and existing state licensing regimes.

A. Jurisprudence supports threshold number of five sales as reasonable

Past cases applying the definition of “dealer” provide some guidance about the number or frequency of firearm sales that courts may find reasonably establish a “regular course of trade or business.”⁴⁵ Courts frequently uphold convictions for dealing firearms without a license in cases with a relatively small number of sales,⁴⁶ including cases where the sales activity was:

⁴⁵ 18 U.S.C. § 921(1)(21)(C).

⁴⁶ *U.S. v. McGowan*, 746 F. App'x 679, 680 (9th Cir. 2018) (defendant bought 8 guns over a span of “a few years” and sold six of them during such period); *Brenner*, 481 Fed. App'x at 126 (defendant sold at least 14 guns over a several month period); *Tyson*, 653 F.3d at 201 (defendant sold 23 firearms over the course of approximately seven months and intended to sell 11 more); *U.S. v. White*, 175 Fed. App'x 941, 942 (9th Cir. 2006) (unpublished) (defendant sold between 23 and 25 firearms in a year); *U.S. v. Kubowski*, 85 Fed. App'x 686 (Dec. 30, 2003) (unpublished) (defendant sold undercover agents 24 handguns and one rifle over five months, offered five more firearms for sale, and was found in possession of nearly 400 firearms); *U.S. v. Conn*, 297 F.3d 548 (7th Cir. 2002) (rejecting the defendant’s sufficiency-of-the-evidence argument on plain-error review where the defendant sold undercover agents seven firearms on six occasions in a three-month period and government presented indirect evidence of additional transactions); *U.S. v. Collins*, 957 F.2d 72 (2d Cir. 1992) (defendant agreed to sell undercover officers five guns in three transactions over seven months and government presented evidence of additional sales; defendant did not challenge sufficiency of the evidence on appeal); *U.S. v. Berry*, 644 F.2d 1034 (5th Cir. 1981) (defendants sold undercover agents about 16 guns over three months and offered dozens more); *U.S. v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981) (defendant’s “activity was greater than that of occasional sales entered into by a hobbyist” when defendant sold undercover agents eight guns in one month and offered at least 24 other guns for sale at one point or another); *U.S. v. Perkins*, 633 F.2d 856, 860 (8th Cir. 1981) (defendant engaged in at least three transactions involving eight guns over three months); *U.S. v. Huffman*, 518 F.2d 80 (4th Cir. 1975) (per curiam) (defendant engaged in “more than a dozen transactions in the course of a few months”); *U.S. v. Wilkening*, 485 F.2d 234, 234-36 (8th Cir. 1973) (defendant made 20 sales over a 17-month period and stated that he also made additional sales); *U.S. v. Gross*, 451 F.2d 1355, 1357-58 (7th Cir. 1971) (defendant sold 11 weapons over less than two months).

two firearms,⁴⁷ three firearms in four months,⁴⁸ four firearms in one month,⁴⁹ four firearms in two months,⁵⁰ five firearms in one month,⁵¹ five firearms in four months,⁵² and six firearms.⁵³

The proposed rule is more likely to be upheld as reasonable if the specified number or frequency of sales is supported by existing case law. Based on this review of the jurisprudence, the proposed rule's threshold number of five guns sold or offered for sale in any 12-month period is within the range supported by case law and is reasonable.

B. Legislative history supports the proposed rule

The legislative history of the GCA also sheds some light on the scope of the ATF's discretion in promulgating regulations to quantify the meaning of "dealer." Although there is no significant legislative history regarding the meaning of "regular course of trade or business," the legislative history of § 921(a)(21) suggests that Congress intended the statutory exception for "occasional sales, exchanges, or purchases" to be quite limited.⁵⁴

In the proposed rule, the ATF should assert that the GCA's exception for individuals who make only "occasional sales, exchanges, or purchases of firearms for the enhancement of a personal

⁴⁷ *U.S. v. Swinton*, 521 F.2d 1255, 1259 (10th Cir. 1975) (defendant sold at least two firearms, facilitated an additional sale, and offered to sell additional weapons).

⁴⁸ *U.S. v. Carter*, 801 F.2d 78, 81-83 (2d Cir. 1986) (defendants sold three firearms to an undercover agent in two transactions four months apart and there was indirect evidence of other sales or potential sales); *U.S. v. Orum*, 106 Fed. App'x 972, 974 (6th Cir. 2004) (unpublished) (defendant "offered to sell firearms to [confidential informants] on several occasions and actually sold them three different firearms on two different occasions").

⁴⁹ *U.S. v. Shirling*, 572 F.2d 532 (5th Cir. 1978) (defendant sold four firearms to two persons over the course of one month).

⁵⁰ *U.S. v. Day*, 476 F.2d 562, 567 (6th Cir. 1973) (defendant sold firearms on four occasions over a two-month period and offered to sell additional firearms); *U.S. v. Fridley*, 43 Fed. App'x 830, 831-33 (6th Cir. 2002) (unpublished) (defendant sold undercover officers four guns in two months and offered as many as 20 more).

⁵¹ *Palmieri*, 21 F.3d at 1267-68 (defendant sold undercover officer five firearms in three transactions over approximately four weeks); *U.S. v. Williams*, 502 F.2d 581, 582-83 (8th Cir. 1974) (defendant engaged in five firearms transactions in one month).

⁵² *U.S. v. Beecham*, 993 F.2d 1539 (4th Cir. June 2, 1993) (unpublished) (defendant engaged in five transactions over approximately four months).

⁵³ *U.S. v. Van Buren*, 593 F.2d 125, 126 (9th Cir. 1979) (per curiam) (defendant sold at least six new firearms over the course of five weeks); *U.S. v. Powell*, 513 F.2d 1249, 1250 (8th Cir. 1975) (defendant sold six shotguns within "several" months of acquiring them); *U.S. v. Zeidman*, 444 F.2d 1051, 1055 (7th Cir. 1971) (defendant sold six firearms).

⁵⁴ See, e.g., 131 Cong. Rec. S16,987 (daily ed. June 24, 1985) (statement of Sen. Hatch) (in proposing amendments to the 1968 Act, describing the 1968 Act as requiring clarification because it could be read to permit the prosecution of "hobbyists who sell a few guns out of their collection"); 131 Cong. Rec. S18,225 (daily ed. July 9, 1985) (statement of Sen. Hatch) (describing the 1968 Act as requiring clarification because it "allow[ed] law-abiding citizens to be convicted of a felony for selling one or two guns inherited from a family member"); 131 Cong. Rec. S18,226 (daily ed. July 9, 1985) (statement of Sen. Durenberger) (describing the 1968 Act as requiring clarification because "[m]any gun collectors have been enticed into two, three, or four gun sales out of their collection over a period of 6 months, then charged with having engaged in the business").

collection or for a hobby” is narrow, and that five sales or offers of sales for profit per year reasonably exceeds the exception.

C. Past rulemaking supports imposing numerical thresholds

Past rulemaking under the GCA offers precedent for imposing a numerical threshold where the statute’s plain language does not directly contain one.

For example, the GCA prohibits firearms’ possession by any current “unlawful user of or [person] addicted to any controlled substance.”⁵⁵ The implementing regulations define this statutory provision to include a person who has had one drug conviction or failed one drug test in the past year, or has had multiple arrests for drug offenses in the past five years.⁵⁶

Additionally, the GCA prohibits assembling semi-automatic assault rifles from imported parts, but does not specify the number of imported parts at which the rifle becomes prohibited. The implementing regulations provide that the statute is triggered only if a fully assembled weapon has more than 10 specified imported parts (a firearm generally has 20 major parts).⁵⁷ Notably, the NPRM for this regulation initially set the threshold at two or more parts (reasoning that “two” satisfies the plural “parts” language), but the final rule increased that number to 10 or more parts.⁵⁸

D. State licensing regimes also suggest numerical thresholds are reasonable

Some state licensing regimes are also instructive. For example, Massachusetts exempts from the state licensure requirement state residents who transfer “not more than four firearms ... in any one calendar year,” provided that the buyer and seller comply with certain other requirements.⁵⁹ In California, no license is required for “infrequent” sales of handguns, which the state defines to mean fewer than six transactions, each involving any number of handguns, per calendar year.⁶⁰

⁵⁵ 18 U.S.C. § 922(g)(3).

⁵⁶ 27 C.F.R § 478.11.

⁵⁷ 18 U.S.C § 922(r).

⁵⁸ See Domestic Assembly of Nonimportable Firearms (91—0001F), 58 Fed. Reg. 40,587 (July 29, 1993).

⁵⁹ Mass. Gen. Laws ch. 140, § 128A.

⁶⁰ Cal. Penal Code §§ 16730, 27545, 27966.