
COMMENT OF THE BASS FIRM, PLLC
TO NOTICE OF PROPOSED REVISION TO 27 C.F.R. PART 478
(DOCKET NO. ATF 2022R-17)

ENTITLED:

Definition of Engaged in the Business as a Dealer in Firearms

**To: Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol,
Tobacco, Firearms, and Explosives**

Respectfully submitted by:

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The Bass Firm, PLLC (“Bass Firm”) files this comment to assist in clarifying and proposing changes to the proposed rule entitled **Definition of Engaged in the Business as a Dealer in Firearms (docket number ATF 2022R–17)** .

Bass Firm is a law firm operating in Texas. Bass Firm has an interest in the Rule because it represents current and former Federal Firearm Licensees. Additionally, Bass Firm provides legal advice on Second Amendment issues and licensing and regulatory matters related ATF.

The Proposed Rule Seeks to Impermissibly Punish Former Licensees

The ATF’s proposed rules on Former Licensees seeks to unfairly punish them for once being licensed by placing onerous obstacles, different from the rules that apply individuals who have never been licensed, that prevent them from selling firearms from their personal collections or as part of a hobby, especially if those firearms came into their personal collections as part of a business closure. Nothing in the National Firearms Act or the Gun Control Act supports that proposition that former Licensees should be treated differently than people never licensed. Proposed presumption Section II (D)(5) states “as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated... and were not transferred to a personal collection...” This proposed rule punishes lawful firearm owners who previously held licenses, holding them a different and more onerous standard, and violates the Second Amendment and is in direct contradiction of 18 U.S.C. 921(a)(21)(C) and 923(c). 18 U.S.C. 921(a)(21)(C) states that the term dealer “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.” While the ATF acknowledges that this statute does not “provide exceptions to the definition of ‘engaged in the business’ based on

one's prior license status”, **it also does not exclude those *formerly* engaged in the business from this definitional exclusion of the term “dealer.”** Additionally, 923(c) adds that “nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer.” Thus, under the statute, a dealer may acquire a personal collection while he is a dealer, or while going out of business, and may later dispose of that collection, under the same rules as other non-dealers, except as provided in 18 U.S. Code § 923(c).

This ATF’s explanation for Section II(D)(5) seems to be that the “licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a ‘personal collection.’” The ATF offers no citation for the proposition that firearms acquired by an FFL are not (or cannot be) for a “personal collection.” While all can agree that the *predominant* purpose of the FFL is to earn a profit, the proposed rule ignores the fact that many FFL holders are also firearm collectors and/or enthusiasts, and that often many of the firearms that are put into the business inventory are for the personal collection of the FFL holder or its responsible persons. Additionally, nothing in 18 USC 921(a)(21)(C) or 923 discusses the intention at the time of acquisition of the firearm. The ATF also ignores the fact that the status of the firearms might change over time. A firearm originally acquired to resale as business inventory, may be retained by an FFL and later become a part of a personal collection, and the former FFL should be entitled to sell part or all of that collection under the statute without becoming a dealer. Indeed, 18 U.S.C. 923(c) discusses that firearms in a dealers personal collection may become part of the dealers business inventory, and such would require entering

that firearm into the licensee's Acquisitions and Dispositions book¹, so a change from Business Inventory to personal collection should also be allowed.

Unlike the similar proposed Section II(D)(6) there is no timeframe or intent standard placed on this restriction in Section II(D)(5). At most, this section should have the one-year hold period described in 18 U.S.C. 923(c). Here, this rule basically acts as a prohibition of ever selling firearms for any purpose that were formerly in business inventory without the presumption of "engaging in business." This presents numerous issues and could constitute an impermissible government taking. Many former FFL's have likely relied on prior guidance and rules, and just taken unsold business inventory into their personal collections after shutting down their FFL business. The ATF offers no alternative method of ever selling that collection to these former licensees, except perhaps to become licensed – which is a massive hurdle for a one time sell of a collection. Additionally, licensing may not be an option for the former licensee – who may no longer have a suitable business premise or who may not be permitted to open an FFL because of state or local laws, such as zoning. Requiring licensing for a one-time sale is simply unworkable.

The proposed rule inexplicably differentiates between firearms "transferred" to a personal collection of the former FFL (Section II(D)(6)) and those not "transferred" (Section II(D)(5)). Those firearms should not be treated differently. Often an FFL will cease dealing or other licensed activities, and the remaining firearms in his business inventory will then simply become owned in the former FFL's personal collection as a matter of law. No "transfer" is necessary for this transition to occur.² This presumption seemingly states that those firearms can never be sold without the presumption that that person is again "engaged in business." This is especially

¹ <https://www.atf.gov/firearms/qa/may-licensee-maintain-personal-collection-firearms-how-can-they-do-so> (citing 18 U.S.C. 923(c); 27 CFR 478.125a) ("If that firearm is sold within a year of having been transferred to the licensee's personal collection, the licensee must re-enter the firearm in the business A&D record.")

troublesome for some firearms that can be retained by the former FFL, but are not able to be transferred to the responsible persons of the business, such as firearms that were imported as Title II sales samples. “FFLs licensed as corporations, partnerships, or associations, who have been qualified to deal in NFA firearms and who go out of the NFA business, **may lawfully retain their inventory of these firearms, including imported NFA ‘sales samples,’ as long as the entity does not dissolve but continues to exist under State law.**”³ “However, ATF will not approve the transfer of an NFA ‘sales sample’ unless the transfer is to a government agency or to an FFL/SOT qualified to receive such samples.”⁴ At a minimum, the proposed rule should grandfather in former FFL’s who went out of business prior to this rule, and allow them to treat those firearms as a personal collection similar to the firearms in Section II(D)(6), even if all the proposed criteria of that section, such as a formal transfer from the A&D book, were not followed.

Additionally, proposed rule Section II(D)(6) seeks to apply the presumption to all firearms transferred to any responsible person of an FFL, even if those guns were transferred to that responsible person via a ATF Form 4473 and a background check was conducted. The rule seems to overlook that an entity may have dozens of “responsible persons,” that those responsible persons may change frequently, and that a former responsible person may have no say in the business dealings or the licensing of the company once he is gone. Indeed, it is conceivable that a former employee, who was once a responsible person on a corporate FFL, may not even know that the entity has given up its FFL. Yet, the ATF now seeks to hold that

2 See, e.g., ATF National Firearms Act Handbook, ATF E-Publication 5320.8 (Revised April 2009) at p. 85; see also ATF Pub. 5300.4 (9/14), Federal Firearms Regulations Reference Guide, p. 189

3 *Id.* at pp. 90-91, 189

4 *Id.*

former responsible person to a burdensome presumption, based on their former employer's decision to cease its firearm operations.

The proposed rule's definition of "personal collection" also places unnecessary obstacles by using additional requirements for former licenses to have a firearm considered in their personal collection. The ATF proposes that firearms can only be in the personal collection of a former licensee if the firearms were: (1) acquired or transferred without the intent to willfully evade the restrictions placed upon licensees by chapter 44, title 18, United States Code; (2) recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale); (3) recorded as a disposition from the licensee's business inventory to the person's personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e); (4) stored separately from, and not commingled with the business inventory, and appropriately identified as "not for sale" (e.g., by attaching a tag), if on the business premises; and (5) maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a. However, there is simply no requirement that an FFL going out of business "dispose" the firearms in its Acquisitions and Dispositions book to itself to in order for them to be part of that person's personal collection. Although the proposed rule cites 27 CFR 478.122(a), 478.123(a), and 478.125(e) for this proposition, none of the regulations (or underlying statute) states anything about a licensed individual disposing a firearm to oneself. **Indeed, this transfer to a personal collection happens as a matter of law once the license is given up, because there is no more business inventory, because the firearms business has ceased.** Indeed, the ATF gives a clear example of this in the NFA handbook, stating "FFLs

licensed as corporations, partnerships, or associations, who have been qualified to deal in NFA firearms and who go out of the NFA business, may lawfully retain their inventory of these firearms, . . . as long as the entity does not dissolve but continues to exist under State law.”⁵ Similarly, it is unclear how a company going out of business would store the firearms “separately from, and not commingled with the business inventory” when the company is going out of business, and no longer has a business inventory. Also, the proposed rule offers no clarity for how to treat former FFL’s former business inventory if that former dealer just allowed that firearms to come into his collection after his business was ceased, but did not meet all of these requirements.

The ATF should exclude certain sales from the presumption of being “Engaged in Business” if background checks are conducted.

Seemingly, the ATF’s chief concern regarding unlicensed sales is that this will somehow use this as a way of avoiding background checks. As such, the ATF should exclude all sales from this presumption where background checks are conducted, including 1) sales to a current Federal Firearm Licensee, 2) sales that are done as facilitated private sales through a current FFL, 3) sales of Title II NFA firearms. Selling firearms to a currently licensed FFL poses almost no threat, as that current FFL holder has gone through extensive vetting to become licensed and would be subject to the background check requirement when they ultimately sell the firearm to the public. Similarly, the ATF in encouraging facilitated private sales, and sales conducted in this matter propose no threat because a background check is done.⁶ The ATF has previously stated that facilitated private sales “enhance public safety, assist law enforcement, and help ensure

⁵ See, e.g., ATF National Firearms Act Handbook, ATF E-Publication 5320.8 (Revised April 2009) at p. 85

⁶ See generally ATF publication Facilitating Private Sales: A Federal Firearms Licensee Guide, available at <https://www.atf.gov/firearms/docs/guide/facilitating-private-sales-federal-firearms-licensee-guide/download>

firearms end up only in the hands of those who are legally allowed to possess them.”⁷ Lastly, firearms regulated by Title II of the National Firearms Act (NFA) should also be exempt from this presumption because a background check is conducted on each of these transfers as part of the ATF Form 4 or Form 5 process.⁸ The ATF collects even more information for background checks on these firearms, as they require FBI Fingerprint cards and a photo of the applicant or their responsible persons. So, every NFA firearm undergoes a thorough background check, even those sold through private sales. The sale of Title II NFA firearms also provides the ability to trace those firearms, as all transfers are recorded in the National Firearms Registration and Transfer Record (NFRTR).

The proposed definition of Personal Collection is too Narrow and offers no alternative for guns not within that narrow definition.

18 U.S.C. 921(a)(21)(C) excludes from the term “dealer” a “person⁹ 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.” The ATF seeks to define “personal collection” using a narrow brush as “personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (e.g., noncommercial, recreational activities for personal enjoyment such as hunting, or skeet, target, or competition shooting).” **I propose a more broad definition more inline with Congress’s intent: “personal collection” means “a group firearms that a person accumulates for any reason, other than firearms currently in the business inventory of a current licensee.”**

⁷ <https://www.atf.gov/firearms/docs/guide/facilitating-private-sales-federal-firearms-licensee-guide>

⁸ See ATF Form 4 (5320.4) and ATF Form 5 (5320.5) questions 14-22 (collecting information for background checks). For entity purchases, this information is collected for *each* responsible person of the entity via the ATF Form 23 (5320.23).

⁹ It should be noted here that the term “person” includes entities under both the Gun Control Act and the National Firearms Act. Thus, entities such as corporations and LLC’s may have “personal collections.” 26 U.S.C 479.1 (“Person” defined as “partnership, company, association, trust, estate, or corporation, as well as a natural person.”)

Marian-Webster offers two applicable definitions of the word “Collection.”

Collection (noun)

1) something collected, especially: an accumulation of objects gathered for study, comparison, or exhibition or as a hobby

2) Group, Aggregate¹⁰

While the ATF attempts to use the first definition of “collection” as “something collected,” it improperly narrows it by including the words after “especially” in definition to make them an exhaustive list of what items can make up a collection – that is only firearms that are acquired for “study, comparison, exhibition, or for a hobby.” **Using this definition, firearms acquired by an individual for any other purpose, such as for the constitutionally protected use of self-defense, would not be a “personal collection.”** However, the word “especially” in the definition is not intended to make those examples an exhaustive list, but instead is only used to give some, *but not all*, common examples of why things are collected. The second definition supports a more broad definition of “collection”- and is simply a “group” or “aggregate” of something. The definition proposed by ATF seems too focused on the “hobby” aspect. Here, Congress intended the more broad definition of “collection” because it used the term in the statute “enhancement of a personal collection or for a hobby,” clearly believing a “personal collection” was something different than just firearms accumulated for a hobby. Under the ATF’s proposed definition the word “hobby” in the statute would be superfluous because it would be encompassed within the words “personal collection” as it would be used to define that term. The ATF should use a more broad definition that just means a group of firearms personally owned for any reason.

¹⁰ Marriam-Webster Dictionary (online version) available at www.m-w.com

The proposed rule fails to recognize there are only two classifications of firearms: “personal collection” and “business inventory.” The proposed rule apparently attempts to create a third unnamed category of firearms that are owned by unlicensed individuals, but are not acquired for “study, comparison, exhibition, or for a hobby.” The definition proposed by the ATF of “personal collection” leaves it unclear what personally owned firearms that were not acquired for “study, comparison, exhibition, or for a hobby” would be defined as, or how those would be treated if the person wanted to sell them. Take for instance, a homeowner has legally acquired a shotgun, a rifle, and a pistol for the sole purpose of home defense. These firearms would not fall within ATF’s definition of “personal collection” because they were not purchased for “study, comparison, exhibition, or for a hobby.” How would the ATF classify these firearms if not as the owner’s “personal collection?” How would the ATF propose this owner sell these firearms if they were no longer needed for home-defense? This is another reason to use a broad definition that encompasses all personally owned firearms, regardless of the intended use of the firearms.

Also, the examples of hobbies provided in the proposed rule focus heavily on activities that involve shooting firearms (hunting, or skeet, target, or competition shooting), but does not mention other non-shooting hobbies that often occur in the firearms community, such as curio collecting. Indeed, this term should not focus on activities that require the “shooting” of firearms. This is similar to people in the hobby of comic books – those passionate about the hobby rarely open and read the books as this could significantly diminish the value of the comic. It is also unclear why the ATF believes a “personal collection” has to be for a non-commercial purpose. Many commercial entities use firearms for commercial business purposes that do not require a license, *i.e.* commercial purposes other than dealing, manufacturing, or importing

firearms. For instance, a hunting outfitter might have a collection of firearms that are for use in his commercial hunting enterprise, yet his firearms would still be considered his “personal collection.” Similarly, a security or armored car company might have hundreds of firearms it issues daily to its employee guards for bona fide use in their jobs, and even with this commercial purpose, these firearms would still be considered in the company’s “personal collection.” If not, how would the ATF classify these firearms?

The proposed definition of “Responsible Person” is too broad.

The proposed definition of “Responsible Person” is “[a]ny individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and business practices of a corporation, partnership, or association, insofar as they pertain to firearms.” The use of the terms “indirectly” is confusing and undefined. Similarly, “cause the direction” is unclear and undefined. **Instead, the ATF should use the more simple definition from Safe Explosives Act in 2002 which is “Responsible person” means “an individual who has the power to direct the management and policies of the applicant pertaining to” the firearms business.**¹¹

The proposed definition of “Predominantly Earn a Profit” is expanded to any “Pecuniary gain.”

The ATF should recognize that all sales involve some motive of pecuniary gain. If the seller did not intend a pecuniary gain, the seller would just give away or destroy the firearms rather than sell them. Congress has specifically allowed a non-dealer to make “occasional sales. . . for the enhancement of a personal collection or for a hobby” or to sell “all or part of his personal collection of firearms.” Nothing in this statute prohibits a non-licensed seller from attempting to derive a pecuniary gain from these occasional sales. Indeed, it should be noted

¹¹ 18 USC 841(s)

that often inherent in the hobby of collecting is the hope and expectation that your hobby collection may appreciate in value.¹² This is not just true with a firearms collection, but other things also other items commonly collected like baseball cards, comic books, cars, art, or antique glassware. Indeed, it is rare that someone engages in a hobby of collecting with the expectation that their collection will someday be worthless. While many hobby collectors find joy in other aspects of the hobby, such as completionists or novelty value, many hobbyist believe their collections will go up in value. Indeed, there is a plethora of price guides, published yearly to provide the most up-to-date value data, support this position.¹³ The ATF should not use a definition that is so expansive as to include these legal gunowners and occasional sellers.

The “presumption list” under the Definition of “Predominantly Earn a Profit” is too broad.

The “presumption list” under the Definition of “Predominantly Earn a Profit” is too broad and includes things many legitimate non-licensed entities, and even personal firearm owners, do and thus should be removed from this list. First, as discussed above, there are many legitimate businesses that use firearms for commercial purposes and have large inventories of firearms that are not required to be licensed. Only firearm dealers, manufacturers, pawnbrokers, and importers are required to be licensed. Examples of businesses that use firearms, but are not required to be licensed, include armored car services, security companies, farmers, ranchers, and commercial hunting operations, just to name a few. This rule is so broad that it would capture all of the businesses. As a few examples:

¹² Additionally firearm values also go up with inflation and increased cost of parts, materials and labor. It would be difficult to find a firearm sold new in 1970, selling for the same price (or lower) today.

¹³ See, e.g., 44th Edition Blue Book of Gun Values (2023); Gun Trader's Guide - Forty-Fifth Edition: A Comprehensive, Fully Illustrated Guide to Modern Collectible Firearms with Market Values (2023); Shooter's Bible 115th Edition: The World's Bestselling Firearms Reference (2023).

Item (3) “makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales.” - A security company would surely keep track of its firearm inventory and track the cost of obtaining those firearms for tax and other reasons. Yet surely this act does not presume a security company is a dealer of firearms.

Item (5) “formally or informally purchases, hires, or otherwise secures business security services.” - Here, for instance, a hunting outfitter with a large inventory of firearms would surely have security services like a monitored alarm or camera. This item is particularly troublesome because it would almost certainly also apply to a good number of firearm collectors who have a monitored home alarm, in part to protect their firearm collections. In addition, this presumption could lead to parties reducing security on firearms, which seems to go against public policy.

(6) “formally or informally establishes a business entity . . . through which the person makes or offers to make firearms transactions. – Again it is highly likely that a security company would have a formal entity established and use that entity to purchase firearm for corporate use.

Item (7) “secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms” – Most states have combined “resale” and “use” licenses. So a company that uses firearms would likely be required to acquire a “sales tax and use” license or certificate.¹⁴

Item (8) “purchases a business insurance policy, including any riders that cover firearms inventory.” Here it is likely that almost any business that uses firearms would have a business insurance policy that covers its firearm assets.

¹⁴ See, e.g., Texas Sales and Use Tax Resale Certificate Form 1-339 (Rev.4-13/8).

The ATF proposed revisions to the definition of “Dealer” do not add clarity

The ATF proposes to amend the regulatory definition of “dealer” in 27 CFR 478.11 to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities may be conducted. This includes at any domestic or international public or private marketplace or premises. The revised definition provides nonexclusive examples of such marketplaces: a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order; over the internet; through the use of other electronic means (*e.g.*, an online broker, online auction, text messaging service, social media raffle, or website; or at any other domestic or international public or private marketplace or premises.

The ATF suggest that making this change clarifies that dealing in these locations requires a dealer license, however it would likely create more confusion. Having a federal firearms license would expressly prohibit an individual from selling in some of these locations. Indeed, the ATF has made clear that a dealer can only transact sales at its licensed premises or at a “qualifying gun show or event” as defined in 27 CFR 478.100. This limit a dealer to only selling at gun show or event if it is “sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.” For instance, it would be difficult to imagine a circumstance where a licensed dealer would be allowed to sell at a flea market, though private sales there might be legal.

The ATF should clarify that its proposed exemption of Auctioneers should apply to auctions of personal sales as well as estates.

The proposed rule seems to suggest that the exemption of Auctioneers only applies to Estate sales. The ATF should clarify that the treatment of auctioneers is the same, regardless of

the owner of the firearm (individual vs estate). The first sentence states it applies to “owner or executor of an estate who is liquidating a personal collection,” however, subsequent sentences suggest that the exemption only applies to estates sales. For instance, the proposed rule states, “[t]he firearms are within the estate's control and the sales made on the estate's behalf.” Seemingly limiting the exemption to estates. Similarly, the ATF’s sentence “An ‘estate-type’ auction as described above differs from liquidating a personal collection of firearms by means of a ‘consignment-type’ auction, in which the auctioneer is paid to accept firearms into a business inventory and then resells them in lots, or over a period of time,” suggests that estate sales fall under the exemption while selling items from personal collections do not. That is not case, instead the ATF should clarify it is the method or sale (consignment vs. true auction) that determines if the auctioneer exemption applies, not the origin of the firearm (estate vs. personal collection).

Some of the factors considered for the presumptions that a person is “Engaged in the Business” captures too many permissible sales by collectors.

Several of the presumptions would apply to collectors who would be permitted occasional sales to enhance their collection and should be eliminated. Section II(D)4(b) stating that a presumption of dealing occurs when a person sells a firearm that is “new, or like new in their original packaging” should be removed as it is too board and encompasses many collectable firearms that are often legally traded, acquired and sold by unlicensed collectors and licensed non-dealer collectors with a 03 FFL Type (Collector of Curios and Relics). Indeed, collectors often highly value firearms in “new” or like “new condition” condition and often pay a premium for firearms in their original packaging, due to rarity. The National Rifle Association has three collector grades for new or like new modern firearms – “New,” “Perfect,” and “Excellent” –

which represent the three most coveted and sought-after grades.¹⁵ Similarly, it is generally regarded that selling firearms with box and papers significantly increases the collector value.¹⁶

Similarly, the ATF should eliminate the presumption in Section II(D)4(c) that a person is presumed to be a dealer if the firearms “are of the same or similar kind (i.e., make/manufacture, model, caliber/gauge, and action) and type (i.e., the classification of a firearm as a rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm).” The ATF states that “[i]ndividuals who are bona fide collectors are less likely to amass firearms of the same kind and type than amass older, unique, or less common firearms that hold special interest.” This is simply incorrect, and the ATF offers no citation or data to support this statement. Many, if not most, collectors focus on a type or kind of firearm to collect. For instance, many collectors collect only Colt single action revolvers, over-under shotguns, or World War II era bolt-action rifles – so it would follow that those collectors would be more likely permissibly sell the same manufacturer or type of firearm to enhance their collection.

15 NRA Museum, *Evaluating Firearms Condition* at <https://www.nramuseum.org/gun-info-research/evaluating-firearms-condition.aspx>

16 The Firing Line, *Why are guns worth more with the box and original paperwork?* <https://thefiringline.com/forums/showthread.php?t=379479>