



Executive Action to Strengthen Background Checks by Addressing High-Volume Gun Sellers

By Chelsea Parsons and Arkadi Gerney

October 15, 2015

In recent years, proponents of stronger gun laws have coalesced around one key legislative proposal: close the loopholes in the law that allow guns to be sold without a background check. This gap in the law is a primary way that dangerous individuals legally prohibited from gun ownership—such as those convicted of violent felonies, domestic abusers, and fugitives—are able to acquire guns.¹ Such efforts have focused primarily on legislation at both the federal and state level that would amend existing law to require all sellers of guns, not just licensed gun dealers, to conduct a background check before completing a sale. While these efforts have stalled in Congress, a number of states have made progress to enact universal background checks, including the 2013 passage of such a law in Colorado,² a successful ballot initiative in Washington state in November 2014,³ and, most recently, the enactment of a new Oregon state law in May 2015.⁴

However, it is also possible to address aspects of this loophole via executive action at the federal level. Federal law requires individuals who are deemed to be “engaged in the business” of dealing in firearms to obtain a federal firearms license, or FFL, from the Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF.⁵ Becoming a licensed gun dealer has two primary consequences: The licensee is subject to oversight and regulation by ATF and is required to conduct background checks for all gun sales. Ensuring that all individuals who are engaged in the business of selling guns are, in fact, licensed has significant implications for the number of transactions that are covered by the existing statutory background check requirement.

Unfortunately, the existing statutory and regulatory language regarding what exactly it means to be “engaged in the business” is vague and ambiguous and provides insufficient guidance to individuals, ATF, and federal prosecutors regarding who is required to obtain a federal firearms license because of the volume and character of their gun sales and who is violating the law for failing to do so. This weakness in the current regulatory framework allows unscrupulous individuals to exploit this ambiguity and sell guns at a high volume without oversight from ATF and without conducting background checks.

In recent weeks, the issue of this weakness in the current regulatory definition of what it means to be engaged in the business of dealing in firearms for purposes of determining who is required to become a licensed gun dealer has received national attention, and the Obama administration has indicated that it is considering options for amending the regulation.⁶ In this issue brief, the Center for American Progress offers options for how the regulation could be amended to provide better guidance regarding when an individual is engaged in the type and volume of retail gun sales that warrant ATF oversight through a federal firearms license. CAP also examines the framework many states use to determine which retail sellers are engaged in business activity that warrants collection of state sales tax as a useful analogy for how the aforementioned engaged-in-the-business regulation could be improved. CAP proposes a nuanced approach that would take into account a number of factors in determining whether an individual is engaged in the business of dealing in firearms that includes not only the number of guns sold, but also other aspects of the business, such as frequency of sales, total proceeds, and other indicators of the commercial nature of the sales activity. Finally, CAP concludes that the Obama administration can and should rewrite the federal regulation that defines which gun sellers are required to conduct background checks—and that doing so would represent a meaningful but modest step toward the goal of ensuring that all gun sales involve a background check.

Weaknesses in the current regulation

Federal law requires that any person who is “engage[d] in the business” of “dealing in firearms” obtain a federal firearms license from ATF and become a licensed gun dealer.⁷ Such licensed dealers are the only individuals mandated by federal law to conduct background checks prior to completing any gun sale. The statute goes on to define the term as follows:

*A person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and 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 personal collection of firearms.*⁸

The current ATF administrative regulation that provides additional definition and clarification regarding a number of statutory provisions related to ATF, found in section 478.11 of title 27 of the Code of Federal Regulations, offers an identical definition of the term and does not provide any further guidance about how to assess what constitutes “occasional sales” or how to determine whether a person’s retail activity is undertaken “with the principal objective of livelihood and profit.”⁹ This is precisely the purpose of

enacting a body of administrative regulations relating to federal legislation: to provide additional administrative guidance as to how the regulatory agency should interpret and apply certain terms and concepts.

This vagueness in the current regulatory definition has provided the opportunity for individuals to take advantage of the ambiguity and sell guns at a high volume without becoming licensed and, therefore, without conducting background checks. It also makes it difficult for law enforcement to successfully charge someone with violating the law by selling guns without a license. Former ATF agent John Risenhoover, in a recent interview, explained the challenge of meeting the high burden of proof created by the current vague regulatory definition of engaged in the business: “You know how you can beat any of these cases? Shut up. If you don’t say anything, it’s really hard to prove.”¹⁰ He also relayed that gun sellers are well aware of this challenge for law enforcement and often knowingly exploit it for profit. “If you go to gun shows in the deep South or Arizona, there will be people who have booths where they go buy new guns from an FFL and then sell them at a markup under a sign saying ‘no paperwork necessary,’” said Risenhoover.¹¹

Even with these challenges, there have been some successful recent prosecutions of individuals who illegally sold guns without a license that provide a limited glimpse into the kind of unlicensed gun sales that pose the biggest concern for law enforcement.¹² In July 2015, an individual in Orlando, Florida, was convicted of selling guns without a license after he sold 113 guns over a 14-month period for around \$63,000, including at least one sale to a prohibited purchaser.¹³ In June 2015, an individual in Camden, New Jersey, was convicted of selling guns without a license after he admitted to selling at least 200 handguns over a nine-month period, many of which were sold to an admitted drug dealer who then resold many of those guns to other drug dealers.¹⁴ In May 2013, a woman in Manassas, Virginia, was convicted for violating this law after she purchased 31 handguns at gun shows across three consecutive weekends with the intent of reselling them. A number of these guns were later used in drug-trafficking crimes in Maryland.¹⁵

State sales tax collection laws and regulations: An instructive analogy

As policymakers consider options for amending the regulation to provide better guidance as to what it means to be engaged in the business, one useful set of laws that provides a model is state laws governing who is required to collect state sales tax. Nearly every state imposes a sales tax on goods sold within the state.¹⁶ In many states, certain individuals and entities are exempt from the sales tax collection requirement if they engage in low-volume or infrequent sales, often described as “occasional” or “casual” sales. Many of these state laws take a nuanced approach to determining what constitutes an occasional or casual sale that considers not only the raw number of products sold, but also other factors that assess the overall nature of the business, such as frequency of sales activity, character of products being sold, and amount of money earned through the sales transactions. By and large, these state laws and regulations defining what kinds

of sellers should collect taxes are more thoughtful, precise, and enforceable than the current vague federal regulation that defines “engaged in the business” as relating to gun sales. Examination of some of these state statutory and regulatory schemes for determining which vendors are obligated to collect sales tax provides useful guidance for redrafting the engaged-in-the-business gun regulation.

Missouri

In Missouri, the following factors are to be considered in determining whether an individual is engaged in business and therefore required to collect sales tax: whether the individual advertises or otherwise holds him or herself out as being a retailer; frequency and duration of sales activity; and the nature of the market for the good or service being sold. Missouri law and regulation also provide that, regardless of the above factors, any individuals who earn more than \$3,000 in a calendar year through their sales activity will not be considered to be engaging in occasional or isolated sales.¹⁷

Nebraska

Nebraska exempts from the sales tax collection requirement individuals who are only engaged in occasional sales. Sales activity only qualifies as an occasional sale if all of the following conditions are met: The sales take place at the person’s residence or via an online auction site; sales occur no more than three days during the calendar year; neither the individual nor any members of the individual’s household operates a business in which similar products are sold; the property being sold was originally purchased for the individual’s personal use; and the property being sold is not subject to any other law that would require that the sale not be considered occasional. Nebraska also provides that any sale that is aided by an agent or auctioneer, any sale in which the seller did not pay sales tax when he or she first purchased the item, and any sale of property that was originally purchased for the purpose of resale do not qualify as occasional sales.¹⁸ If Nebraska’s rules were applied to guns, most of the activity of unlicensed sellers operating tables at gun shows would clearly be beyond the occasional-sale exception. Such unlicensed gun show sellers commonly sell new-in-the-box guns, rent space at the show to sell the guns, operate at more than three shows a year, and operate outside their homes.¹⁹

Texas

Texas also provides an occasional-sales exception to its sales tax collection requirement. State law and regulation provide that there are two categories of qualifying sales. First, an individual who engages in only one or two sales at retail during a 12-month period and does not hold him or herself out to be engaged in the business of selling such items at retail qualifies for the occasional-sales exception. Second, the sales are considered to

be occasional sales if the following factors are met: The property was originally purchased by the individual or a family member for personal use; the individual does not have a permit to be a seller or retailer as required by state law; the individual does not use a broker or auctioneer to facilitate the sale; and the total proceeds from the sale in a calendar year do not exceed \$3,000.²⁰

West Virginia

Individuals who engage in what are deemed “isolated transactions” are not required to collect sales tax in West Virginia. Sales qualify as isolated transactions if the seller is not in the business of regularly selling the type of product being sold, and the seller does not engage in more than four isolated transactions in a 12-month period.²¹

Florida

Florida law exempts occasional sales of goods from sales tax collection. The following conditions must be met to qualify for this exemption: The seller paid sales tax when he or she originally bought the item; the individual does not engage in sales activity more than twice during a 12-month period; the property was not originally purchased for the purpose of resale; the sales do not take place on commercial premises or another location where they are competing with other retailers who are required to collect sales tax; and the sale is not made through an auctioneer or other agent who is required to collect sales tax.²

Review of these state laws demonstrates that it is commonplace for laws and regulations to establish clear guidelines about what type of retail sales conduct should be considered casual, occasional, or part of a hobby and what type of sales are clearly part of an established business undertaken for the primary purpose of profit. An updated regulation defining engaged in the business in the gun sales context could follow the approach taken in many of these state laws and regulations.

Options for strengthening the regulatory definition of engaged in the business

A revised regulation defining what it means to be engaged in the business of dealing in firearms for the purpose of determining who is required to obtain a federal firearms license and, by extension, conduct background checks for all gun sales should take a nuanced approach. A revised regulation should consider a few different factors to accurately gauge whether individuals selling guns at retail are, in fact, engaging in sales of such volume and character that they should be treated as gun dealers under the law.

While a strict numerical threshold based on number of sales would offer a bright-line rule that would provide clear guidance, such an approach in isolation would fail to take into account all of the aspects of retail sales of firearms that should be part of the determination as to whether an individual should be required to become a licensed dealer. A numerical threshold should be a component of a revised regulation, as it is in many state sales tax laws, and would provide a useful signal to the market of gun sellers. However, just as many states consider a number of factors in determining whether a seller of goods should be required to collect sales tax, a revised regulation relating to gun sellers should consider other factors in addition to the number of guns sold. The following factors should be considered in a revised regulatory scheme, and the presence of some of these factors should create a rebuttable presumption that the individual is engaged in the business of dealing in firearms.

Quantity of sales

One factor to consider in determining whether an individual is engaged in the business of dealing in firearms is the volume of the business during a 12-month period. There are a few options for quantifying business volume:

- Number of guns offered for sale
- Number of guns sold
- Amount of money involved in sales transactions

Character of sales activity

Another element of a comprehensive approach to assessing whether someone is engaged in the business of dealing in firearms is consideration of other aspects of the gun sales that indicate the commercial nature of the sales and a substantial business in guns. Such factors may include:

- Renting tables at gun shows or flea markets
- Operating a virtual store online
- Frequency of sales activity
- Advertising the sale of guns
- Accepting credit card payments

- Formal record keeping
- Paying employees
- Selling new and unopened guns
- Selling multiple guns with the same make and model

In addition to clarifying the types of sales that should be considered sufficiently commercial activity to qualify as engaging in the business, a revised regulation should also provide clear guidance as to what types of sales should not be considered when determining whether an individual needs to obtain an FFL. These exempt sales should include:

- Any sale made to a licensed dealer or a private sale for which a background check was conducted through a dealer
- Liquidating a private collection, with some limitations
- Selling guns as part of settling an estate

A new regulation should also clarify that so-called fire sales—meaning sales of all guns in inventory when a licensed dealer has his or her license revoked—constitute engaging in the business and require a federal firearms license. Under current practice following a 2006 opinion by the U.S. Department of Justice, dealers whose licenses are revoked are permitted to transfer the inventory from their store to their personal collection and continue to sell those guns as private sellers, regardless of the quantity of guns sold in this manner.²³ Put simply, the Justice Department’s 2006 opinion letter makes no sense and is inconsistent with the letter and intent of the existing statute. This reading of the law is at odds with the plain language of the statute and creates a significant risk to public safety by allowing proven bad actors to continue selling guns at a high volume without being required to keep any paperwork or conduct background checks. A revised regulation should make it clear that dealers who lose their licenses should not be permitted to sell off their inventory as private sellers through fire sales but rather should be required to dispose of these firearms by selling them to other licensed dealers.²⁴

Conclusion

In his passionate and angry remarks following the October 1, 2015, shooting at Umpqua Community College in Roseburg, Oregon—the nation’s 45th school shooting this year—President Barack Obama made it clear that he is not willing to wait for Congress to take action to address the loopholes in the nation’s current gun laws, which allow people who pose an increased risk to public safety to have easy access to guns.²⁵ Indeed,

the president has been a strong leader on the gun issue since the December 2012 shooting at Sandy Hook Elementary School, when he took a number of executive actions to address various aspects of gun violence in the United States, beginning with 23 actions announced in January 2013.²⁶ The president should add to this legacy of leadership by using his existing executive authority to amend the regulatory definition of what it means to be engaged in the business of dealing in guns to provide much-needed guidance to individuals and law enforcement about what type of sales activity requires licensure by ATF. Doing so would be a strong step toward reducing the number of guns that change hands every year without a background check—guns that too often end up in the wrong hands, with devastating results.

Chelsea Parsons is Vice President of Guns and Crime Policy at the Center for American Progress. Arkadi Gerney is a Senior Vice President at the Center.

Endnotes

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