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BSCA RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Implementing the "Engaged in the Business" Provision
Date: November 28, 2022

Implementation Recommendation: The ATF should issue a regulation clarifying that any person who sells or offers for sale five or more firearms in any 12-month period is "engaged in the business" of selling firearms.

I. Summary

A. Description Of Recommended 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 must follow, including the statutory requirement that they conduct a background check on potential purchasers. Gun sellers who do not qualify as firearms "dealers" are not required to obtain an FFL, and thus, are not required under federal law to conduct background checks.

Prior to the Bipartisan Safer Communities Act (BSCA), the GCA was unclear 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 frustrated 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 ambiguity, individuals prohibited from purchasing or possessing firearms under federal law have long been able to 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]

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1. 18 U.S.C. § 923(a).

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

3. Matthew Miller, Lisa Hepburn & Deborah Azrael, "Firearm Acquisition Without Background Checks," Annals of Internal Medicine 166, no. 4, 2017, pp. 233–239, https://www.acpjournals.org/doi/full/10.7326/M16-1590?rfr_dat=cr_pub++0pubmed&url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org.

The BSCA took steps to clarify this definition and expand the type of sales subject to background checks by amending the definition of "engaged in the business."[4] Instead of including only those who sell guns with "the principal objective of livelihood and profit" in the definition, federal law now includes anyone who deals guns "to predominately earn a profit." By eliminating the word "livelihood," this new framework confirms Congress' intent to include those who make repetitive sales in the federal licensing regime, regardless of whether the profits from such sales constitute a significant portion of the seller's "livelihood."

While this change was important, it still leaves significant uncertainty as to when a seller crosses the new threshold. As a result, enforcing the law against unlicensed sellers will still be difficult, frustrating the purpose of the BSCA.

To carry out the intent of the BSCA and increase the frequency at which gun sales are subject to background checks, the ATF should issue a new rule clarifying that any person who sells or offers for sale five firearms 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.

B. Overview Of Recommendation Process

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice and comment rulemaking (NCRM) process.[5] 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,[6] 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.[7] In total, the multi-phase NCRM process generally extends for a year.

II. Current State

A. Federal Regulatory Scheme and the BSCA

The GCA makes it unlawful for any person except a licensed dealer to "engage in the business" of dealing in firearms.[8] By contrast, a so-called "private seller" (one who is not "engaged in the business") is exempt from federal licensing requirements.[9] Thus, private sellers are not subject to federal requirements imposed on dealers under the GCA, including: mandatory background checks on prospective buyers; keeping firearms transaction records so that firearms recovered in crime 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.[10]

Many private sellers have taken advantage of the GCA's ambiguous definition of "engaged in the

4. 18 U.S.C. § 921(a)(21)(C).

5. 5 U.S.C. § 553.

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

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

8. 18 U.S.C. § 922(a)(1)(A).

9. Id.

10. 18 U.S.C. § 922(t)(1)(A)–(B).

business" to purchase and sell high volumes of firearms without a license, without conducting background checks, and without oversight from the ATF.[11] These unregulated sales are a significant threat to public safety as unlicensed sellers regularly provide firearms to people who are prohibited and would not pass a background check, go on to commit violent crimes or engage in illegal firearms trafficking.[12]

Prior to the BSCA, the term "engaged in the business" was defined as:

> [A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, 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 (emphasis added).[13]

In turn, the GCA defined the term "with the principal objective of livelihood and profit" as meaning:

> [T]hat 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.[14]

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." Prior to the BSCA, it also failed to articulate when profits gained from sales were sufficient to constitute a seller's "livelihood." These three interconnected issues have long frustrated the ability of regulators and prosecutors to enforce the statute.

On June 25, 2022, President Biden signed the BSCA into law, in part, to address the GCA's lack of clarity. Specifically, the legislation amended the GCA's definition of "engaged in the business" by striking the language "with the principal objective of livelihood and profit" and replacing it with "to predominantly earn a profit." In doing so, the law changed the standard by which sales will be deemed sufficient to require individuals to register as FFLs.

Now, sellers must be licensed as firearms dealers if they: (i) devote time, attention, and labor to dealing in firearms; (ii) as a regular course of trade or business; (iii) to predominantly earn a profit through the repetitive purchase and resale of firearms. So long as a seller meets these standards, they must be licensed, regardless of whether the profit gained was large enough to sustain an individual's livelihood.

B. Lack of Clarity Frustrates BSCA's Intent

While the BSCA clarified that any profits gained from repetitive sales were sufficient to satisfy part of

11. 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-strengthenbackground-checks-by-addressing-high-volume-gun-sellers/.

12. 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.

13. Firearms Owners' Protection Act., Pub. L. 99-308, 100 Stat. 449, 450 (1986).

14. Id.

the GCA's "engaged in the business" framework, the statutory change made by Congress interacts with other parts of the "engaged in the business" definition. In particular, the question of what constitutes "repetitive" sales under the new definition is intertwined with another question: what frequency of firearm sales would give rise to a "regular course of trade or business"?

The lack of clarity on these points means that, even after the BSCA, 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 weak standards to justify a decision not to become licensed or to intentionally avoid ATF oversight. Therefore, for the BSCA's change to have any meaningful impact, the ATF must clarify how this new language interacts with the full definition to "engaged in the business," including by clarifying the frequency of firearm sales that would give rise to a "regular course of trade or business."

In a September 12, 2022 letter to ATF Director Steven Dettelbach, Senator Chris Murphy, an author of the BSCA, highlighted Congress' intent to expand the definition of "engaged in the business" in the BSCA, and sought updates on steps the ATF was taking to clarify which sellers will require federal licensure under the new law. Senator Murphy underscored the need for this clarification, noting that "there are many documented examples of unlicensed individuals selling multiple firearms without background checks to strangers they met online; that behavior should be clearly captured by the law."[15]

The firearms industry has also expressed a need for the ATF to clarify the statute. The website Guns.com, a firearm seller itself, said the updated "engaged in the business" language is "still not clear in terms of how many guns can be sold or in what period before a license is needed, leaving that red line subject to the interpretation of the ATF."[16]

Indeed federal courts have struggled to effectively resolve the statutory ambiguity. 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.[17] 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.[18]

C. 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.[19] One such action sought to clarify that it "doesn't matter where you conduct your business—from a store, at gun

15. Senator Chris Murphy, Letter to ATF Director Steven Dettelbach, September 12, 2022, https://www.murphy.senate.gov/imo/media/doc/atf_letter_re_bsca_implementation.pdf.

16. Guns.com, "Gun Owners Get Nothing in 80-Page Bipartisan Senate Deal." June 22, 2022, https://www.guns.com/news/2022/06/22/gun-owners-get-nothing-in-80-page-bipartisan-senate-deal.

17. 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).

18. 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).

19. 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.

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).[20] In particular, the ATF clarified the following principles via guidance:

> A person can be engaged in the business of dealing in firearms regardless o-f 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.
>
> 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.[21]

The nonpartisan Congressional Research Service, in reviewing the ATF guidance in context of the BSCA, wrote, "it could be concluded that the BSCA more explicitly codifies ATF's interpretation of prior law."[22] This analysis underscores the ATF's guidance and its recognition that even a small number of sales or offers of sale can trigger the need for a FFL. A rule setting a bright line threshold would build on this guidance and further shrink the private sales loophole.

D. 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.[23] 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.[24]

III. Proposed Action

A. Substance of Proposed Rule

In order to effectuate the purpose of the GCA and the intent of the BSCA to ensure those who genuinely deal in firearms are required to comply with federal law, the ATF should promulgate a rule providing that anyone who sells or offers for sale 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.

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20. Id.

21. Id. See also, ATF supra note 20.

22. Krouse, William, J. "Firearms Dealers 'Engaged in the Business'", Congressional Research Service, August 202, https://crsreports.congress.gov/product/pdf/IF/IF12197.

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

24. Mass. Gen. Laws Ch. 140, § 128A.

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 or more firearms in any 12-month period is presumed to be "engaged in the business" of selling firearms. This threshold should be set at five firearms, and would serve as a rebuttable presumption that an individual is selling firearms in the "regular course of trade or business," clarifying the amended language in § 921(a)(21)(C). In addition to this numerical threshold, the new proposed rule should codify a set of factors 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 (selling guns at more than one point in time), (3) selling guns for profit, (4) re-selling guns shortly after obtaining them, (5) selling multiple guns of the same make and model, (6) selling multiple guns in a single transaction, and (7) 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, an absolute or almost absolute absence of these other factors would be required to 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 in any 12-month period 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 in a 12-month period,[25] 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.

- It should clarify that the terms "devote time, attention, and labor to dealing in firearms" and "repetitive purchase and resale of firearms" are fully satisfied when the numerical threshold outlined above is met. In particular, the new proposed rule should clarify that these terms do not create distinct requirements for the number of sales sufficient to trigger the licensing regime. Instead, a finding that an individual sells or offers for sale firearms as a "regular course of trade or business" is sufficient to meet the sales volume requirements in the other parts of the "engaged in the business" definition.

- 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

25. 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).

offers to sell.[26] 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 guns, firearms 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.[27] Finally, the definition should clarify that the term "personal collection" does not include the business inventory of an out-of-business FFL, and firearms sold or offered for sale from such a business would be subject to the rule.

B. Process

To issue a new rule, the ATF must go through the NCRM process under the APA.[28] 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.[29] An oral hearing is not required.[30] 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.

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26. Id.

27. 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 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.

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

29. 18 U.S.C. § 926(b).

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

IV. Legal Justification:

A. Statutory Authority

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 to the ATF rules and regulations related to the GCA.[32] These provisions are "general conferral[s] of rulemaking authority" that would lead a court to defer to the agency's interpretation.[33] The ATF's interpretation of who qualifies as a dealer is in the exercise of its general rulemaking authority.[34] 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).

B. Substantive Justification

i. Jurisprudence supports a threshold number of five sales is 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."[35] Courts frequently uphold convictions for dealing firearms without a license in cases with a relatively small number of sales,[36] including cases where the sales activity was: two firearms,[37] three firearms in four months,[38] four firearms in one month,[39] four firearms in two months,[40] five firearms

31. 18 U.S.C. § 926(a).

32. 28 C.F.R. §§ 0.130, 0.131.

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

34. Id.

35. 18 U.S.C. § 921(1)(21)(C)

36. 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).

37. 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).

38. 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").

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

40. 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).

in one month,[41] five firearms in four months,[42] and six firearms.[43] Therefore, 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.

ii. 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.[44]

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 collection or for a hobby" is narrow, and that five sales or offers of sales for profit per year reasonably exceeds the exception. With the BSCA's addition on profit motive, the reasoning for a narrow exception is even more clear.

iii. 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."[45] 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.[46]

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).[47] Notably, the NPRM for this regulation initially set the threshold at two or more parts (reasoning that "two" satisfies the

41. 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).

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

43. 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).

44. 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").

45. 18 U.S.C. § 922(g)(3).

46. 27 CFR § 478.11.

47. 18 USC § 922(r).

plural "parts" language), but the final rule increased that number to 10 or more parts.[48]

iv. 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.[49] 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.[50]

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

49. Mass. Gen. Laws ch. 140, § 128A.

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