

Updated February 9, 2024

Firearms Dealers *Engaged in the Business*

On June 25, 2022, President Joe Biden signed into law the Bipartisan Safer Communities Act (BSCA; P.L. 117-159). Section 12002 of P.L. 117-159 amends definitions related to firearms dealer licensure in the Gun Control Act of 1968 (GCA, 18 U.S.C. §§921 et seq.). Under the GCA, the definition of *engaged in the business* undergirds provisions that require persons buying and selling firearms at the wholesale or retail level to be federally licensed as firearms dealers. Section 12002 of P.L. 117-159 amends a subparagraph of the GCA definition of engaged in the business as it pertains to federally licensed firearms dealers by striking the language “with the principal objective of livelihood and profit,” and replacing it with “to predominantly earn a profit.” As amended, the definition at 18 U.S.C. §921(a)(21)(C) reads as follows:

[Engaged in the business,] as applied to a dealer in firearms, as defined in section 921(a)(11)(A), [means] a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business *to predominantly earn a 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 collection of firearms.

As discussed below, Section 12002 also amends the GCA to define the clause “to predominantly earn a profit” as specifically excepting firearms transfers made to improve or liquidate a personal firearms collection. Notably, Section 12002 does not amend the parallel GCA subparagraphs defining engaged in the business for firearms and ammunition manufacturers, gunsmiths, and importers at 18 U.S.C. §921(a)(21)(A), (B), (D), (E), and (F).

Engaged in the Business and Licensure

The GCA requires all persons engaged in the business of importing, manufacturing, and dealing firearms to be licensed as federal firearms licensees (FFLs) (18 U.S.C. §923). Any person who imports or manufactures ammunition must also be licensed, but a federal dealer’s license is not required to deal in ammunition. Under Section 922(a)(1)(A) of Title 18 of the U.S. Code, it is unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a federal license. Offenses are punishable by up to five years’ imprisonment. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the federal agency that administers and enforces the GCA and licenses FFLs. Section 921(a)(11) of the GCA defines the term *dealer* to mean:

(A) any person engaged in the business of selling firearms at wholesale or retail [i.e., firearms dealers],

(B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, trigger mechanism to firearms [i.e., gunsmiths], or

(C) any person who is a pawnbroker.

The term “licensed dealer” means any dealer who is licensed under the provision of this chapter.

It is notable that the subparagraph (18 U.S.C. §921(a)(21)(C)) that defines engaged in the business for federally licensed firearms dealers only refers to subparagraph (11)(A) of the GCA definition of *dealer*. The subparagraph does not refer to subparagraphs (11)(B) and (11)(C) of the definition of dealer. Hence, gunsmiths and pawnbrokers must be federally licensed as gun dealers, even if they do not meet the conditions set out in the definition of engaged in the business for federally licensed firearms dealers at 18 U.S.C. §921(a)(21)(C).

Defining “To Predominantly Earn a Profit”

The amendment to P.L. 117-159 further emphasizes a profit motive as a factual circumstance requiring federal licensure as a gun dealer by defining “to predominantly earn a profit” to mean

that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

Again, this definition reiterates a personal firearms collection exception included in the definition of engaged in the business. On the other hand, in regard to firearms transfers related to terrorism and other criminal conduct, this definition includes the following proviso:

That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this paragraph, the term ‘terrorism’ means activity, directed against United States persons, which—

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended—

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by assassination or kidnapping.

This new provision is designated in the GCA as Section 922(a)(22) of Title 18 of the U.S. Code, moving and re-designating to Section 922(a)(23) the definition of “with the principal objective of livelihood and profit” as it still applies to licensed manufacturers and importers. The terrorism/criminal purposes proviso is, and was previously, included in the latter provision as well.

GCA Recordkeeping and Background Checks

To deter unlawful firearms commerce and gun trafficking, the GCA generally prohibits anyone who is not licensed as an FFL from acquiring a firearm from an out-of-state source, requiring that such transfers be facilitated through an FFL in the state where the transferee resides. The GCA requires FFLs to maintain records on all commercial firearms transactions. The act also requires an FFL to initiate a background check through the National Instant Criminal Background Checks System (NICS) on any unlicensed person who seeks to acquire a firearm from the FFL through a sale, trade, or redemption of firearms exchanged for collateral (18 U.S.C. §922(t)). In the case of a NICS system “proceed” response, the FFL may complete the transfer. In the case of a system “delayed” response, the FFL is permitted to proceed with the transfer at their discretion after three business days have elapsed if the FFL has not received a final NICS eligibility determination.

Intrastate private transfers between unlicensed persons not engaged in the business of dealing in firearms “to predominantly earn a profit” are not covered by the recordkeeping or the background check provisions of the GCA, as amended by P.L. 117-159. However, such transfers and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances. Some gun control advocates refer to intrastate private firearm transfers as the *gun show loophole* and call for comprehensive/universal background checks. Related legislation has been introduced in the 118th Congress (see H.R. 3122).

Shift in Focus from Livelihood to Profit

Amendments to P.L. 117-159 shift the focus of the GCA dealer licensing requirement onto an intent to seek a profit by eliminating the “principal objective of livelihood” as a condition for licensure. For federally licensed firearms and ammunition manufacturers and importers, the “principal objective of livelihood and profit” remains a central condition requiring licensure. For federally licensed gun dealers, “to predominantly earn a profit” is now the central condition requiring licensure.

The amendments to P.L. 117-159 are intended to require persons who buy and resell firearms repetitively for profit to be licensed federally as gun dealers, even if they do not do so with “the principal objective of livelihood.” As a result, the definitional changes in P.L. 117-159 could make

some, but not all, intrastate private firearm transfers subject to GCA recordkeeping and background check requirements, if those transfers are made by profit-oriented, repetitive firearms buyers and sellers. Arguably, such transfers were not covered under previous law, if the firearms transfers in question were not also made for the “principal objective” of one’s “livelihood.” According to the sponsors of P.L. 117-159, there was confusion about the GCA’s definition of engaged in the business as it pertained to individuals who bought and resold firearms repetitively for profit, but possibly not as the principal source of their livelihood. They maintain that these changes clarify who should be licensed, eliminating a gray area in the law, ensuring that one aspect of firearms commerce is more adequately regulated.

Implementation of P.L. 117-159

Prior to P.L. 117-159, there had been disagreement and confusion between ATF, courts, and legislators on how to interpret who is required to be a registered FFL. As noted, P.L. 117-159 codified a broader interpretation of what it means to be engaged in the business than interpretations before the legislation was enacted. On December 7, 2023, the period for comments ended on a September 8, 2023, proposed rule. ATF further clarified their interpretation by publishing a notice of proposed rulemaking in the *Federal Register* that explained a person is a firearms dealer if they meet any of six criteria:

- The person sells or offers for sale firearms and represents or demonstrates to potential buyers a willingness to purchase and sell additional firearms.
- The person spends more money or its equivalent on purchases of firearms for the purpose of resale than their reported taxable gross income during the applicable period of time.
- The person “repetitively sells or offers for sale firearms” through straw or sham businesses or straw purchasers, or that cannot be lawfully purchased or possessed.
- The person “repetitively sells or offers for sale firearms – within 30 days after they were purchased; that are new or like new in their original packaging; or 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 person sells firearms that were in their business inventory before their license was terminated.
- The person sells or offers for sale firearms that were transferred to a personal collection prior to the time someone lost their license.

ATF has estimated that the final action on this proposed rule will take place in April 2024.

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IF12197

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