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The Biden Administration's New Restrictions on Firearms Sales

Federal firearms policies and changes to firearms regulations are subjects of ongoing congressional interest. The Biden Administration made several recent changes to firearms regulations, including those that affect licensing and associated requirements to perform background checks and those that govern private gun sales both within and across U.S. borders. The Biden Administration notes that these changes are intended to reduce the flow of “illegally acquired firearms” and “hold accountable those who supply the firearms used in crime.” Policymakers may examine how these regulatory changes affect both lawful domestic firearms dealers and criminal networks engaged in firearms trafficking.

Federal Firearms Licenses and Background Checks

The Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is primarily tasked with regulating domestic sales of firearms. Following the enactment of the Bipartisan Safer Communities Act (BSCA; P.L. 117-159), the Biden Administration made regulatory changes to reduce unregulated private gun sales. In order to implement the provisions of the BSCA, ATF issued a rule (finalized May 11, 2024) redefining who is *engaged in the business* of dealing firearms and thus required to obtain a Federal Firearms License (FFL). Prior to this final rule and the BSCA, individuals were required to have an FFL if their firearms sales had the *principal objective of livelihood*.

Individuals with FFLs are licensed gun dealers and are required to conduct background checks before completing a firearms transfer. Federal law requires that sellers with FFLs conduct background checks on any person seeking to purchase a firearm from them (18 U.S.C. §922(t)). Because different states have different background check requirements, prior to the ATF's May 2024 final rule individuals who were unable to purchase a firearm from a seller with an FFL in one state, for various reasons including because they could not pass that state's background check requirements, might have been able to buy a firearm from a seller in a different state with less strict background check requirements. Private firearm transfers that do not require background checks are colloquially called *private sale exemptions* or *gun show loophole* transfers.

ATF's rule change alters who is required to have an FFL and thus who is required to conduct background checks on prospective firearm purchasers. Prior to the May 2024 final rule, unlicensed sellers were able to transfer firearms to another person without conducting a background check as long as they did not have reasonable cause to believe that the person was prohibited from receiving or possessing firearms. Following this rule change, a person who sells

firearms is required to be a licensed gun dealer and obtain an FFL if the objective of their gun sales is *to predominantly earn a profit*. Thus, generating profit more broadly (rather than earning a livelihood more narrowly) is now considered being engaged in the business of dealing firearms and thus requires licensure.

Additionally, ATF's rule makes private firearm transfers subject to Gun Control Act (GCA, 18 U.S.C. §§921 et seq.) recordkeeping and background check requirements if the transfers are made by profit-oriented, repetitive firearms buyers and sellers, regardless of where a potential purchaser resides. These sellers now need FFLs, thus requiring them to conduct National Instant Criminal Background Check System (NICS) background checks. While states may still set additional background check requirements, the ATF rule change may reduce the number of individuals crossing state lines to purchase firearms in states with less restrictive background check requirements.

The Department of Justice estimates that 23,006 unlicensed persons currently engaged in the business of firearms dealing will need to apply for licenses.

Commerce Department Rule on Revision of Firearms License Requirements

The Commerce Department's Bureau of Industry and Security (BIS) is tasked with regulating private sales of firearms to other countries. On April 30, 2024, BIS released an interim final rule (IFR) that restricts private transfers of firearms out of the United States.

To sell a weapon across international borders prior to the April 2024 IFR, U.S. citizens needed to receive an export license and undergo end-use monitoring designed to ensure that weapons sent are not those in short supply nor being received by individuals sanctioned by the United States or who wish to do harm or engage in activity that could harm the United States.

In 2020, new regulations shifted export control of certain small arms and light weapons from the State Department's (DOS's) United States Munitions List to BIS's Commerce Control List. BIS initially did not have access to DOS's internal watch list for end-use monitoring, resulting in BIS lacking prior end-use monitoring information. BIS was also lacking in other areas of end-use monitoring compared to DOS, including having no requirements for written certification of the purchaser agreeing not to resell, allowing multiple end-users on a single license, granting more license exemptions, and not having public notification requirements.

According to a CRS analysis of data issued by BIS between March 2020 and July 2023 and a separate report from the Government Accountability Office examining DOS approval of these licenses between 2013 and 2017, the average yearly total dollar value from approved export licenses for firearms, artillery, and ammunition granted after this transition rose by over \$4.45 billion per year—nearly a 45% increase.

On October 23, 2023, BIS paused issuance of new export licenses involving firearms from individual private sellers to assess export control review policies for firearms, specifically to “mitigat[e] the risk of firearms being diverted to entities or activities that promote regional instability, abuse or violate human rights, or fuel criminal activities, including terrorism, extortion, and illicit trafficking of any kind.” Some gun trade groups suggest the pause has cost U.S. sellers over \$250 million since October 2023. The IFR notes that an ATF analysis of international crime gun trace requests received between 2017 and 2021 indicates that 11% of traced firearms were lawfully exported from the United States before being diverted to a foreign country different from the one listed on the export license and traced in association with a crime. These firearms were reported in various locations around the world after being diverted post-export.

BIS’s IFR makes three changes affecting private firearms exports. First, 36 countries are labeled by DOS’s Country Reports on Human Rights Practices and the Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries, as well as by reputable nongovernmental reports, as having a “substantial risk that lawful firearms exports to non-governmental end users will be diverted or misused.” These countries will be treated with a “presumption of denial” for granting a license, whereas the previous policy was one of “general approval.” The seller can only overcome this presumption of denial by successfully arguing their sale does not contain risks, such as if the purchaser is protecting U.S. interests or is otherwise trustworthy. Additionally, 17 countries in the Organization of American States will no longer be treated with a policy of general approval, and instead will be considered case-by-case because of their higher risks for firearms diversion or misuse.

Second, export licenses will now last one to two years instead of the previous four to five years, resulting in sellers having to more frequently make the case that the sale meets existing requirements.

Third, in their applications, potential exporters will need to include purchase orders and passport identifications from the intended recipient to show that it is an actual person who is interested in and allowed to receive a firearm.

Effects on U.S. Gun Dealers and Illicit Trafficking Networks

The ATF and BIS rule changes may have effects on certain firearms dealers’ ability to sell weapons. For one, the unregulated market for firearm sales may be reduced because ATF’s final rule expands licensure requirements for sellers, increasing the number of firearm transfers that require background checks on the prospective purchaser.

Additionally, there may be a decrease in private firearms sales to foreign buyers. Prior to the October 2023 pause in issuing export licenses, individuals who sold weapons internationally could often charge more for the firearms than they could in the United States, and were regulated by BIS’s relatively less stringent export requirements.

These rules aim to reduce straw purchases and sales to individuals in the 36 countries labeled as posing a “substantial risk” by DOS. According to ATF trace data on closed firearms trafficking investigations, in 2021 many firearms legally transferred *from* the United States to another country and later trafficked were initially transferred between private parties (34.2%) or obtained through straw purchases (50.8%). These data also revealed that of all closed firearms trafficking investigations where firearms were trafficked *into* the United States, in 2021 29.0% were initially transferred between private parties and 7.0% were obtained through straw purchases. The five countries that received the most firearms trafficked from the United States—Mexico, Canada, the Bahamas, Haiti, and Brazil—made up 86% of all outbound (United States to a foreign country) trafficking cases. Following implementation of BIS’s IFR, exporting firearms to these countries (with the exception of Canada) will no longer be treated with a policy of general approval. Moreover, three states (Texas, Arizona, and California) along the Southwest border accounted for 70% of all outbound closed trafficking cases.

In the explanation for both rules, the agencies refer to a larger network of illicit activities in which firearms trafficking is only a single part. Transnational criminal organizations rely on firearms—including trafficked firearms—to protect the activities of the criminal network, including drug smuggling activities and smuggling routes. For instance, firearms trafficking has been cited as a central component to Mexican drug trafficking organizations’ illicit activities, as money from the sales of illicit drugs in the United States is used in part to purchase firearms; these weapons, along with cash proceeds from drug sales, are smuggled south across the U.S.-Mexico border, further fueling the drug trafficking cycle. These weapons may also be used by criminal gangs in the United States for purposes such as enforcing drugs payments and protecting turf.

Law enforcement has noted that criminal networks may source firearms in the United States from licensed gun dealers using straw purchases or from unlicensed dealers. However, the new ATF and BIS rules may reduce the ease with which individuals may acquire firearms from unlicensed dealers. As such, policymakers and law enforcement may examine how this shifts the dynamics for the acquisition of crime guns, including whether it increases the use of straw purchasers or theft from individuals or sellers with FFLs.

For further reading, see CRS In Focus IF12197, *Firearms Dealers Engaged in the Business*.

Jordan B. Cohen, Analyst in Firearms Policy
Kristin Finklea, Specialist in Domestic Security

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