



RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Require FFLs to Video Record Gun Sales
Date: November 2020

Recommendation: Issue a new regulation requiring federal firearm licensees to video record all gun sales in order to deter straw purchases and the use of false identification.

I. Summary

Description of recommended executive action

Federally licensed firearms dealers (FFLs) are currently required to submit paper and electronic records of all firearms sales to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Despite these requirements, the prevalence of straw purchases and the use of false identification remain prominent safety issues in firearm sales and contribute significantly to violent crime and firearm trafficking.

In order to combat straw purchases and deter the use of false identification in firearm purchases, the next administration should issue a regulation requiring FFLs to maintain video recordings of each gun sale, in addition to the paper and electronic sale records they are currently required to maintain. Not only would this deter bad-faith purchasers, it would equip law enforcement and ATF industry operations inspectors (IOIs) with the proper tools to investigate gun trafficking crimes and enforce ATF regulations against FFLs.

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.¹ To finalize a new rule under the Gun Control Act of 1968 (GCA), the ATF will be required to issue a notice of proposed rulemaking (NPRM), provide a 90-day period for receiving public comments,² 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.³ In total, the multi-phase NCRM process generally extends for a year.

II. Current state

The GCA requires FFLs to identify and sell firearms only to buyers who are eligible to possess firearms.⁴ People who are prohibited from possessing firearms under the GCA include those with felony records, illegal substance addictions, and severe mental illness.⁵ These safeguards

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

² The GCA explicitly requires a 90 day comment period. 18 U.S.C. § 926(b).

³ Congressional Research Service, “An Overview of Federal Regulations and the Rulemaking Process,” January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

⁴ 18 U.S.C. §§ 922(d), (g).

⁵ 18 U.S.C. §§ 922(g), (n)

are designed “to prevent guns from falling into the wrong hands.”⁶ The GCA prohibits FFLs from selling to anyone whom they know or have reason to believe is a prohibited buyer,⁷ and “establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun.”⁸ This scheme requires a purchaser to actually appear at the dealer’s “business premises” to buy a gun,⁹ and requires a dealer to verify the purchaser’s identity,¹⁰ collect the buyer’s “name, age, and place of residence,”¹¹ and run a background check through the National Instant Criminal Background Check System (NICS).¹²

In addition, the GCA stipulates that FFLs must keep “such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe.”¹³

The ATF’s current regulations require FFLs to maintain records of all gun sales by filling out Form 4473, and to promptly send to the ATF reports of sales of multiple firearms to the same purchaser within a certain time period.¹⁴ Form 4473 asks for a variety of information, including whether the individual filling out the form is “the actual transferee/buyer of the firearm(s) listed on this form.”¹⁵ These reports may be cross-referenced with crime gun trace information to further criminal investigations, including investigations into illegal firearms trafficking.¹⁶

Under the GCA, it is a criminal offense for either the purchaser or the firearms dealer to provide false information on these mandated records.¹⁷ Thus, it is a crime for a customer to state on Form 4473 that they are the actual buyer when they are in fact purchasing the firearm for someone else—even if that other person is legally eligible to purchase a firearm.¹⁸

Despite these provisions, straw purchases remain a serious problem. A straw purchase is any purchase in which someone with a clean background agrees to buy a firearm from a licensed dealer on behalf of someone who is ineligible to purchase that firearm for themselves.

Straw purchases are the most common way for illegal firearms to enter the trafficking trade, accounting for 41.3% of gun trafficking investigations by the ATF.¹⁹ Research on the behavior of

⁶ *Abramski v. United States*, 573 U.S. 169, 172 (2014) (citing 18 U.S.C. § 922(g)).

⁷ 18 U.S.C. § 922(d).

⁸ *Abramski*, 573 U.S. at 172.

⁹ Subject to certain exceptions. 18 U.S.C. § 922(c).

¹⁰ 18 U.S.C. § 922(t)(1)(C).

¹¹ 18 U.S.C. § 922(b)(5).

¹² 18 U.S.C. § 922(t)(1)(A)–(B).

¹³ 18 U.S.C. § 923(g)(1)(A).

¹⁴ ATF, “ATF Form 4473 - Firearms Transaction Record,” updated September 8, 2020, <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>; ATF, “Reporting Multiple Firearms Sales,” updated July 2, 2020, <https://www.atf.gov/firearms/reporting-multiple-firearms-sales>.

¹⁵ *Abramski*, 573 U.S. at 173 (quoting Form 4473); see *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014) (discussing Form 4473).

¹⁶ ATF, “Reporting Multiple Firearms Sales,” July 2, 2020, <https://www.atf.gov/firearms/reporting-multiple-firearms-sales>.

¹⁷ 18 U.S.C. §§ 922(a)(6), (m).

¹⁸ 18 U.S.C. § 922(a)(6); *Abramski*, 573 U.S. at 175, 177–93.

¹⁹ Anthony A. Braga, et al., “Interpreting the Empirical Evidence on Illegal Gun Market Dynamics,” *Journal of Urban Health* 89 no. 5 (2012): 779–793, Table 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3462834/>.

FFLs underscores the widespread nature of the issue: more than two-thirds of dealers experience at least one attempted straw purchase per year,²⁰ dealers regularly show a willingness to ignore warning signs that suggest straw purchases,²¹ and 20% of gun dealers are willing to sell even when the customer explicitly states they plan to buy firearms on behalf of someone else.²²

The use of false identification documents similarly interferes with the effectiveness of the background check process. According to a testimony submitted on behalf of the Government Accountability Office in 2003:

...counterfeit driver's licenses can be used to purchase firearms. Between October, 2000, and February, 2001, used counterfeit driver's licenses with fictitious identifiers to purchase firearms from license dealers in five states—Virginia, West Virginia, Montana, New Mexico, and Arizona. When we purchased the firearms, the majority of the firearms dealers we dealt with complied with laws governing such purchases, including instant background checks required by federal law. However, an instant background check only discloses whether the prospective purchaser is a person whose possession of a firearm would be unlawful. Consequently, if the prospective purchaser is using a fictitious identity, as we did, an instant background check is not effective.²³

Requiring FFLs to video-record sales will deter straw purchases and the use of false identification, and support law enforcement efforts to investigate gun crimes, including firearm trafficking. The federal government has not previously imposed or considered this type of regulation. However, such a rule is supported by public opinion and other precedential examples:

- A 2008 survey found that 74% of Americans support requiring gun dealers to video-record all gun sales.²⁴
- That same year, Wal-Mart voluntarily began videotaping all gun sales.²⁵

²⁰ Garen J. Wintemute, "Frequency of and Responses to Illegal Activity Related to Commerce in Firearms: findings from the Firearms Licensee Survey," *Injury Prevention* 19 no. 6 (2013): 412–20, <https://pubmed.ncbi.nlm.nih.gov/23478404/>.

²¹ Susan B. Sorenson, Katherine Vittes, "Buying a Handgun for Someone Else: Firearm Dealer Willingness to Sell," *Injury Prevention* 9 no. 2 (2003): 147–50, <https://injuryprevention.bmj.com/content/9/2/147>.

²² Garen Wintemute, "Firearm Retailers' Willingness to Participate in an Illegal Gun Purchase," *Journal of Urban Health* 87 no. 5 (2010): 865–78, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2937134/>.

²³ Statement of Ronald D. Malfi Director, Office of Special Investigations, Government Accountability Office before the Committee on Homeland Security, October 1, 2003, <https://www.gao.gov/assets/120/110403.html>

²⁴ Greenberg Quinlan Rosner Research & The Tarrance Group for Mayors Against Illegal Guns, "Americans Support Common Sense Measures to Cut Down on Illegal Guns," April 10, 2008: 3-6, https://web.archive.org/web/20091128023131/http://www.mayorsagainstilllegalguns.org/downloads/pdf/polling_memo.pdf.

²⁵ Jeremy W. Peters, "Mayors and Wal-Mart Back Gun Sales Plan," *New York Times*, April 15, 2008, <https://www.nytimes.com/2008/04/15/nyregion/15bloomberg.html>.

- Also in 2008, New York City reached a settlement agreement in a public nuisance suit that charged 27 gun dealers with regularly making sales that violated federal law.²⁶ As part of the settlement, the dealers agreed to video all firearm sales and maintain video records for six months “to deter illegal purchases and monitor employees.”²⁷ Notably, researchers determined that the odds of a NYPD recovery of a firearm by one of these dealers was 84.2% lower during the post-lawsuit sales period than the pre-lawsuit period.²⁸
- In 2021, Illinois will become the first state to require gun retailers to video-record sales.²⁹ Under the new law, retailers are required to video all store areas where guns are sold, handled, and transferred, as well as all of the store entrances and exits, and to keep these video records for at least 90 days.³⁰

Video-recording sales of other commodities is not atypical in today’s streaming world. The National Association of Boards of Pharmacies recommends video surveillance, for example.³¹ According to the US Pharmacist, addressing security for prescription drug sales:

“The use of high-resolution cameras supporting facial recognition, including video and hidden cameras, is critical for security. Video cameras must cover entrances, exits, high-risk areas such as the pharmacy counter, and dispensing areas. Cameras must be correctly positioned to record full-face views; cameras mounted near the ceiling may capture only the top of a hat. Data-storage devices can be housed in secured cabinets or at an off-site location.”³²

III. Proposed action

In order to combat straw purchases and deter the use of false identification in firearms purchases, and to equip law enforcement and ATF IOIs inspectors with the proper tools to investigate gun crimes and enforce federal regulations, the next administration should issue a rule requiring all FFLs to video-record gun sales and maintain those records for a certain amount of time.

A. Substance of proposed rule

²⁶ Office of the Mayor, “Mayor Bloomberg Announces Final Settlement in Groundbreaking Litigation Against Gun Dealers Caught Selling in Apparent Violation of Federal Law,” NYC.gov, September 23, 2008, <https://www1.nyc.gov/office-of-the-mayor/news/374-08/mayor-bloomberg-final-settlement-groundbreaking-litigation-against-gun-dealers-caught>.

²⁷ *Id.*

²⁸ Daniel W. Webster and Jon S. Vernick, “Spurring Responsible Firearms Sales Practices through Litigation,” in *Reducing Gun Violence in America* (2013), 128, https://jhupress.files.wordpress.com/2013/01/1421411113_updf.pdf.

²⁹ 430 Ill. Comp. Stat. Ann. 68/5-50.

³⁰ *Id.*

³¹ “Model Pharmacy Act/Rules,” National Association of Boards of Pharmacy, accessed October 13, 2020, <https://nabp.pharmacy/publications-reports/resource-documents/model-pharmacy-act-rules/>.

³² Helen L. Figge, “Pharmacy Security: Know the Options,” U.S. Pharmacist, August 18, 2015, <https://www.uspharmacist.com/article/pharmacy-security-know-the-options>.

To successfully withstand a legal challenge, an agency issuing a new rule must consider all relevant factors to the new regulation.³³ Providing this analysis from the beginning of the rulemaking process will ensure that the final rule is the “logical outgrowth” of the NPRM, such that stakeholders could reasonably anticipate the final rule.³⁴ The NPRM should include as much detail about the new requirements as possible. Among other things, the rule should:

- Specify that all portions of a sale must be recorded (i.e., while the buyer fills out Form 4473, pays for the gun, particularly when the buyer returns after a waiting period).
- Require the video to capture the transaction in such a way that the facial features of the purchaser or transferee are clearly visible. The rule may include a minimum video resolution, or specify how large the image of the sale has to be in relation to the screen. The rule may also require sound capture to a specific standard of quality.
- Dictate a certain time period for maintaining records. We would suggest five years.

Additionally, the NPRM should include a well-developed and supported cost-benefit analysis of the rule’s impact. The costs analysis should include the costs to the ATF of ensuring compliance with the new rule. However, the primary costs to account for are related to FFL compliance, such as the costs to:

- **Install video surveillance systems and other required technology**
 - Factors include the rule’s proposed standards for resolution, features, sound capture, etc.
 - Estimates should reflect likely variation according to the size and type of the business. For example: gun shops with one cash register vs. multiple cash registers, and specialty gun stores that only sell firearms vs. stores that sell a wide variety of merchandise in addition to firearms.
 - Extensive files may be cumbersome in criminal investigations. Hence, the rule should specify the scope of the required recording of the sale.
 - Many FFLs might already have compliant video recording systems. The ATF may wish to consider the existence of these systems in determining the additional cost.
- **Maintain and replace video equipment**
 - FFLs should be required to maintain the equipment so that it functions as required.
- **Store video data securely for the required period of time**
 - Storage must be secure, especially in light of privacy concerns.
 - The size of these files (and thus the cost of storage) will depend on the required resolution, and the length and scope of the interaction for which the rule mandates recording.

The benefits discussion should focus on the ways in which the new rule would further the purpose of the GCA and be in accordance with existing requirements. The agency should also explain what alternatives were considered but assessed as less effective. The ATF should

³³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁴ *See, e.g., CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079-81 (D.C. Cir. 2009).

specifically enumerate why a video recording requirement is likely to further deter straw purchases and the use of false identification, and why current reporting requirements are not sufficient.

This discussion will likely preempt many comments and criticisms of the proposed rule and will facilitate a smoother revision process for the final rule.

B. Process

To issue this new rule, the ATF must go through the NCRM process under the APA.³⁵ 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.³⁶ An oral hearing is not required.³⁷ 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.

Because this regulation is novel, the ATF should anticipate a significant influx of comments from the public and industry stakeholders. Consequently, after the comments period has closed, it may take several months 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.³⁸ In turn, the attorney general has delegated authority to issue rules and regulations related to the GCA to the ATF.³⁹ In addition, 18 U.S.C. § 923(g)(1)(A) states that FFLs must keep "such records of...sale...for such period, and in such form, as the Attorney General may by regulations prescribe."⁴⁰ Thus, the ATF has statutory authority to promulgate regulations for gun dealers that dictate the required form and duration of recordkeeping.

IV. Risk analysis

Legal vulnerability

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

³⁶ 18 U.S.C. § 926(b).

³⁷ See *Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990).

³⁸ 18 U.S.C. § 926(a).

³⁹ 28 C.F.R. §§ 0.130, 0.131.

⁴⁰ 18 U.S.C. § 923(g)(1)(A).

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.⁴¹ 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 may argue either that: (1) the rule is “in excess of [the agency’s] statutory jurisdiction, authority or limitations,”⁴² (2) the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,”⁴³ or (3) the rule is unconstitutional. A court will address the first two categories using the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a court will defer to an agency rule’s reasonable statutory interpretation if it determines “that Congress delegated authority to the agency generally to make rules carrying the force of law,” and that the agency rule “was promulgated in the exercise of that authority.”⁴⁴

Challengers could potentially raise arguments spanning these categories. But the ATF would have reasonable responses.

A. Statutory authority

A challenger could argue the ATF lacks statutory authority to impose a video recording requirement on FFLs because Congress did not contemplate *video* records when it enacted the GCA in 1986. Certain sections of the GCA could be used to argue that Congress was thinking only of written records—those that can be expressed through “forms.”⁴⁵

Because video records cannot be provided on “forms,” the challenger might argue, the GCA does not provide for video records to be sent to the ATF directly. The new rule provides that the ATF will inspect the videotapes in the FFLs’ premises (instead of requiring FFLs to send to the ATF), but the challenger may argue that the GCA does not permit the ATF to require dealers to keep records that they may not, under the GCA’s plain language, have sent to the agency directly.

However, the ATF could argue that the word “records” in the GCA is meant to be read broadly, and reasonably includes video records. It may be true that Congress did not specifically envision *video* records when it enacted the GCA in 1986, “[b]ut none of [those] contentions about what the [challengers] think the law was meant to do, or should do, allow [a court] to ignore the law as it is.”⁴⁶ At worst, the term “records” is ambiguous; in which case, ATF’s interpretation receives *Chevron* deference and is reasonable.

⁴¹ 5 U.S.C. § 553.

⁴² 5 U.S.C. § 706(2)(C).

⁴³ 5 U.S.C. § 706(2)(A).

⁴⁴ *United States v. Mead*, 533 U.S. 218, 226-27 (2001); *Guedes*, 920 F.3d at 20-22.

⁴⁵ See, e.g., 18 U.S.C. § 923(g)(3)(A) (“The report shall be prepared on a form specified by the Attorney General....”); 18 U.S.C. § 923(g)(5)(A) (“licensee shall...submit on a form specified by the Attorney General....”); 18 U.S.C. § 923(g)(7) (“the requested information shall be provided orally or in writing, as the Attorney General may require....”).

⁴⁶ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020).

Courts have consistently afforded ATF *Chevron* deference for its interpretations of the recordkeeping requirement in 18 U.S.C. § 923.⁴⁷ Under *Chevron*, courts ask first “whether Congress has directly spoken to the precise question at issue,” in which case both the agency and courts “must give effect to the unambiguously expressed intent of Congress.”⁴⁸ However, if the “statute is silent or ambiguous with respect to the specific issue,” courts move to the second step of the analysis and defer to the agency’s interpretation, so long as it is “based on a permissible construction of the statute.”⁴⁹

The GCA does not explicitly say whether it allows agency regulations requiring FFLs to video record sales. But imposing such a requirement is a reasonable interpretation of the GCA, especially if the agency provides a detailed analysis of the rule’s anticipated significant impact on a serious problem.

The GCA expressly delegates authority to determine the form of sales records that FFLs must maintain, stating that: “[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain **such records** of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business **for such period, and in such form, as the Attorney General may by regulations prescribe**” (emphasis added).⁵⁰

Nothing in the GCA’s text or structure suggests that such “records” may not take the form of videos. The plain language of the word “records” includes video records; indeed, the term “video-recording” refers to the process of creating a video record. Additionally, ATF can point to references to “records” throughout § 923 to show that the word extends beyond paper documentation. For instance:

- The GCA states that, with an appropriate court order, the attorney general may go to an FFL’s premises and examine “any records *or documents* required to be kept” by law (emphasis added).⁵¹ This implies that “records” may be broader than, or at least different from “documents.”
- The GCA requires licensed collectors to “maintain *in a bound volume*[,] the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms” (emphasis added).⁵² This supports the argument that Congress knows how to narrow the type of record required when it wants to.⁵³

⁴⁷ See, e.g., *Ron Peterson Firearms v. Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014) (“We review ATF’s interpretation of § 923 under the standards set forth in *Chevron*.”); *Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 207 (D.C. Cir. 2013) (same); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 717–18 (5th Cir. 2013) (quoting *Nat’l Shooting Sports Found.*, 716 F.3d at 207); *Nat’l Rifle Ass’n v. Brady*, 914 F.2d 475, 479 (4th Cir. 1990) (explaining that *Chevron* applies to litigation about ATF regulations).

⁴⁸ *Chevron*, 467 U.S. at 842–43.

⁴⁹ *Id.*

⁵⁰ 18 U.S.C. § 923(g)(1)(A).

⁵¹ 18 U.S.C. § 923(g)(1)(A)(i).

⁵² 18 U.S.C. § 923(g)(2).

⁵³ See, e.g., *Russello v. United States*, 464 U.S. 16 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (1972) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)).

In addition, the ATF could argue that its new rule hardly thwarts the GCA's purpose—it directly serves the GCA's broad purpose of “prevent[ing] guns from falling into the wrong hands.”⁵⁴

The GCA conditions the general grant of rulemaking authority by stipulating that “[t]he Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of [the statute]” (emphases added).⁵⁵ A challenger might rely on this language to argue that a video recording requirement is not *necessary*—the current system of reports is sufficient. However, the enormous toll of gun violence in the US demonstrates that the current system is not sufficient.

Furthermore, in *National Rifle Ass'n v. Brady*, the Fourth Circuit rejected the National Rifle Association's (NRA) argument that Congress meant to “dispense with the deference that courts would customarily accord [ATF] regulations” by including the word “necessary” in § 926(a).⁵⁶ The court explained that the ATF “is better equipped than the courts” to determine how “to carry out the purposes of the [GCA]” because it has “the technical expertise essential to determinations of statutory enforcement.”⁵⁷ “Because § 926 authorizes [the attorney general] to promulgate those regulations which are ‘necessary,’” the court continued, “it almost inevitably confers some measure of discretion to determine what regulations are in fact ‘necessary.’”⁵⁸

The court further found that “specific grants of rulemaking authority in a number of areas”—including § 923—bolstered its conclusion.⁵⁹ The court also noted that the GCA's legislative history supported its reading, observing that § 926(a) was amended in 1986 from “reasonably necessary” to the current “necessary,” and that this change “was merely meant to remove redundant language” and not “to install the courts as primary arbiters of regulatory necessity” or to imply that “the principles of *Chevron* do not apply.”⁶⁰

A court reviewing this type of challenge to the new video recording requirement would likely come to similar conclusions as the Fourth Circuit. *Brady* is a well-reasoned case, and has been followed by several district courts.⁶¹

Additionally, the GCA is just one of numerous statutes that use similarly qualified language to confer rulemaking authority on agencies.⁶² And courts have not hesitated to apply *Chevron* deference to uphold agency rules enacted under statutes that only permit “necessary” regulations, generally without even pausing to make anything of the “necessary” language.

For example, in 2013, the Supreme Court held that the FCC's interpretation of its own jurisdiction was entitled to *Chevron* deference.⁶³ The Court noted that the statute at issue gave the agency authority to “prescribe such rules and regulations as may be necessary in the public

⁵⁴ *Abramski v. United States*, 573 U.S. 169, 172 (2014) (citing 18 U.S.C. § 922(g)).

⁵⁵ 18 U.S.C. § 926(a).

⁵⁶ 914 F.2d 475, 478–89 (1990).

⁵⁷ *Id.* at 479.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See, e.g., *Armalite, Inc. v. Lambert*, 512 F. Supp. 2d 1070, 1073–74 (N.D. Ohio 2007), *aff'd*, 544 F.3d 644 (6th Cir. 2008).

⁶² See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 471 & n.8 (2002) (providing examples).

⁶³ *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013).

interest to carry out [the act's] provisions," but did not separately discuss or dwell upon the "necessary" limitation.⁶⁴

These principles would likely apply here. The GCA expressly authorizes the attorney general to "maintain such records of...sale...in such form[] as [they] may by regulations prescribe."⁶⁵ Given this "specific grant of rulemaking authority,"⁶⁶ a court will likely find that the ATF is best suited to determine whether a video recording requirement is "necessary" to "combat violations of [] firearms laws."⁶⁷ The court will look at whether the ATF has reasonably determined that it is necessary to add video record requirements to current recordkeeping regulations.

B. Arbitrary and capricious

A challenger could claim the new rule is arbitrary and capricious by arguing the ATF failed to examine the relevant data and articulate a satisfactory explanation for the rule.

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

A court will be more likely to accept arguments about the reasonableness of the new rule if it is accompanied by a detailed analysis showing the benefits of a video recording requirement are commensurate with the costs. The APA does not expressly require a cost-benefit analysis; however, a rule will be struck down as arbitrary and capricious during judicial review if the court finds that the agency failed to "consider an important aspect of the problem" or "examine the relevant data and articulate a satisfactory explanation for [the] action."⁷²

The Supreme Court has also emphasized that agencies promulgating "appropriate and necessary" regulations must "consider cost—including, most importantly, cost of compliance."⁷³ The Court added that it is "up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost," and that there need not always be "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value."⁷⁴ Courts

⁶⁴ *Id.* at 293 (quoting 47 U.S.C. § 201(b)).

⁶⁵ 18 U.S.C. § 923(g)(1)(A).

⁶⁶ *Brady*, 914 F.2d at 479.

⁶⁷ *NAt'l Shooting Sports Found.*, 716 F.3d at 203 (internal citations omitted).

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

⁷³ *Michigan v. EPA*, 135 S. Ct. 2699, 2706-08, 2711 (2015).

⁷⁴ *Id.* at 2711; *see, e.g., Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 406 (D.D.C. 2017) ("*Michigan v. EPA* does not require that the benefits be quantified in any particular way when compared to the costs."), *aff'd*, 944 F.3d 267 (D.C. Cir. 2019); *cf., e.g., Bump Stock Rule*, 83 Fed. Reg. at 55,539, 66,544, 66,551 (finding it impossible to quantify benefits of bump stock rule but listing unquantified benefits like potentially reducing casualties in mass shootings).

also acknowledge the difficulty of prediction, especially when the rule is entirely new. Courts require “only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive.”⁷⁵

Thus, the ATF should cogently explain why, notwithstanding the costs, the proposed rule is “necessary to carry out the provisions”⁷⁶ of the GCA by ensuring that fewer criminals are able to use straw purchasers or false identification to evade the law.⁷⁷ The rule should quantify costs and benefits where possible; describe them qualitatively; identify why other alternatives are inferior; and explain the insufficiency of existing recordkeeping requirements. The ATF’s responses to significant comments—some of which will undoubtedly raise cost-benefit issues—and incorporation of their input into the final rule will also help to demonstrate that the new rule was “based on a consideration of the relevant factors.”⁷⁸

C. Constitutional

A challenger may argue that a video-recording requirement infringes on the privacy rights of gun buyers and dealers.

The Second Amendment may confer a right to own firearms in the home for self-defense, but it does not confer a right to *secretly* do so. Indeed, the entire scheme of the GCA makes this clear.⁷⁹

The Fourth Amendment protects “reasonable expectation[s] of privacy,” but there is no reasonable expectation of privacy when undertaking a commercial transaction in a store open to the public.⁸⁰ The Supreme Court has rejected a Fourth Amendment challenge to on-site inspections of FFLs under § 923(g), stating that “[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”⁸¹

Even if there were some constitutional privacy interest at stake, the Fourth Amendment’s touchstone is reasonableness.⁸² The “federal interest” in preventing violent crime is “urgent,” while “the threat to privacy [is] not of impressive dimensions.”⁸³

Additionally, the GCA imposes strict limits on the government’s collection of FFL records, and the new rule would not alter those restrictions.⁸⁴ Consequently, under the new rule, FFLs would be responsible for video-recording gun sales and maintaining those records, but the government

⁷⁵ *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); see *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978).

⁷⁶ 18 U.S.C. § 926(a).

⁷⁷ *Abramski*, 573 U.S. at 183.

⁷⁸ *Mozilla Corp. v. FCC*, 940 F.3d 1, 69 (D.C. Cir. 2019) (per curiam).

⁷⁹ *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he right secured by the Second Amendment is not unlimited. ... [T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”). Note the difference between carrying a weapon in secret and owning a weapon in secret.

⁸⁰ *Carpenter v. U.S.*, 138 S. Ct. 2206, 2219 (2018).

⁸¹ *U.S. v. Biswell*, 406 U.S. 311, 316 (1972).

⁸² *Carpenter*, 138 S. Ct. at 2221.

⁸³ *Biswell*, 406 U.S. at 315–17.

⁸⁴ See *supra* note 32; 18 U.S.C. § 926(a).

could only ask to “inspect or examine” the video recordings in connection with a criminal investigation, or to “ensure[] compliance with the record keeping requirements.”⁸⁵

⁸⁵ 18 U.S.C. § 923(g)(B)(i)–(iii).