

United States Senate

WASHINGTON, DC 20510

120 HUYSHOPE AVENUE
SUITE 401
HARTFORD, CT 06106
(860) 549-8463

<http://murphy.senate.gov>

December 7, 2023

Helen Koppe
Mail Stop 6N-518
Office of Regulatory Affairs
Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice
99 New York Avenue NE,
Washington, DC 22026

Attention: ATF 2022R-17

Re: Notice of Proposed Rulemaking: Definition of “Engaged in the Business” as a Dealer in Firearms

To Whom It May Concern:

Thank you for the opportunity to offer a written comment regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Notice of Proposed Rulemaking (NPRM), ATF 2022R-17, further clarifying the definition of “Engaged in the Business as a Dealer in Firearms” (EITB NPRM), as a result of the enactment of the *Bipartisan Safer Communities Act* (BSCA). I co-led a bipartisan group of members of Congress who negotiated the eventual legislation passed by Congress and signed into law by President Biden in June 2022, which included changes to the statute that are the subject of the EITB NPRM. I write in strong support of the proposed rule, which will increase the efficacy of BSCA, strengthen our background check system, and keep firearms out of the hands of individuals who should not have them, exactly as Congress intended when it enacted BSCA.

According to the Pew Research Center, 48,830 people died from gun-related deaths in the United States in 2021, an average of 133 firearm-related deaths every day. In 2021, as is true today, this senseless violence occurred in our neighborhoods, public spaces, and schools, all while Congress stood paralyzed by inaction after each massacre. At the same time, growing discontent reached a tipping point after the shooting at Robb Elementary in Uvalde, Texas when America witnessed yet another unspeakable tragedy in an elementary school. Finally, the logjam was broken and a bipartisan group of Senators came together to negotiate meaningful gun safety legislation. I proudly led that effort for the Democratic caucus alongside the longtime Second Amendment advocate, Senator John Cornyn (R-TX) (Sen. Cornyn). The result of our bipartisan efforts

culminated in BSCA. I offer my unique perspective as the chief Democratic negotiator and legislative drafter of BSCA for a comment on this proposed EITB NPRM.

I. Congress Was Familiar with the Existing Background Check Requirements

The Gun Control Act (GCA) requires all persons engaged in the business of importing, manufacturing, or dealing firearms to obtain a Federal Firearms License (FFL). Additionally, the GCA requires an FFL to initiate a background check through the National Instant Criminal Background Check System (NICS) for any prospective recipient before transferring a firearm to prevent receipt by prohibited persons. As a result, from the 1990s through the enactment of BSCA, background checks were generally only required for firearm purchases from an FFL. Under the standard in use since 1986, sellers were only considered to be “engaged in the business” if they were dealing firearms with the “principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”¹

Restrictive interpretations of this standard meant that firearms sellers could evade federal licensing requirements and therefore transfer firearms to individuals without first conducting a background check. This standard also created significant confusion in the industry, leaving many individuals who were engaged in the business of dealing firearms unaware of their obligation to obtain a license and conduct background checks. Ultimately, this resulted in countless firearms sales to persons who should not have had access to a gun, which sadly became a common and deadly occurrence. For example, one study in 2017 found that one in five gun sales occurred outside the background check system, predominantly carried out by individuals who did not believe they were engaged in the business of dealing firearms.²

These sales came to be described by gun safety advocates as a loophole. For example, my chief counterpart in BSCA negotiations, Sen. Cornyn, eloquently acknowledged the implications of the loophole in a floor speech in 2019, stating, “We know we need to take decisive action against individuals who are violating current law by selling and manufacturing large numbers of firearms without a Federal firearms license. It is clearly Congress’s intent to make sure that if you are in the business of buying and selling firearms in a commercial enterprise, you should be licensed by the [ATF]....the shooter in Odessa[, Texas] attempted to purchase a firearm from a licensed dealer, but because licensed dealers must perform background checks, he flunked it. He managed to circumvent the background check requirement by later purchasing his weapon from an individual who was obviously in the business of manufacturing and selling firearms, but who never registered as a firearms dealer. Thus, the shooter evaded a background check, because, as I said, all federally licensed firearms dealers are required to do that [sic].”³

¹ Firearm Owners’ Protection Act, Pub. L. No. 99-308, § 101(6), 100 Stat. 449, 450-451 (1986).

² Matthew Miller et al., *Firearm Acquisition Without Background Checks* 166 Ann. Intern. Med 233, 237 (2017).

³ 165 Cong. Rec. S2554 (2019).

I have long believed – as have many Americans, including gun safety advocates and Members of Congress – that all potential firearm purchasers should undergo a background check first, with limited exceptions. I first introduced such a proposal in 2017, and have introduced similar legislation in each Congress since. Furthermore, whether Congress should require universal background checks is a policy topic of conversation that rears its head, at a minimum, each time our country faces another horrific mass shooting. There have been too many congressional floor speeches, bill introductions, hearings and public statements on the subject of background checks to list in this comment. Congress has routinely discussed and debated background check requirements, the obligations of an FFL, and the extent to which firearm sales have occurred outside of such requirements. It is plainly obvious from this legislative history that my fellow drafters of BSCA and the broader Congress well understood the implications of revising the statute.

II. Congress Intended BSCA to Narrow Some Existing Gun Safety Loopholes

This context is important when examining BSCA as enacted. While BSCA contained a number of provisions designed to reduce gun violence, including provisions that narrowed the boyfriend loophole, imposed new criminal penalties for straw purchases, and importantly, provided millions of dollars in funding for mental health services, as noted above, BSCA also introduced new statutory changes modifying what it means to be “engaged in the business” for purposes of being an FFL.

Of particular interest is Section 12002 of BSCA, which amended the GCA as it pertains to FFL dealers in two very important ways. Firstly, BSCA changed what it means to be “engaged in the business” of firearms sales by discarding the existing standard (“principal objective of livelihood and profit”) and inserting a new one (“predominantly earn a profit”) in its place, and secondly, by providing a clarifying definition of the new standard to enable ATF to promulgate regulations such as the one at issue today. Clearly, Congress meant *something* when it changed the definition of who was engaged in the business, and merely restating existing law seems inconsistent for the product of a bipartisan negotiation.

I made public comments during the BSCA negotiations which helped clarify what that *something* was and which provided additional clarity about the tough negotiated outcome in BSCA: something substantially less than universal background checks, but something more than current law at the time. For example, on June 13, 2022 – just nine days before the Senate passed the bill – I explained the statutory change by stating that the negotiated text would “update our background checks statutes... I support universal background checks, but what we have agreed on is an update to the definition of federal firearms dealer to make sure that everyone who is

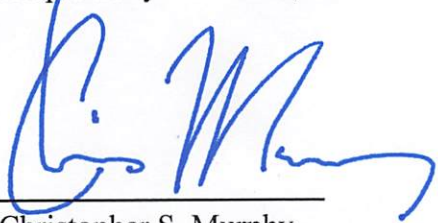
engaged in the repeated for profit sale of firearms has to perform background checks.”⁴ Furthermore, after the enactment of BSCA, on September 12, 2022, I sent a letter to the ATF Director asking for a status update for new regulations. At the time, I noted, BSCA “clarified the definition of ‘engaged in the business’ as it relates to the requirement of an unlicensed gun seller to register for a [FFL]. 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. ATF should immediately review the new definition to determine whether it is appropriate to update the agency’s guidance.”⁵

III. Interpretation of BSCA by ATF aligns with Congressional Intent

As noted above, among the significant reforms made by BSCA was the clarification of which firearm sellers are considered to be “engaged in the business” of dealing firearms, and this proposed rule aligns with that intent. Specifically, many of the proposed presumptions outlined in the EITB NPRM appear to appropriately capture congressional intent by ensuring that most firearms sales at gun shows or online, for example, are done so by a licensed seller who adheres to federal background check requirements. Congress was clear that the underlying intent of the sale is key to understanding whether a seller must be licensed and thus comply with additional obligations, including background checks. In my view, the EITB NPRM, including the proposed presumptions, align with Congressional intent by ensuring these sales, which are clearly intended for profit, are covered by the FFL apparatus.

I am pleased to see the ATF propose a rule interpreting this section of the law as a direct result of BSCA negotiations. This rule is an important and necessary step to ensuring our background check system works as effectively as possible. Based on the text alone, it is plainly obvious that this NPRM aligns with our intent in BSCA.

Respectfully submitted,



Christopher S. Murphy
United States Senator

⁴ Murphy Lays Out Bipartisan Gun Safety Framework, <https://www.murphy.senate.gov/newsroom/press-releases/murphy-lays-out-bipartisan-gun-safety-framework> (Accessed Dec. 7, 2023).

⁵ Sen. Murphy Letter to Director Dettelbach re BSCA Implementation, https://www.murphy.senate.gov/imo/media/doc/atf_letter_re_bsca_implementation.pdf (Accessed Dec. 7, 2023).