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

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result

The principal objective of livelihood and profit

persons who buy and resell firearms repetitively for profit

condition requiring licensure.

dealers

condition requiring licensure. For federally licensed gun

ammunition manufacturers and importers, the

by eliminating the “principal objective of livelihood” as a

dealer licensing requirement onto an intent to seek a profit

Amendments to

Shift in Focus from Livelihood to Profit

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).

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/manufacturer, 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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